

Homosexuality In India – The Invisible Conflict

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Abstract

This research paper analysis the homosexual marriages in the Indian context as an invisible conflict which is successfully kept under cover. It also attempts to describe and explain various aspects of Homosexuality including the evolution, the reasons, the societal attitude and reactions towards such relations. The author also draws insight from the countries where homosexual marriages are legalized and also highlights their outcome out of legalising Homosexual relations. At the end taking fair and strong arguments both in favour and in against the author concludes about the possibility of legalizing homosexual marriages in India based on empirical and theoretical facts and evidences.

Homosexuality In India – The Invisible Conflict

The institution of marriage in society is generally regarded as extending only to male-female relationships, although most marriage statutes use gender-neutral language. Where as, many examples of acceptance of homosexual marriages has only been recently forthcoming as society is gradually becoming more permissive. This change is reflected in the increasing number of jurisdictions, which have decriminalised such acts. However, many jurisdictions have retained their statutory prohibitions on homosexual marriages despite much criticism from groups and individuals who believe that the sodomy law is obsolete and should be repealed. Hence same-sex relationships, regardless of their duration, are not legally recognized in most countries and as a result, homosexual partners are denied many of the legal and economic privileges automatically bestowed by marital status. These include employment benefits, the ability to file joint tax returns and perhaps most importantly since the advent of AIDS -- health benefits and rights arising on the death of a partner, including interstate inheritance etc. In society at large many

of these benefits are available to heterosexual de facto partners, but continue to be unavailable to homosexual partners.¹

Definition

The word homosexuals literally means as 'of the same sex, being a hybrid of the Greek prefix homo-meaning 'same' and Latin root meaning 'sex'.² Homosexuality is a sexual orientation characterized by sexual attraction or romantic love exclusively for people who are identified as being of the same sex. People who are homosexual, particularly males are known as 'gay', gay females are known as 'lesbians'. That is homosexual marriages, sometimes referred to as gay marriage, indicates a marriage between two persons of the same sex.³

History

The earliest western document concerning homosexual relationship come from Ancient Greece, where same sex relationship were the societal norm. Even homosexual marriages have occurred with relative frequency in the past, both within Christian and non-Christian communities.⁴ Researches suggest that the Catholic Church, which has been extremely vociferous in its opposition to homosexuality in general, approved of same-sex marriages for over 1 500 years, only ceasing to perform them in the nineteenth century.⁵

In preindustrial societies also homosexuality was generally accepted by the lower classes while some members of upper classes considered it immoral. However with the rise of urbanization and the nuclear family, homosexuality became much less tolerated and even outlawed in some cases. The sexual orientation in pre modern era as depicted in love poetry and paintings and even in historic figures such as Alexander the great, Plato, Hadrian, Virgil, Leonardo da Vinci, Michelangelo and Christopher Marlowe included or were centered upon relationship with people of their own gender.⁶

¹ A relationship not based on blood or marriage is not entitled for Social Security benefits under Employee Provident Fund Act, Pension Act, Workmen Compensation Act, Insurance Act, Housing Act etc.

² Older words for homosexuality, such as homophilia and inversion have fallen into disuse. Less frequently used terms are queer, homo, fag or faggot and dyke.

³ Homosexual marriages are also known as gender-neutral marriage, equal marriage, and gay marriage.

⁴ <http://www.ilga.info/index.html>

⁵ findarticles.com/p/articles/mi_m2065/is_n1_v50/ai_20344099/pg_4 - 28k -

⁶ <http://www.umiacs.umd.edu/users/sawweb/sawnet/news/news337.txtg>

However the term homosexuality appears in print for the first time in 1869 in an anonymous German pamphlet paragraph 142 of the Prussian penal Code and Its maintenance paragraph 152 of the Draft of a Penal Code for North German Confederation written by Karl Maria Kertbeny. This pamphlet advocated the repeal of Prussia's sodomy laws.⁷

Thus homosexuality is not a new phenomenon. Even instances of homosexuality are available in Hindu Mythology.⁸ The literature drawn from Hindu, Buddhist, Muslim, and modern fiction also testifies the presence of same-sex love in various forms. Ancient texts such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads and Puranas refer to homosexuality.⁹ Also there are reports that same-sex activities are common among sannyasins, who cannot marry. Thus instances of homosexuality are available in historical and mythological texts world over and India is not an exception to this.

The Cultural residues of homosexuality can be seen even today in a small village Angaar in Gujarat where amongst the Kutchi community a ritualistic transgender marriage is performed during the time of Holi festival. This wedding which is being celebrated every year, for the past 150 years is unusual because Ishaak, the bridegroom and Ishakali the bride are both men.¹⁰

Thus the history is filled with evidences proving the existence of homosexuality in past. Whereas in the past 10 years world over, for the lesbian and gay rights, we find that the legal initiatives have shifted from the right to be privately sexual, that is the right to have same-sex relationships at all, to the right to be individual civic subjects, protected from discrimination in the work place and in the provision of services, toward the right to have relationships given status by the law. This shift in rights-focus, from decriminalization, to civil protection, to civil recognition is, not entirely a linear one. Thus in recent years a number of jurisdictions had relaxed or eliminated laws curbing homosexual behavior.

Homosexual Marriages: The Global Scenario

⁷ Ruth Vanita and Saleem Kidwai (Eds.) *Same Same Sex Love In India : Readings From Literature And History* (St. Martin Press, 2000).

⁸ <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/suchana/0909/rh374.html>

⁹ Sandeep Roy Chowdhury, 'The best of both worlds? South Asian bisexuals speak out,' *India Currents*, February issue, 1996.

¹⁰ Arvind Kala, *Invisible Minority: the unknown world of the Indian homosexual* (Dynamic Books, New Delhi, 1994).

Faced with the fact of homosexual unions, civil authorities adopt different positions. At times they simply tolerate the phenomenon, at other times they advocate legal recognition of such unions, under the pretext of avoiding, with regard to certain rights, discrimination against persons who live with someone of the same sex. In other cases, they favour giving homosexual unions legal equivalence to marriage properly so-called, along with the legal possibility of adopting children. Thus an increasing number of jurisdictions have de-criminalised homosexual acts. However, many jurisdictions have retained their statutory prohibitions on homosexual acts despite much criticism from groups and individuals who believe that the laws are obsolete and should be removed.

