

# SOCIO -LEGAL ASPECT OF SAME SEX MARRIAGE

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## ABSTRACT

Society basic institute is family and Family depends upon the Marriage. Marriage regulates sex life of human beings, thereby giving them a chance to procreate, thus aiding the survival of human race. Marriage creates new social relationships and reciprocal rights between the spouses. It establishes the rights and the status of the children when they are born. Each society recognises certain procedures for creating such relationship and rights. The society prescribes rules for prohibitions, preferences and prescriptions in deciding marriage. It is this institution through which a man sustains the continuity of his race and attains satisfaction in a socially recognised manner. The rules and regulations differ from one culture to another. Presently the new concept of Same-sex marriage is also known as gay marriage is originated. It is the marriage between two people of the same biological sex and/or gender identity. The aim is the same as to provide security and legality to the sexual desire. . How can one anticipate a significant shift in the way same sex marriage is seen in a society when the validity of intercaste marriage is still debatable? It is debatable whether the legal recognition of same-sex marriage or the ability to conduct one is frequently referred to as marital equality or equal marriage, especially by advocates. The Supreme Court of India decriminalised IPC Sec. 377, which deals with unnatural offences, in 2018 on the grounds of privacy, holding that a person's sexual orientation should not be disclosed in public. because it is a fundamental human right. This was a positive move for the LGBTQ community, although the Supreme Court used a diplomatic tone while addressing their civil rights, noting that. The LGBTQ community is at a higher risk for suicide because we lack peer support and face harassment, mental health Sexual orientation, gender identity and being intersex are not the same thing. They are each different and independent aspects of a person. Respecting people's choice of terminology, names, and pronouns when referring to oneself is vital. disorders and drug addiction. Laws, treaties, and regulations are designed to protect and control society as a whole. The law provides citizens with a standard of behaviour. This research paper focuses on the prevalence of same-sex marriage, especially in India. if it is morally and legally right to do so?

## INTRODUCTION

Development should be perceived as a multi-dimensional process involving the reorganization and reorientation of entire economic and social change of the society. In addition to improvements in income and output, it typically involves radical changes in institutional and social as well as population attitudes and in many cases even the beliefs<sup>1</sup>. In traditional societies, the influence of blind beliefs, customs, superstitions and values is very high. They will never accept the state interference of state in their traditional customs and beliefs<sup>2</sup>. Society basic institute is family and Family depends upon the Marriage. Marriage regulates sex life of human beings, thereby giving them a chance to procreate, thus aiding the survival of human race. Marriage creates new social relationships and reciprocal rights between the spouses. It establishes the rights and the status of the children when they are born. Each society recognises certain procedures for creating such relationship and rights<sup>3</sup>. The society prescribes rules for prohibitions, preferences and prescriptions in deciding marriage. It is this institution through which a man sustains the continuity of his race and attains satisfaction in a socially recognised manner. Sociologists and anthropologists have given definitions of marriage. Individual happiness has been given the least importance. It is considered to be sacrament, a spiritual union between a man and a woman in the social status of husband and wife. Marriage is culturally specific. The rules and regulations differ from one culture to another. Same-sex marriage is also known as gay marriage. It is the marriage between two people of the same biological sex and/or gender identity. The aim is the same as to provide security and legality to the sexual desire. A society where the marriage between interrelation of inter caste is still lying in doubt how can one expect any wide change with regard to same sex marriage. Legal recognition of same-sex marriage or the possibility to perform a same-sex marriage is sometimes referred to as marriage equality or equal marriage, particularly by supporters. The legalization of same-sex marriage is characterized as “redefining marriage” by many opponents<sup>4</sup>.

### Right to marry fundamental right

The right to marry is a part of right to life under Article 21 of Indian Constitution. Right to marriage is also stated under Human Rights Charter within the meaning of right to start a family. The right to marry is a universal right and it is available to everyone irrespective of their gender. Various courts across the country have also interpreted right to marry as an integral part of right to life under Article 21.

A forced marriage is illegal in different personal laws on marriage in India, with the right to marry recognised under the Hindu laws as well as Muslim laws. Other laws that lay down a person's right to marry in India are:

- The Prohibition of Child Marriage Act, 2006
- The Guardians and Wards Act, 1890

<sup>1</sup> S.R.Myneni, “Sociology part 2”, Allahabad law agency, p.12

<sup>2</sup> Ibid.