Anyhow the last century witnessed major changes in the conception of homosexuality. Since 1974, homosexuality ceased to be considered an abnormal behaviour and was removed from the classification of mental disorder. Since then homosexuality has been de-criminalized in different countries. There are various states across the globe that enacted anti-discriminatory or equal opportunity laws and policies to protect the rights of gays and lesbians.¹¹ In the late 1990s and early 2000s, progress towards and bans of same-sex marriage created a topic of debate all over the world. Currently, same-sex marriages are recognized nationwide in six countries: Netherland (2001) , Belgium (2003), Canada (2005), Spain (2005) and South Africa (2006). The state of Massachusetts in the United States also recognizes same-sex unions (although these marriages have no legal recognition at the federal level in the US). With this an estimated 155 million people worldwide, or approximately 2.5% of the world's total population, will live in places where same-sex marriage exists.¹²

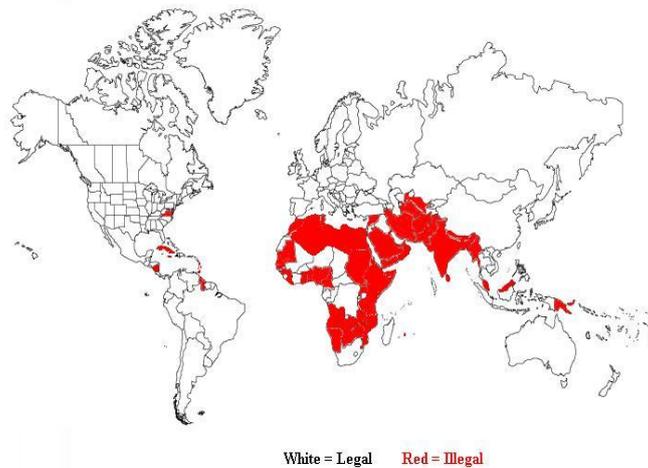
Following map gives the global scenario about legalisation of Homosexual marriages.¹³

¹¹ http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/narrain/

¹² <http://www.fsw.ucalgary.ca/ramsay/gay-lesbian-bisexual/3ta-south-asia-homosexuality.htm>

¹³ www.wikipaedia.com

Laws around the World



That is civil unions and other forms of legal recognition for same-sex couples, which offer most if not all the rights accorded in a civil marriage, exist in Croatia, Denmark, Finland, France, Germany, Iceland, Israel, New Zealand, Norway, Portugal, Slovenia, Sweden, Switzerland and the United Kingdom. Regions of Australia, and additional territories in the United States offer some rights and responsibilities as civil Unions.¹⁴

Even events such as Mardi Gras in Sydney, Midsumma in Melbourne, Gay and Lesbian Pride in Johannesburg, Women's Celebration Week in Greece, and the Gay and the Lesbian Film Festival in Lisbon express the essence of being homosexual.¹⁵ So, world over many countries has given social and legal recognition to homosexual marriages¹⁶. Where as more than 70 countries, including India, consider

¹⁴ Ibid

¹⁵ <http://www.fsw.ucalgary.ca/ramsay/gay-lesbian-bisexual/3ta-south-asia-homosexuality.htm#India%20Films>

¹⁶ **Countries Where Homosexuality Is Legalised**

Greece, Greenland, Guadeloupe, Guatemala, Guinea-Bissau, Haiti, Honduras, Hongkong, Hungary, Iceland, Indonesia, Iraq, Ireland, Israel, Italy, Ivory Coast, Montenegro, Albania, Andorra, Argentina, Armenia, Aruba, Austria, Azerbaijan, Bahamas, Belarus, Belgium, Belize, Bolivia, Brazil (no Sodomy law for military person), Bulgaria, Burkina Faso, Cambodia, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Croatia, Cuba (Article 303a of the penal code punishes 'publicly manifested homosexuality'), Cyprus (Ban on military on health ground), Czech Republic, Denmark (homosexuals equivalent to heterosexuals), Dominican Republic, Dutch Antilles, Ecuador, El Salvador, Eritrea, Estonia, Farland Islands, Faroe Islands, Finland, France, French Guyana, French Polynesia, Gabon, Georgia, Germany, Japan, Jordan, Kazakhstan, Kosovo, Kyrgyzstan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Macau, Macedonia, Madagascar, Malawi, Martinique, Mexico, Moldova, Monaco, Netherlands, Netherlands Antilles, New Caledonia, New Zealand, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Reunion, Romania, Russia, Rwanda, San Marino, Sao Tome and Principe, Serbia, Sierra Leone, Slovenia, South Africa, South Korea, Spain, Suriname, Sweden, Switzerland, Taiwan, Thailand, Ukraine, Uruguay, Vanuatu, Venezuela, Vietnam, Voivodina, Vanuatu, Venezuela, Vietnam, Voivodina

Countries Where Homosexuality Is Illegal

Algeria, Angola, Barbados, Bhutan, Bosnia, Botswana, Burundi, Ethiopia, Ghana, Herzegovina, Kenya, Liberia, Malawi, Malaysia, Maldives, Morocco, Mozambique, Namibia (male Homosexuality is illegal), Nepal, Pakistan, Singapore, Togo, Turkey, Uganda, Zaire, Zimbabwe

homosexuality a crime, and 30 of these deny homosexuals even basic human rights and the homosexual acts remain punishable by death in Afghanistan, Mauritania, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, United Arab Emirates, and Yemen, and by life in prison in Bangladesh, Bhutan, Guyana, India, Maldives, Nepal, Singapore, and Uganda.¹⁷

Thus the legal position of homosexuals differs from country to country. In England, for example, homosexual relationships involving anal intercourse is not illegal between consenting adults as long as they are 21 or over and conduct themselves in private. In India, however, such active sexual relationships between men are still illegal. The age of consent varies, too, according to the country being as young as 10 in Hungary and as old as 23 in Spain.¹⁸

Evolution

A frequent argument is that homosexuality prior to the modern period differed from modern homosexuality (age, gender or class –structure rather than the more egalitarian form seen today). Homosexuality in different periods had different features, the underlying phenomenon has always existed and is not a recent invention of our society or that, while the particular manifestation of homosexuality may highly depend on social factors, its fact remains constant.¹⁹

The fact is that among approximately 1500 animal species whose behavior has been extensively studied, homosexual behaviour has been described in at least 450 of the species. The reality is that it is so common that it begs an explanation and sociobiologists have proposed a wide variety of explanations to account for it. The fact that it is so common also means that it clearly has evolutionary significance, which applies as much to humans as it does to other animal species.²⁰

Afganistan, Antiglia, Bardlanda, Bahrain, Bangladesh, Bosnia, Heazegonia, Botswana, Brunei, Burma, Burundi, Cameron, cape Verda, Cook Islands, Dji Bonti, Ethiopia, Fiji, Ghana, Guinea, Guyana, Inida, Iran, Jamiaca, Kenya, Kiri Bati, Kuwait, Laos, Lebanon, Liberia, Mali, Marshall, Islands, Mauritania, Mauritius, Mongolia, Naruru, Nicaragua, Nigeria, Niue, Oman, Papua, newGuinea, Puerto Rico, Qatar, Saint Lucia, Samoa, Saudi Arabia, Senegal, Seychelles, Slovakia, Soloman Islands, Somalia, Srilanka, Swaziland, Syria, Tajkistan, Tanzania, Tokelau, Tongo, Trinidad, Tobago, United Ara, Emirates, Uzbekistan, Zambia

¹⁷ According to a study by the Amnesty International

¹⁸ Supra note 13

¹⁹ C. Alfred Kinsey, W.B. Pomeroy and C.E. Martin, *Sexual Behavior In The Human Male* (WB Saunders, Philadelphia , 1948).

²⁰ W. Michael Ross, 'A Taxonomy of Global Behavior' in R. Tielman, M. Carballo and A. Hendriks eds. *Bisexuality And HIV/AIDS: A Global Perspective*. (Prometheus Books, Buffalo, 1991).

Theoretical Explanation of Homosexuality

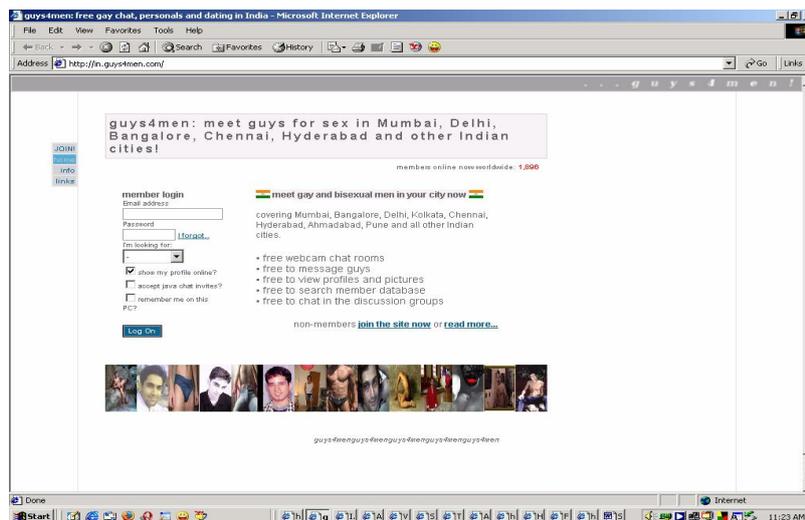
The causes of sexual orientation are currently under investigation. The general understanding is that there is symphony of factors that act over a long time to determine each individual's sexual orientation. Nurture, Nature or some combination of the two is often thought to determine human sexual behaviour. Researches suggests that homosexuality is largely genetic in origin and it also states further that individuals with homosexual genes will feel less inclined to behave heterosexually and will thus reproduce less frequently.²¹ Findings also suggest that homosexual men are feminized where as other study found that homosexual men and homosexual women are masculine. Another cause stated is imitation, a major mechanism of cultural transmission, which also accounts for some homosexual behaviour. Irregular levels of sex hormones during the development of the child in the womb has also been cited as an influence. Family upbringing may also have an effect by failing to produce a strong sense of being male in the growing child or by inducing guilt about early heterosexual contacts or by blocking initial heterosexual behaviour. Experiences outside the family may also, of course, encourage homosexual behaviour.²²

²¹ As per study conducted by Dean Hamer in 1994, wherein he studied 40 pairs of homosexual brothers, reports that 33 pairs shared a set of five genetic markers. Hamer concluded that genetics played "some role" in a minority of gays. *Source* : Dean Hamer and P. Copeland *The Science Of Desire: The Search For The Gay Gene And The Biology Of Behavior* (Simon and Schuster, New York, 1994).

²² Lane Tim Dean, *Homosexuality And Psychoanalysis* (The University of Chicago Press, Chicago, 2001).

Indian Society and Homosexuality

In India, so far no such progressive changes have taken place as regards social and legal recognition and homosexuals remain victims of violence in different forms supported by the state and society. In India from a scattered group of a few hundred, homosexuals are at present ten crore strong and growing community evolving its own hip and happenings. They are weaving there way from metros into semi-urban societies both online as well as offline.²³ This number is gradually increasing with more and more such people coming out of the closet. While Delhi and Mumbai (with five lakh gays each) and, to a lesser extent, Bangalore and Calcutta are the hub of the Indian gay movement, people from smaller towns in Gujarat, Maharashtra and Bihar are also coming out.²⁴ These Indian gays are talking live in chat rooms, looking for soul mates, falling in love, having sex on the net and crossing cities to be with each other in real world.²⁵



Web page showing a Gay website

This shows that homosexual relationships are not unheard of in India, but they generally exist in the country's larger cities where people can be more open about their sexuality.²⁶ A number of cities and larger towns, such as Karnataka, Delhi, Mumbai, Calcutta, Bangalore, Hyderabad, Pune, Chennai, Patna, Lucknow, Akola, Trichi and Gulbarga, had a number of resources for gays, lesbians and transgender communities that include - help-lines, publications/newsletters, health resources, social spaces and drop-in

²³ www.haworthpress.com/store/E-Text/View_EText.asp?a=3&fn=J236v07n01_09&i=1%

²⁴ According to Shaleen Rakesh, Coordinator, Milan project, Naz Foundation, New Delhi.

²⁵ <http://www.ilga.info/index.html>

centers.²⁷ In recent past the homosexual community of Calcutta, Mumbai and Bangalore also hosted the gay pride march.²⁸ All the above instances show that the homosexual community in India is visible and is gradually becoming vocal in their demand.²⁹

Legal Status of Homosexuals in India

Section 377³⁰ of the Indian Penal Code (1860) relates to Unnatural Offences and includes homosexuality within its domain. In India this Law relating to homosexuality was adopted from the British penal code dating to 19th century. Section 377 states:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.”

Similarly section 292 of IPC refers to obscenity and there is ample scope to include homosexuality under this section.

Also section 294 of Indian Penal Code, which penalizes any kind of "obscene behaviour in public", is also used against gay men.

It is important to note here that in England the offence of homosexuality between consenting partners has been abolished by the Sexual Offenders Act 1967 (that is in the country of origin of this law) whereas in India, the consent is quiet immaterial for constituting an offence as defined under this section.³¹

Thus in India it is primarily section 377 which explains and defines unnatural offences.³² It is this section which makes Homosexuality illegal with life imprisonment or with imprisonment for ten years with fine³³.

²⁶ BBC news article dated 29 May 2001

²⁷ www.tribuneindia.com/2004/20040319/world.htm - 46k

²⁸ findarticles.com/p/articles/mi_m2065/is_n1_v50/ai_20344099/pg_4 - 28k -

²⁹ Arvind narain, *Queer: Despised Sexuality, law and Social Change* (Books for Change, 2004).