<sup>3</sup> Puja Mondal, “Essay on Marriage: Meaning, Functions and Forms,” available at: <http://www.yourarticlelibrary.com/marriage/essay-on-marriage-meaning-functions-and-forms/8592>, (last visited on may 2<sup>nd</sup>, 2023).

<sup>4</sup> Available at: [https://blog.ipleaders.in/issues-and-challenges-of-same-sex-marriages-in-india/#\\_ftn3](https://blog.ipleaders.in/issues-and-challenges-of-same-sex-marriages-in-india/#_ftn3), (last visited on June 4<sup>th</sup>, 2023).

- The Majority Act, 1875
- The Family Courts Act, 1984
- The Protection of Women from Domestic Violence Act, 2005<sup>5</sup>

Supreme Court viewed the right to marry as a component of right to life under article 21 of Indian constitution. The court observed that:

“This is a free and democratic country, and once a person becomes a major, he or she can marry whoever he/she likes. If the parents of the boy or girl do not approve of such inter caste marriage the maximum, they can do is that they can cut off social relations with son or daughter, but they cannot give threat or commit or instigate acts of violence and cannot harass the person who undergoes such inter caste marriage<sup>6</sup>”

“The social values and morals have their space but they are not above the constitutionally guaranteed freedom”, the two judges said adding it is a constitutional and a human right. “Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow<sup>7</sup>.”

India is still struggling with the issues like honour killing of those couples who are trying to marry outside their clan or caste or even religion. In such a condition it is quite impossible to see a hope of ray to talk about the same sex people’s desire is seems a distant dream. A ray of hope was arise by the Naz foundation case<sup>8</sup> is a landmark Indian case decided by a two-judge bench of the Delhi High Court, which held that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution. The verdict resulted in the decriminalisation of homosexual acts involving consenting adults throughout India. This judgement is just a step towards the thinking that a certain equality may be there for homosexual people but thus small bubble of hope burst in a small time when the supreme court reverse the verdict of high court. In 2018, that ray of hope was accepted by the supreme court by decriminalizing the provision of sec 377<sup>9</sup> on the account that, “The right to freedom of opinion and expression.— Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers<sup>10</sup>”.

<sup>5</sup> Available at: <https://www.myadvo.in/blog/right-to-marry-in-india-hadiya-case>, (last visited on July 6<sup>th</sup>, 2023)

<sup>6</sup> Lata Singh v State of U.P., AIR 2006 SC 2522.

<sup>7</sup> Available at: <https://indianexpress.com/article/india/right-to-marry-supreme-court-hadiya-case-5131055/>, (last visited on June 4<sup>th</sup>, 2023).

<sup>8</sup> Naz foundation v. government of NCT of delhi, 2009.

<sup>9</sup> Indian Penal Code, 1860.

<sup>10</sup> Para 19, Navtej Singh Johar vs Union Of India Ministry Of Law And others, AIR 2018.

## Right to privacy

Right to privacy of any individual is essential a natural right, which inheres in every human being by birth. Such right remain with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguish with the human being. One cannot conceive an individual enjoying meaning full life with dignity without such right. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in article 21 of the constitution ...privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy safeguards individual's autonomy and recognises the ability of the individuals to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. The right to privacy is a fundamental right. It is a right which protects the inner sphere of the individual from inference from both state and non-state actors and allow the individuals to make autonomous life choices<sup>11</sup>. At international level too UN accept the fact that right to privacy is inbuilt in fundamental right but when question comes regarding the homosexuals, they are not allowed to live their life in privacy. Their gender status as well as sexual orientations is a matter of right to the whole society. They do not have right to discuss their personal matter in four walls of corner as no one is there to hear their plea as society is unfavourable to them. Morality came in the way of their right to privacy. In *Lawrence v. Texas*<sup>12</sup> the Court held that moral disapproval is not by itself a legitimate state interest to justify a statute that bans homosexual sodomy. Justice Kennedy observed:

"The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." .... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

Further, *Justice O'Connor* while concurring in the majority judgment added that: "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons<sup>13</sup>."

<sup>11</sup> Nine judge, six concurring verdicts", the tribune, 25 aug, 2017.