³⁰ This section (377) is mostly been used to register cases on the child sexual abuse, since the rape laws do not have scope to include male rape. On the other hand 'Against the order of nature' is broad enough to include sexual abuse of male children.

³¹ Under this clause, a third party can sue the partners who voluntarily entered into sodomy thereby infringing on the right to personal liberty and privacy as enshrined in the Fundamental Rights of the Constitution.

Cases and Sentence

In the history of the statute from, 1860 to 1992 there were only 30 cases in the High Courts and Supreme Court. Out of these 30 cases, 18 were non-consensual, 4 were consensual of which 3 were before 1940 and 8 were unspecified and 15 out of 30 cases registered were assault on minors.³⁴

In a judgement (Fazal Rab Vs State of Bihar)³⁵ the Supreme Court was dealing with a case where a man had homosexual relations with a boy with the consent of the boy.³⁶ The Supreme Court in 1983 observed that: 'the offence is one under Sec. 377, IPC which implies sexual perversity.'³⁷ Considering the consent of the boy, the Supreme Court reduced the sentence from 3 years rigorous imprisonment to six months rigorous imprisonment.³⁸

Also Section 377 had been used to intimidate women, particularly in the case of women who have run away together or if they make their relationship-known.³⁹ In 1987, Tarulata/Tarun Kumar underwent female to male sex change operation and married Lila in 1989.⁴⁰ Lila's father filed a petition in the Gujarat High Court saying that it is a lesbian relationship and that the marriage be annulled.⁴¹ The petition contends that 'Tarun Kumar possesses neither the male organ nor any natural mechanism of cohabitation, sexual intercourse and procreation of children.'⁴² Adoption of any unnatural mechanisms does not create manhood and as such Tarun Kumar is not a male. The petition called for criminal action under Sec. 377.⁴³

³² The legal status of homosexuality in the Indian Armed Forces follows the model set by Sec. 377 of IPC. Sec. 46 of chapter VI - offences of the Army Act, 1950 states: any person subject to this Act who is guilty of any disgraceful conduct of a crude, indecent or unnatural kind shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or much less punishments as is this Act mentioned. Similar provisions exists in the Air force Act and Navy Act.

³³ *Explanation-* Penetration is sufficient to constitute the carnal intercourse necessary to the offences described in this section.
Essential Ingredients

- i. That there must be voluntarily carnal intercourse against the order of the nature.
- ii. That it may be with man, woman or animal.

Classification of offence

Punishment – Imprisonment for life or imprisonment for 10 years and fine – cognizable – Non Bailable – Triable by Magistrate of first class – Non-Compundable.

³⁴ www.ilga.info/Information/Legal_survey/Asia_Pacific/india.htm

³⁵ AIR 1983 (SC) 323.

³⁶ <http://gendwaar.gen.in/rep9.pdf>

³⁷ In this case perversity was treated synonym for homosexuality.

³⁸ It went on to say that " No force appears to have been used neither omissions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking'.

³⁹ Even though this section does not distinguish sodomy between males and between male and female, this section is targeted against males more so than females.

⁴⁰ timesofindia.indiatimes.com/articleshow/msid-1381303,prtpage-1.cms - 15k -

⁴¹ www.dialognow.org/node/view/941 - 211k

⁴² The Gujarat High Court said that it is a lesbian relationship and that the marriage be annulled.

⁴³ <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/suchana/0909/rh374.html>

In 1992, 18 men were arrested from a park in New Delhi on the suspicion that they were homosexuals.⁴⁴ After protest and demonstration by gays, lesbians and human rights groups, they were released from police custody after filing a petty case against them. In fact they were not indicated under Sec. 377 but under the provision of public nuisance under the Delhi Police Act.⁴⁵

Similarly in another instance in september 1994 Section 377 of the Indian Penal Code, which makes sodomy a crime, was being cited by prison authorities in India to justify their refusal to distribute condoms among inmates.⁴⁶

Similarly in 2001, the Delhi High Court admitted a petition challenging the constitutional validity of the article on the ground that it "criminalizes homosexual acts" even between two consenting adults and impedes AIDS control efforts among homosexuals.⁴⁷ The case is pending in court despite several hearings.

In 2004, a parcel containing a few copies of a gay and lesbian magazines for the South Asians from the US was sent to a gay group in Calcutta for distribution to subscribers was confiscated by the Customs authority under Section 292 of IPC. They contended that as per law this publication amounts to obscenity and offensive to the morality of the country.⁴⁸ This case was closed when the addressee discarded the parcel seeing no way out.

In a recent case a highly educated person committed this offence, the Supreme Court having regard to his loss of service and other consequences to his career following the offence let him off with a sentence of

⁴⁴ www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-

⁴⁵ www.altlawforum.org/PUBLICATIONS/PUCL%20REport%201

⁴⁶ The Inspector General of Prisons, Kiran Bedi, refused to supply condoms to inmates in India's largest prison, Delhi's Tihar Jail, on the grounds that Section 377 makes homosexuality illegal. A human rights activist group ABVA filed a Public Interest Litigation in the Delhi High Court. The petition challenged the constitutional validity of Sec. 377 of IPC and advocates supply of condoms to jail inmates, with a plea to restrain the authorities from segregating or isolating prisoners with homosexual orientations or those suffering from HIV/AIDS.

⁴⁷ The petition urges that Sec. 377 is obsolete and must be struck down as being unconstitutional on the grounds that Right for Privacy is part and parcel of the Fundamental Rights of life and liberty under Article 21 of the constitution and recognised by the 1948 International Convention on Human Rights. Sec. 377 is a violation of Article 14 of the constitution since it discriminates persons on the basis of their sexual orientation; having been enacted in 1860, Sec. 377 is archaic, absurd and implemented by the British in all its colonies, including India, but now been repealed in England, the country of origin.

⁴⁸ Section 292 to 294 of Indian Penal Code enumerates obscenity. Subsection (1) to section 292 of the code defines obscene publication and rest of the part of section 292 and Section 293 of the code, Prohibits the sale and distribution of obscene Publications and Sec 294 of the code prohibits obscene acts and songs.

two months' imprisonment.⁴⁹ In yet another case the Supreme Court reduced the sentence of the accused to six months imprisonment as the accused while committing sodomy did not use force on the boy.⁵⁰ In a case of Himachal Pradesh where a truck driver twice committed sodomy on a boy in his truck, a sentence of one year's imprisonment and a fine of Rs. 500.00 were imposed on the accused.⁵¹

All these instances indicates that the actual sentence imposed under this section is not usually heavy.