<sup>12</sup> page 578

<sup>13</sup> page 582



In *Dudgeon v. United Kingdom*<sup>14</sup> the UK Government urged that there is feeling in Northern Ireland against the proposed change, as it would be seriously damaging to the moral fabric of Northern Irish society. The issue before the Court was to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims. The Court after referring to Wolfe den report<sup>15</sup> observed that overall function served by the criminal law in this field is to preserve public order and decency and to protect the citizen from what is offensive or injurious. Furthermore, the necessity for some degree of control may even extend to consensual acts committed in private, where there is call to provide social safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence. The Court concluded as follows:

"As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States .... In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public...<sup>16</sup>"

In *Norris v. Republic of Ireland*<sup>17</sup> the Court drew a comparison with the Dudgeon case and relied on the reasoning in the latter case to hold that:

"It cannot be maintained that there is a "pressing social need" to make such acts criminal offences. On the specific issue of Proportionality, the Court is of the opinion that "such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or

<sup>14</sup> *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, available at: <https://www.refworld.org/cases,ECHR,47fdfaf7d.html> [accessed 28 September 2023]

<sup>15</sup> Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, published in the United Kingdom on 4 September 1957

<sup>16</sup> Para60, *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, available at: <https://www.refworld.org/cases,ECHR,47fdfaf7d.html> [accessed 28 September 2023]

<sup>17</sup> *Norris v. Ireland*, Application no. 10581/83, Council of Europe: European Court of Human Rights, 26 October 1988, available at: <https://www.refworld.org/cases,ECHR,48abd5a2d.html> [accessed 28 September 2023]

disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved<sup>18</sup>."

Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly. While moving the Draft Constitution in the Assembly Dr. Ambedkar quoted Grote, the historian of Greece, who had said:

"The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves<sup>19</sup>."

After quoting Grote, Dr. Ambedkar added:

"While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution. ....The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic."

The question of the State in fact being a protector of constitutional morality was also canvassed by the Constitutional Court of South Africa in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*<sup>20</sup>

"A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil.... The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State,

<sup>18</sup> Para 46, *Norris v. Ireland*, Application no. 10581/83, Council of Europe: European Court of Human Rights, 26 October 1988, available at: <https://www.refworld.org/cases,ECHR,48abd5a2d.html> [accessed 28 September 2023]

<sup>19</sup> Constitutional Assembly Debates : Official Reports Vol.VII: November 4, 1948, page 38,

<sup>20</sup> *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, Case CCT 11/98, South Africa: Constitutional Court, 9 October 1998, available at: [https://www.refworld.org/cases,ZAF\\_CC,48246cf72.html](https://www.refworld.org/cases,ZAF_CC,48246cf72.html) [accessed 21 September 2023]

however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself<sup>21</sup>."

The *Wolfenden Committee*<sup>22</sup> in considering whether homosexual acts between consenting adults in private should cease to be criminal offences examined a similar argument of morality in favour of retaining them as such. It was urged that conduct of this kind is a cause of the demoralisation and decay of civilisations, and that, therefore, unless the Committee wished to see the nation degenerate and decay, such conduct must be stopped, by every possible means. Rejecting this argument, the Committee observed: "We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own. In so far as the basis of this argument can be precisely formulated, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Many people feel this revulsion, for one or more of these reasons. But moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind<sup>23</sup>." The Committee regarded the function of the criminal law in this field as:

"to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence, but not to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined<sup>24</sup>."

In the **172nd report, the Law Commission** has recommended deletion of Section 377 IPC, though in its earlier reports it had recommended the retention of the provision. In the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and inter alia, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC. The Commission discussed various provisions related to sexual offences and was of considered opinion to amend provisions in the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973; and Indian Evidence Act, 1872. In the Indian penal Code, recasting of 375 IPC has been recommended by redefining it under the head of 'Sexual Assault' encompassing all ranges of non consensual sexual offences/assaults, which in particular penalize not only the sexual intercourse with a woman as in accordance with the current 'Rape Laws'; but any non-consensual or

<sup>21</sup> [para 136], National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, Case CCT 11/98, South Africa: Constitutional Court, 9 October 1998, available at: [https://www.refworld.org/cases,ZAF\\_CC,48246cf72.html](https://www.refworld.org/cases,ZAF_CC,48246cf72.html) [accessed 28 September 2023]

<sup>22</sup> Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, published in the United Kingdom on 4 September 1957

<sup>23</sup> [para 54], Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, published in the United Kingdom on 4 September 1957

<sup>24</sup> [para 13 and 14], Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, published in the United Kingdom on 4 September 1957



non-willing penetration with bodily part or object manipulated by the another person except carried out for proper hygienic or medicinal purposes.

Pertinently, the major thrust of the recommendation is on the word 'Person' which makes the sexual offences gender neutral unlike gender specific as under the 'Rape Laws' which is the current position in statute book. Amendments in section 376 A, 376B, 376C, 376D have been recommended on the same lines with enhanced punishments. An added explanation defining sexual intercourse is sought to be introduced governing section 376B, 376C, 376D. Insertion of new section 376 E has been recommended to penalize non-consensual, direct or indirect, intentional unlawful sexual contact with part of body or with an object, any part of body of another person. This section specifically penalizes the person committing unlawful sexual contact who is in a position of trust or authority towards a young person (below the age of sixteen years), thereby protecting children. Conclusively the Section 377 IPC in the opinion of the Commission deserves to be deleted in the light of recommended amendments. However persons, having carnal intercourse with any animal, were to be left to their just deserts. Though the Law Commission report would not expressly say so, it is implicit in the suggested amendments that elements of "will" and "consent" will become relevant to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not.

In a Naz foundation case courts attention was also drawn to a statement of the Solicitor General of India appearing on behalf of India at the Periodic Review before the United Nations Human Rights Council that Indian society was accepting of sexual differences. In response to a question from the delegate from Sweden on the state of homosexual rights in India, he stated: "Around the early 19th Century, you probably know that in England they frowned on homosexuality, and therefore there are historical reports that various people came to India to take advantage of its more liberal atmosphere with regard to different kinds of sexual conduct. ... As a result, in 1860 when we got the Indian Penal Code, which was drafted by Lord Macaulay, they inserted s.377 in the Indian Penal Code, which brought in the concept of "sexual offences against the order of nature". Now in India we didn't have this concept of something being "against the order of nature". It was essentially a Western concept which has remained over the years. Now homosexuality as such is not defined in the Indian Penal Code, and it will be a matter of great argument whether it's "against the order of nature".

Justice Michael Kirby, a distinguished former Judge of Australian High Court, expressing in similar vein said that criminalisation of private, consensual homosexual acts is a legacy of one of three very similar criminal codes (of Macaulay, Stephen and Griffith), imposed on colonial people by the imperial rules of the British Crown. Such laws are wrong:

λ Wrong in legal principle because they exceed the proper ambit and function of the criminal law in a modern society;

λ Wrong because they oppress a minority in the community and target them for an attribute of their nature that they do not choose and cannot change. In this respect they are like other laws of colonial times that disadvantages people on the ground of their race or sex;



λ Wrong because they fly in the face of modern scientific knowledge about the incidence and variety of human sexuality; and λ Wrong because they put a cohort of citizens into a position of stigma and shame that makes it hard to reach them with vital messages about safe sexual conduct, essential in the age of HIV/AIDS<sup>25</sup>.

The Section 377 of the Indian Penal Code makes sex or marriage with persons of the same gender punishable by law. On 2 July 2009, in *Naz Foundation v. Govt. of NCT of Delhi*, the Delhi High Court held that provision to be unconstitutional with respect to sex between consenting adults, but the Supreme Court of India overturned that ruling on 11 December 2013. Homosexuality is a taboo in India. In recent years, however, the attitude of people towards homosexuality has shifted slightly. Several organisations, including the Naz Foundation (India) Trust, the National AIDS Control Organisation, Law Commission of India, Union Health Ministry, National Human Rights Commission of India and the Planning Commission of India have expressed support for decriminalising homosexuality in India, and pushed for tolerance and social equality for lesbian, gay, bisexual, and transgender people<sup>26</sup>. Keeping in mind the privacy held as fundamental right in (2017), also known as the Right to Privacy verdict, is a landmark decision of the Supreme Court of India<sup>27</sup>, which holds that the right to privacy is protected as a fundamental right under Articles 14, 19 and 21 of the Constitution of India<sup>28</sup>.

### Right to equality

Liberty and Equality are two most valuable rights of the people. Men are neither equal in respect of their physical features nor in respect of their mental abilities. Some are stronger others weaker and some are more intelligent and capable than others. Their capacities and abilities are different. As such equality of treatment and rewards cannot be ensured. Rewards must depend upon the actual abilities and work of various people. Hence equality does not mean absolute and total equality. Equality really means equal opportunities for development. Development only can be attained when one can open to his desire such desires which are not run as per social scenario but which are inbuilt in his nature, homosexual people are not change due to some defect but they are born with such desires, it is not the impact of some western view or some outside impact. Homosexuality is not a disease which can be cured by some medicine; it is emotions like happiness and sadness. When nature made them with such instinct, they how society can put barrier on them, and teach them how they should live their life.