Activists Movement

Gay rights activists have been battling against Section 377 for a decade. In 1994, lesbian and gay groups filed a petition challenging the law in the Delhi High Court. The case has dragged on for five years and has evoked strong reactions.⁵² In 1996 even members of the Indian lesbian collective Stree Sangam made a presentation on domestic-partnership laws to a government conference on marriage and family law.⁵³ It was "perhaps the first time that a lesbian/gay group [attempted] to create public opinion on the issues in such a forum," the group said in a letter to the gay magazine *Trikone*.⁵⁴

In Feb 99 there was second national LGBT⁵⁵ conference Indian National Gay Conference YAARIAN -99. Similarly the attacks on the film 'Fire' and 'Girlfriend' have led a number of organizations to set up the campaign for Lesbian Rights.⁵⁶ The petition, filed by the voluntary organization, argued that it is wrong for homosexuality to be a punishable offence in 21st century India.⁵⁷

However the most recent legal challenge comes from the Naaz Foundation Trust, New Delhi.⁵⁸ Naaz India has filed a writ petition challenging Section 377 in the Delhi High Court on December 7th, 2001 on the grounds that include:

⁴⁹ www.ilga.info/Information/Legal_survey/Asia_Pacific/india.htm

⁵⁰ Id

⁵¹ http://www.ilga.info/Information/Legal_survey/Asia_Pacific/1world_legal_survey__asia_pacific.htm

⁵² Urvashi Vaid 'Building bridges: thoughts on Identity and South Asian G/L/B/T Organizing' *Trikone Magazine*, Tenth Anniversary Issue, 1996.

⁵³ Id

⁵⁴ www.trikone.org

⁵⁵ LGBT is an acronym used as a collective term to refer to lesbians, gays, bisexuals, and transgender people. It is considered less controversial than the terms "queer" or "lesbigay" stands for Lesbian Gay Bisexual Transgender.

⁵⁶ <http://www.umiacs.umd.edu/users/sawweb/sawnet/news/news337.txt> see also <http://www.fsw.ucalgary.ca/ramsay/gay-lesbian-bisexual/3ta-south-asia-homosexuality.htm#India%20Films>

⁵⁷ Naaz Foundation Trust, New Delhi.

⁵⁸ A group dedicated to halting the spread of HIV and AIDS in India, where about 7 million people are believed to be infected.

Section 377 violates the right to life and personal liberty, the right to equality and the right to freedom guaranteed to all citizens as Fundamental Rights under Chapter III of our Constitution.⁵⁹

Similarly other gay and lesbian groups like *Hamsafar of Mumbai*, *Sahayathrika of Kerala*, etc. are also raising gay issues in the mainstream.

Mainstream Reaction

Indian society is a traditional multicultural diversified integrated society where in Hindus dominate. And for Hindus marriage is an enduring heterosexual Sacrament. Other Indian communities also have similar opinion that marriage is a heterosexual institution. This is supported by Vishwa Hindu Parishad Party, whose president says for Hindus, this kind of behavior is not just against nature, it is against our culture.

Even Shiv Sena members attacked theaters in New Delhi and Bombay where the film 'fire' (1988) and 'Girlfriend' (2004) was being screened they tore down posters, smashed furniture and organized violent protests. The party advocated that the film, which features the same sexual relationship was an affront to India's centuries-old Hindu culture. But at the same time Lesbian groups and women's rights organizations organized rival protests to demand the film run.⁶⁰

That is the strong reaction of society is that many people deny the existence of sexual minorities in India, dismissing same-sex behaviour as a Western, upper class phenomenon. Many others label it as a disease to be cured, an abnormality to be set right or a crime to be punished. While there are no organized hate groups in India as in the West, the persecution of sexual minorities in India is more insidious.⁶¹

Thus at large Gay men aren't accepted in Indian society, and as a result they have been extremely closeted. But in the last five years, the Indian gay community has moved into and flourished on what has probably been the most accepting space they could have ever hoped to find- the Internet. Thus they are forming NGOs, calling up help-lines and meeting regularly to evolve strategies for their cause. Above all,

⁵⁹ Although the high court in Delhi has dismissed the legal petition that sought to legalise homosexuality. The court ruled that the "validity of a law" cannot be challenged by anyone who is "not affected by it".

⁶⁰ web.amnesty.org/library/index/engPOL100012005

⁶¹ According to a report published by the People's Union for Civil Liberties – Karnataka in February 2001

they are partying- not just in remote farmhouses in secret but also in starred hotels and at gatherings of the glitterati where gay fashion designers and diplomats are counted among the star guests.

Even then the ground reality is that sexual minorities in India are largely stigmatized and disempowered socially, culturally, politically and often legally and economically too says Ashok Row Kavihe.⁶² Due to which isolation becomes intrinsic to the existence of a large number of lesbian and gay adolescents, and this feeling of isolation is often accompanied by self-loathing and confusion as to their future this is so because Section 377 which is used to criminalise and prosecute homosexuals in actual legitimizes the abuse of homosexuals. Infact “Gays are beaten up and even raped under the cloak of this law,” says gay rights activist Rakesh Shaleen of Naaz Foundation. Rakesh also refers to a case that “Two years ago, gays were forced into medication to ‘cure’ them. This mistreatment included shock and aversion therapy. When we petitioned the NHRC, the case was rejected in the light of Section 377.”⁶³

Thus Gay right activists and homosexuals has now started demanding social and legal recognition of homosexuality because they have a firm opinion that Legal protection is probably the only way by which homosexual community can be guaranteed social rights, rights against exploitation and more importantly, health rights.

The Present Study

The objective behind conducting the empirical survey was to find out the social reality, societal perception, societal attitude and belief system about homosexual marriages and its legal recognition in India. For this purpose 62 respondents were selected at random as sample and questionnaire was given to them to fill up after brief discussion about the topic and the issues involved in year 2005.

Methodology

The sample comprises of youths living in hostel of Law University, Jodhpur, Rajasthan who were pursuing second year of LL.B. The Sample comprises of both male and female belonging to age group 19-21 years coming from middle-middle and middle-upper class families with different religious background representing different states of India.

⁶² Ashok Row Kavihe is the editor of Bombay Dost ("Bombay Friend"), the Quaterly gay magazine published in India.

⁶³ http://www.thegully.com/essays/gaymundo/041018_gay_india_overview.html

The reasons for selecting this particular sample was as follows:

- i. The selected respondents are self-decision makers as they live in hostel away from their parents and decide for their way of life on their own.
- ii. The sample selected is well informed, updated and well aware about legalisation of Homosexual relations around the world.
- iii. The sample selected also have fair idea about legal Frame work in India as the youth representing the sample are Law students (who in future will become either Legislator or Judge or Executive or lawyer).

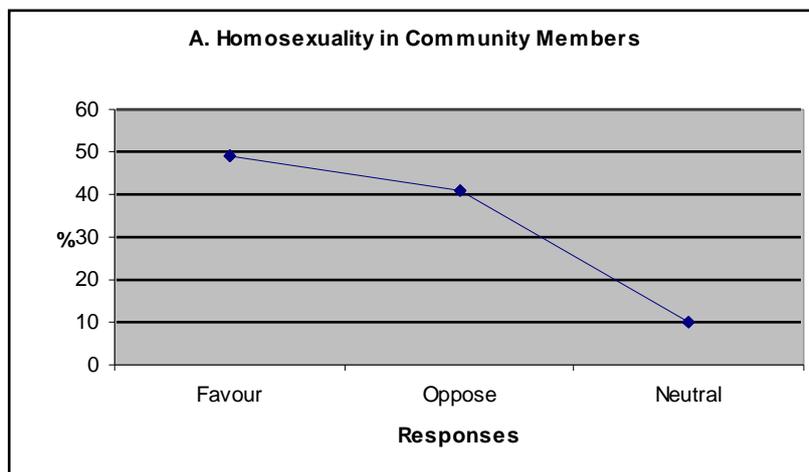
Thus the selected independent youth (from the point of shaping their life in their own desired way) taking the inductive approach represents the independent middle-middle and middle upper class Indian youth's perception about the legal recognition of Homosexual marriages in the context of India.

Findings

The following data are based on the empirical study conducted by the researcher on the above independent decision-making Indian Youth.

The Survey findings are as follows:

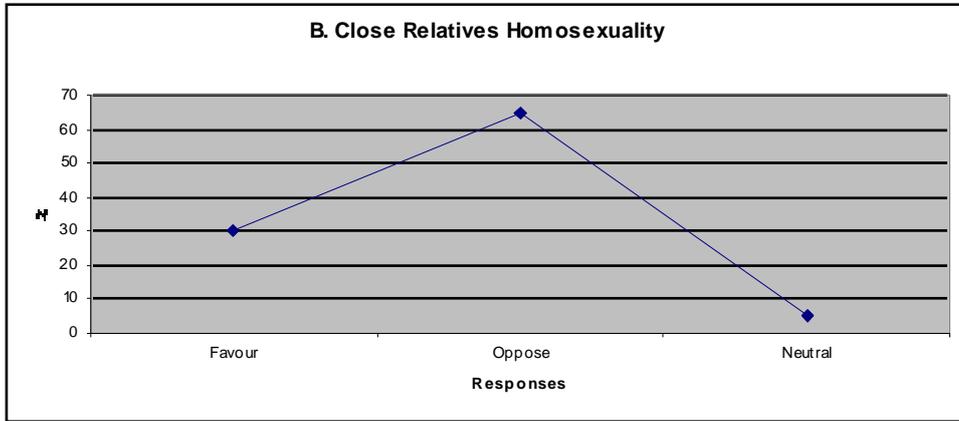
A. Respondents attitude about homosexual marriages amongst community members



.Fig. A states the respondents opinion about Homosexuality in close community members that is the respondents acceptance to homosexual relations amongst neighbour's, friends etc (that is people whom

they know but they are not their kins). To this responses are 49% favoured, 41% opposed and 10% were Neutral.

B. Respondents attitude about Homosexuality in Close relatives



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Fig. B. shows that 30% of the respondents favoured, 65% opposed and 5% were neutral about Close Relative Homosexual marriages (that is Homosexual marriages among their Brother's, Sister and other very close relatives).

Taking fig. A and B that is acceptance of homosexual marriages of community member and kinsmen, the acceptance rate of homosexuality between close relatives is less. That is homosexual relation of Brother's, Sister's and other close relative was opposed by 60% of the respondents as compared to community members where the response rate for opposition was only 41%.

C. Respondents Preference for Homosexual Marriages for Oneself when Illegal

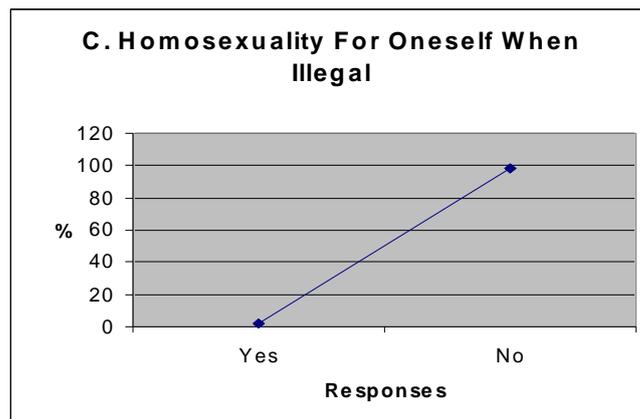


Fig. C suggests that only 2% of the respondents preferred homosexual marriages for oneself even when illegal whereas 98% strongly rejected the possibility of homosexual marriages or such types of acts which

are not considered normal and punishable under the Law. That is of the total population under study only 2% of the population was homosexual who think that they cannot resist their homosexual tendency even when it invites punishment.

D. Attitude Regarding Social Recognition Of Homosexuality

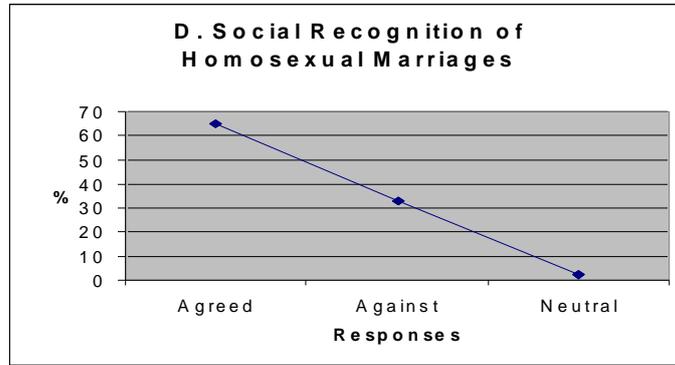


Fig. D shows the possibility about social recognition of Homosexual marriages in India. The outcome of all the responses is that 65% agreed, 33% were against and 2% were neutral. That is majority of the respondents 65% think that there is no problem in giving social acceptance to homosexuality.