<sup>25</sup> Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations by the Hon'ble Michael Kirby AC CMG, 16th National Commonwealth Law Conference, Hong Kong, 8th April, 2009.

<sup>26</sup> Available at: <https://timesofindia.indiatimes.com/topic/same-sex-marriage>, (last visited on may 6<sup>th</sup>, 2023).

<sup>27</sup> Justice K. S. Puttaswamy (Retd.) & Anr. vs. Union Of India & Ors. (2017)

<sup>28</sup> Available at:

[https://en.wikipedia.org/wiki/Right\\_to\\_Privacy\\_verdict#:~:text=\(2017\)%2C%20also%20known%20as,of%20the%20Constitution%20of%20India](https://en.wikipedia.org/wiki/Right_to_Privacy_verdict#:~:text=(2017)%2C%20also%20known%20as,of%20the%20Constitution%20of%20India), (last visited on 7<sup>th</sup> sep, 2023).

Declaration of Principles of Equality described as current international understanding of Principles on Equality ... [which] reflects a moral and professional consensus among human rights and equality experts. The declaration defines the terms 'equality' and 'equal treatment' as follows: THE RIGHT TO EQUALITY The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law. EQUAL TREATMENT Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality, it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals<sup>29</sup>.

When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalised and turned in on itself<sup>30</sup>.

Discrimination must be prohibited where it is on grounds of race, colour, ethnically, descent, sex, pregnancy, maternity, civil, family or career status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition towards illness or a combination of any of these grounds, or on the basis of characteristic associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination 1. Causes or perpetuates systematic disadvantage; 2. Undermines human dignity; 3. Adversely affects the equal enjoyment of a person's right and freedoms in a serious manner that is comparable to discriminate on the prohibited grounds stated above.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground of the association of a person with the other persons to whom a prohibited grounds applied or the perception, whether accurate or otherwise, of a person or having a characteristic associated with prohibited ground<sup>31</sup>.

Discrimination may be direct or indirect. Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourable than another person or another group of person is treated less favourable than another person or another group of persons, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person

<sup>29</sup> Declaration of Principles of Equality issued by the Equal Rights Trust in April, 2008

<sup>30</sup> Naz foundation v government of NCT of Delhi, AIR 2009, p.78

<sup>31</sup> Naz foundation v government of NCT of Delhi, 2009, p.78

or group of person is subjected to detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria<sup>32</sup>.

Jayalakshmi v. The State of Tamil Nadu<sup>33</sup>, in which an eunuch had committed suicide due to the harassment and torture at the hands of the police officers after he had been picked up on the allegation of involvement in a case of theft. There was evidence indicating that during police custody he was subjected to torture by a wooden stick being inserted into his anus and some police personnel forcing him to have oral sex. The person in question immolated himself inside the police station on 12.6.2006 and later succumbed to burn injuries on 29.6.2006. The compensation of Rs.5, 00,000/- was awarded to the family of the victim. Another instance cited is of a case where the Magistrate in his order observed that the case involved a hidden allegation of an offence under Section 377 IPC as well, thereby stretching the reach of Section 377 IPC to two lesbian adult women who were involved in a romantic relationship with each other while the initial accusation was only under Section 366 IPC. An affidavit of a gay person is also filed on record. The person was picked up from a bus stand at about 10 p.m. by the police, who accused him of being a homosexual. He was physically assaulted with wooden sticks, taken to police post where he was subjected to sexual and degrading abusive language. During the incarceration in the police post over the night, four men actually raped and sexually abused him including forcing him to have oral and anal sex.

Here we are concerned by the identity of person but not regarding his gender but with regards to his/her sexual identity. Our constitution provides no discrimination should be done but still left a scope for reasonable classification, under such reasonable classification marriage should not be a ground. It a personal choice of human with whom he wants to live his life, law should not bind them in the rope of morality. Morality cannot be teaching under compulsion it comes from the behaviour of person. Morality varies from one person to another, one thing maybe morally good for one person but not always vice versa. Section 377 of Indian Penal Code does the same it not only tries to teach the person how to conduct their personal act but make such act an offence.