E. Legal Recognition of Homosexual Marriages

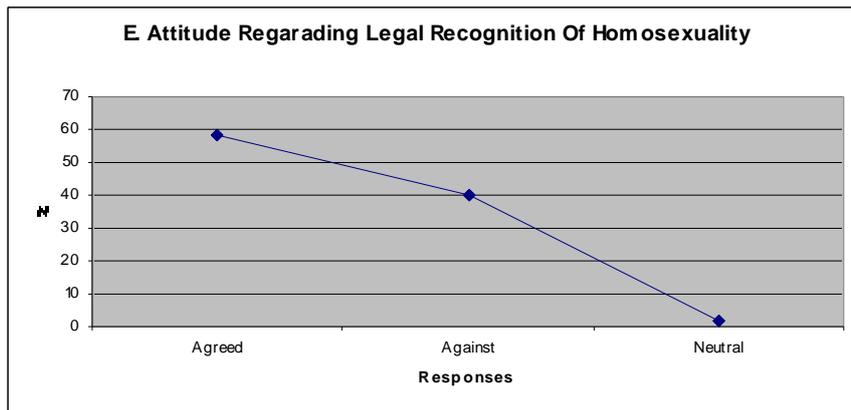


Fig. E. reveals that 58% agreed, 40% rejected and 2% were neutral about Legal Recognition of Homosexual marriages in India.

Taking Fig. D and E the response rate for social acceptance is more that is 65% as compared to legal acceptance which is 58% only.

F. Preference for Homosexual Marriages for Oneself when Legal

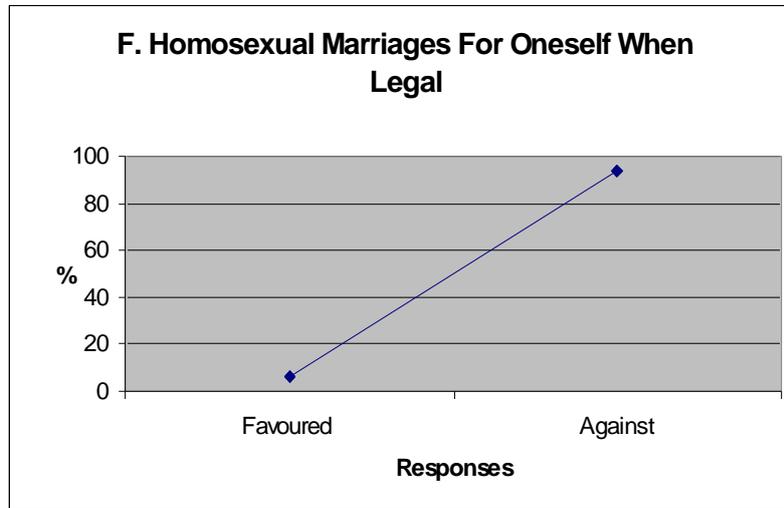
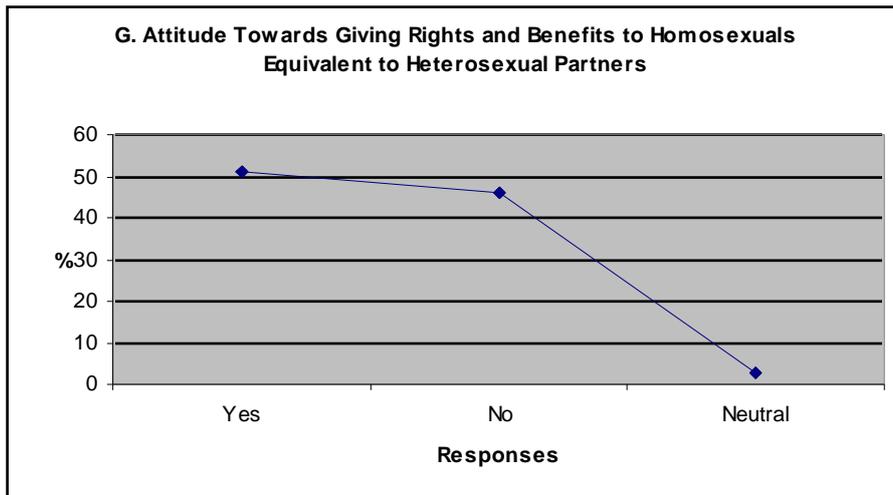


Fig. F gives the preferences of the respondents about homosexual marriages for oneself when legal. Of all the respondents only 6% of the respondents preferred possibility of homosexual marriages for themselves whereas 94% out rightly rejected any kind of possibility or acceptance of such type of behaviour for themselves even if homosexuality was legalized.

Comparing Fig. C and F that is preference of the respondents for homosexual behaviour for oneself when illegal and when legal, the statistics reveal that there is not a steep rise in homosexual behaviour even when it is legalized because acceptance response rate is only 6% when homosexuality is decriminalized whereas when illegal the response rate was only 2% that is there is difference of only 4% for acceptance on legalization.

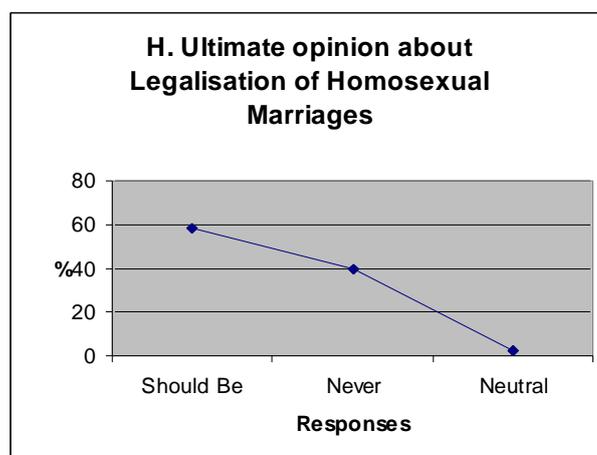
This shows that Homosexuality even if legalised will never become the normal fact of Society. It will be only those individuals who have inclination for homosexuality, that they will prefer going for such type of behaviour whether homosexuality is criminalized or decriminalized. Thus legalization of homosexuality will not be very attractive for heterosexuals because to them this behaviour will also appear as abnormal. But the benefit of legalisation will be that the homosexuals who are also normal people but with different sex orientation will not be criminalized on this count.

G. Accordance of Rights and Benefits to Homosexuals



As shown in fig. G above 51% respondents said yes and advocated that homosexuals should also be given rights and benefits equivalent to heterosexuals whereas 46% said no and 3 % were neutral.

H. Legalization of Homosexual marriages in the context of India in Future



As per fig. G 58% of the respondents gave strong recommendation for legalising homosexual marriage whereas 40% disapproved and 2% were neutral.