Indirect discrimination occurs when a provision criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons. Unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Our Indian society conveys the message that homosexual are less value than other people, demeans them and unconstitutionally infringes upon their right to live with dignity.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violation the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment<sup>34</sup>. A homosexual person suffers unreasonable classification and is

<sup>32</sup> *ibid*

<sup>33</sup> AIR (2007) 4 MLJ 849.

<sup>34</sup> Declaration of principles on equality 2008- the equal right trust.



arbitrarily in the way it unfairly targets the homosexuals or gay community. Public disapproval or disgust can in no way serve to uphold the constitutionality of a status.

### **Hindrances in the way of legality of same sex marriage.**

*Self made morality rule:* our society hold same view as learned ASG hold in Naz foundation case, that there is no fundamental right to engage in the same sex activities. In our country, homosexuality is abhorrent and can be criminalised by imposing proportional limits on the citizens' right to privacy and equality. Learned ASG submits that right to privacy is not absolute and can be restricted for compelling state interest. Article 19(2) expressly permits imposition of restrictions in the interest of decency and morality. Social and sexual mores in foreign countries cannot justify de-criminalisation of homosexuality in India. According to him, in the western societies the morality standards are not as high as in India<sup>35</sup>. Constitution of India protect the dignity require us to acknowledge the value and worth of all individuals as members of society.

*Religion:* religion is one of the important social institutions. Religion refers to the most sublime of human aspirants. Religion existed though out the history of human society. It is part of human social life. It shapes human behaviour in a moral fashion. Religion is a system of belief in the existence of supernatural being<sup>36</sup>. Indian state respects the religious laws of different communities under the rubric of personal laws. “Personal laws” refers the system of religious rules, customs and practice related with family, marriage and succession, particularly in case of minorities<sup>37</sup>. Religion plays a dominant role in our lives. From childhood we believe in superstition of god. Any act which is not as it is prescribe under sacred text is regard as unlawful and against religion. Such person cannot attain salvation as per social rituals and believes. Under all religious text certain glimpse of sexual desire is defined but all these only talk about such desire between man and women. There are plenty of texts which regard homosexual people or place their desire in a acceptable place.

*Slow acceptance to western view:* modernisation requires the replacement of traditional culture of the society concerned, by that of the west. In reality, modernization is a systhesis of old and new ways and takes different forms in different societies. Depending upon the culture each of the society has modernization varies with the needs, the prevailing condition and stage of development of the country. So each country has different starting points for its modernisation process and these points will determine the problems of its modernisation<sup>38</sup>. Traditional values are totally different from the modernization. Modernization works on adoptive process where traditional view still gives importance to religion and customs. Indian societies are slow to modernization. They accept the change bit slow than normal societies. Modernization stands for a rational approach to all aspects of social life, although they are not oppose to traditional views but traditional people is still live in the tendency that all the past beliefs and practice are immutable.

*Illiteracy:* An illiterate is equal to a handicapped person who is unfamiliar with his surroundings and is unable to understand any reasonable fact. Regarding homosexuality their approach is totally different than a literate person. They treat homosexual as an ill person who need treatment.

<sup>35</sup> Naz foundation v government of NCT of Delhi, 2009, p. 23

<sup>36</sup> S.R. Myneni, sociology part 2, Allahabad law agency, p. 133

<sup>37</sup> Ibid, p. 135

<sup>38</sup> Ibid, p. 319



## **IMPACT OF NON-ACCEPTABILITY OF HOMOSEXUAL:**

Sex changing option avail by persons, the good part of such kind of operations has to be considered from the point of view of the transsexuals. Day by day, the percentage of transsexuals who are performing such operation is going up. The experts also agree that sex change operation of a woman to a man is very difficult and challenging as compared to operation of man to a woman. The sex change operation is not the panacea for all the problems of transsexuals. However, at least it helps the transsexuals to come out of the trauma in which they were living prior to the operation. They become more stable on physical as well as mental levels. However, transsexuals also have to face number of problems that may include physical/mental problems owing to such operation. Similarly, such problems may also include public ridicule, instability on family front, etc.

In India, there is no law that authorises sex change operation nor any legal precedent so far has been developed, but there are the instances of sex change operation, which are increasing day by day in India. Such sex change operation gives rise to many legal issues, which are required to be adequately dealt with.

### **Suicide**

The LGBTQ community is at a higher risk for suicide because we lack peer support and face harassment, mental health conditions and substance abuse. For LGBTQ people aged 10–24, suicide is one of the leading causes of death. LGBTQ youth are 4 times more likely and questioning youth are 3 times more likely to attempt suicide, experience suicidal thoughts or engage in self-harm than straight people. Between 38-65% of transgender individuals experience suicidal ideation.

Family support plays a particularly important role in affecting the likelihood of suicide. Someone who faced rejection after coming out to their families were more than 8 times more likely to have attempted suicide than someone who was accepted by their family after revealing their sexual orientation.

### **Disparities In Care**

The history of mental health treatment of lesbian, gay, bisexual, transgender and questioning (LGBTQ) populations is an uneasy one. In the 1950s and 60s, many psychiatrists believed that homosexuality, as well as bisexuality, was a mental illness. Gay men and lesbians were often subjected to treatment against their will, including forced hospitalizations, aversion therapy and electroshock therapy. The majority of gay and bisexual men has and maintains good mental health, even though research has shown that they are at greater risk for mental health problems. Like everyone else, the majority of gay and bisexual men are able to cope successfully if connected to the right resources.

However, ongoing homophobia, stigma (negative and usually unfair beliefs), and discrimination (unfairly treating a person or group of people) can have negative effects on your health. Research also shows that, compared to other men, gay and bisexual men have higher chances of having: Major depression, bipolar disorder, and Generalized anxiety disorder.

Gay and bisexual men may also face other health threats that usually happen along with mental health problems. These include more use of illegal drugs and a greater risk for suicide. Gay and bisexual men are more likely than other men to have tried to commit suicide as well as to have succeeded at suicide. HIV is another issue that has had a huge impact on the mental health of gay and bisexual men. It affects men who are living with HIV; those who are at high risk, but HIV negative; and loved ones of those living with, or who have died from it.

## **SUGGESTIONS:**

**SOCIAL ACCEPTANCE:** Sexual orientation, gender identity and being intersex are not the same thing. They are each different and independent aspects of a person. It is important to respect people choice of terms, names and pronouns to refer to themselves. While this joint UN statement refers to lesbian, gay, bisexual, transgender and intersex people, it should also be read to include anyone who faces and discrimination on the basis of their actual or perceived sexual orientation, gender identity and sex characteristics, including those who identify with other terms. Social acceptance of same sex marriage is compulsory. No doubt 377 is omitted but it left the marriage concept out of table. Presently, before granting them any legislative rights the need is to accept them socially.

**AWARENESS PROGRAMS:** Misconception is here that gay, lesbians, bisexuals are responsible for spreading HIV AIDS in country.

Awareness campaigns are necessary to show that the LGBTQ population is not to blame for erectile dysfunction; rather, they experience severe mental and physical violence as a result of their social choices.

**FAMILY SUPPORT:** Family is the single most important influence in a children's life. From their first moments of life, children depend on parents and family to protect them and provide for their needs. Parents and family form a child's first relationships. They are a child's first teachers and act as role models in how to act and how to experience the world around them. If family support them then there are good chances of change in the society.

**MORAL VALUES:** The struggle for marriage equality in this country is ripe for an intervention. If the effort continues along in the manner in which it has been headed, gay couples may or may not succeed in gaining access to civil marriage. But even if gay couples succeed in getting marriage, the gay rights movement may have missed a critical opportunity-a chance to make a positive moral case for gay sex and gay couples. Society needs to accept the thought that being gay or lesbian is not a feeling but its something which is physical. It's a high time to change our belief system.

**CHANGE IN EDUCATION SYSTEM,** means a lot in everyone's life as it facilitates our learning, knowledge and skill. It completely changes our mind and personality and helps us to attain positive attitudes. We must give importance to the education than other targets in life as it is the only source of real happiness in our life and also make us able to bring a change in society by applying that knowledge in the real world. Studies must focus on educating children about the choices, so that same-sex marriage idea can be normalized.

LEGISLATIVE MEASURE: last but most importantly, legislative measures must be done. Separate provision regarding marriage must be made by parliament. Law, treaties and regulations are made for the protection and regulate the society at large. The law serves as a norm of conduct for citizens. It was made to provide for proper guidelines and order upon the behaviours for all citizens and to sustain the equality on the three branches of the government. It keeps the society running. Without law there would be chaos and it would be survival of the fittest and everyman for himself. So keeping in mind, there is need of proper legislation for same sex marriage acceptance and regulation.