Now summing up all the findings together and taking their average we get the following results:

1. *Cumulation of Youth's attitude for homosexual marriages for others (i.e community members and Kins):*

$$\text{Favour} = 30 + 49 = 79$$

$$\text{Average} = 79/2 = 39.5$$

$$\text{Oppose} = 65 + 41 = 106$$

$$\text{Average} = 106/2 = 53$$

$$\text{Neutral} = 5 + 10 = 15$$

$$\text{Average} = 15/2 = 7.5$$

That is

$$\text{Favour} - 39.5\%$$

$$\text{Oppose} - 53\%$$

$$\text{Neutral} - 7.5\%$$

2. Cumulation of Youth's attitude for homosexual marriages for oneself when both illegal as well as legal

$$\text{Favour} = 2 + 6 = 8$$

$$\text{Average} = 8/2 = 4$$

$$\text{Oppose} = 98 + 94 = 192$$

$$\text{Average} = 192/2 = 96$$

That is

$$\text{Favour} - 4\%$$

$$\text{Oppose} - 96\%$$

3. Cumulation of Youth's attitude towards social as well as legal Recognition of Homosexual marriages in India

$$\text{Favour} = 65 + 58 + 58 = 181$$

$$\text{Average} = 181/3 = 60$$

$$\text{Oppose} = 33 + 40 + 40 = 113$$

$$\text{Average} = 113/3 = 38$$

$$\text{Neutral} = 2 + 2 + 2 = 6$$

$$\text{Average} = 6/3 = 2$$

That is

$$\text{Favour} - 60\%$$

$$\text{Oppose} - 38\%$$

$$\text{Neutral} - 2\%$$

Thus the youth's response for the homosexual marriages of others is that 39.5% favoured, 53% opposed and 7.5% were neutral. Although 60% of the respondents were of the opinion that homosexual marriages can be legalised in India whereas 38% opposed and 2% were neutral. Interesting finding is that only 4% of the respondents agreed for homosexual marriages for oneself whereas remaining 96% strongly rejected.

This shows that Indian youth, although aware of homosexuality still maintains the sanctity of the marriages, as sacred, heterosexual institution where homosexuality even if legalised will result only in 4-6% sexual minority. And majority of them are of the opinion that there is no problem in giving social and

legal recognition to homosexual marriages which further hints about the future prospects of this invisible conflict in the institution of Marriage, Family and Law in the context of India.

Homosexuality: The Arguments

This is true that the conflict between homosexuals and heterosexuals can be witnessed in the institution of marriage not only in India but across the world where sodomy law is applicable. This conflict is arising on account of the reason given in support as well as against the two different types of marriages which involves very delicate issues for social and legal recognition of sexual minority that is whether the social and legal recognition should be given or not and the same has been tabulated below:

| Homosexual Marriages Should Not Be Legalised | Homosexual Marriages Should Be Legalised |
|--------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. The institution of marriage is traditionally the union between man and women. | 1. There is no moral ground on which to support the tradition of marriage as a heterosexual institution. For e.g. slavery once existed but now abolished on humanitarian ground. |
| 2. Institution of marriage involves procreation and rearing of children. | 2. If it was so than there would have been attempt to prohibit unions between a sterile women and a fertile man or vice versa. Nor does legislation exist which requires a married couple to have children. It is true that homosexuals cannot procreate within their union but there are many options available which enable them to have children, including adoption and artificial insemination. |
| 3. The traditional nuclear family comprises of eight primary relations (Husband, wife, Father, Mother, Son, daughter, Brother, Son). | 3. The traditional view of family as consisting of a mother, father and children is no longer representative of today's society. |

| | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>4. The absence of sexual complementarity in these union creates obstacles in the normal development of children who are placed in the care of such parents.They would be deprived of the experience of either fatherhood or motherhood. Also this is gravely immoral and in open contradiction to the principle, recognised by the United Nation Convention on the rights of children, that the best interest of the children as the weaker and more vulnerable party are to be of paramount consideration in every case.</p> | <p>4. Scientific studies and psychologists are of the opinion that the love and commitment of the parents make difference not the gender. The children raised by homosexual partners are just as good as those of straight couples.</p> |
| <p>5. Marriage is a sacred institution. The homosexual inclination is however ‘objectively disordered ‘ and homosexual partners are ‘sins gravely contrary to chastity’.</p> | <p>5. Religion is not an obstacle. Many sects of Buddhism celebrate gay relationship freely. Instances of homosexuality are available in all major religious mythology.</p> |
| <p>6.Same sex marriages is an untried experiment.</p> | <p>6. Homosexual marriages is not an untried experiment. In Denmark since 1989 homosexuality is legally permitted. The result of the experiment suggests that homosexual marriages has actually been civilizing and strengthening, not just the institution of marriage but the society as a whole. So perhaps we should accept the fact that some one else has already done the experiment and accept the result as positive.</p> |
| <p>7. Same sex marriages would start us down a slippery slope towards legalised incest, bestial marriages, polygamy and all kinds of other horrible consequences.</p> | <p>7. If the argument were true than it would have already happened in countries where legalised gay marriages already exists.</p> |
| <p>8. Gay marriages would mean forcing businesses to provide benefits to homosexual on the same basis as Heterosexual sex couples.</p> | <p>8. There is no contradiction to the agrument as all are equal and have equal fundamental rights.</p> |
| <p>9. Homosexual marriages are unnatural. Hence Sodomy law needs to be more strict.</p> | <p>9. Homosexuality is natural. There is substantial agreement amongst researchers that sexual orientation is due to genetic factor and is determined by age five or six.</p> |
| <p>10.Homosexual marriages are the outcome of today complex individualised post modern industrial utilitarian society.</p> | <p>10. Instances of homosexuality can be seen even in ancient , medieval and modern India. Its not the development of post modern society.</p> |
| <p>11. No rights exists that can compel a state to recognise any relationship contrary to the definition of traditional marriages.</p> | <p>11. Denial of legal recognition infringes the rights of citizens.</p> |

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>12. Decriminalised homosexual marriages will lead to an increase in homosexuality and this in turn will undermine the whole institution of marriage and family.</p> | <p>12. Sexual orientation is due to genetic factor and it is unlikely that an increase in the incidence of homosexuality will occur as a consequence of decriminalisation.</p> |
| <p>13. Societal attitude is that people oppose it, hate it, even fear it. That is people are not comfortable with the idea of homosexual marriages.</p> | <p>13. Homosexual marriages have the potential to reject hierarchical concept of gender. They challenge patriarchy and the male supremacy derived from it and are consequently punished for not participating fully in daily maintenance of women oppression.</p> |
| <p>14. Heterosexuality has the advantage of slowing the speed of sexually transmitted disease.</p> | <p>14. Laws regulating and/or penalising homosexual activity impede public health programs as it drive underground many people at risk.</p> |
| <p>15. The human species will be in danger of dying out if homosexuality is legalised due to lack of reproductive power in homosexuals.</p> | <p>15. In fact gays are giving big favour by not bringing more hungry mouth into this excessive overpopulated world. At the same time the continuity of species can never be in danger due to sexual minority which represent not even 10% of the total world population.</p> |
| <p>16. The principle of respect, non discrimination and the people autonomy to support legal recognition of homosexual unions of the individual is not reasonable to invoke. It is something quite different to hold that activities which do not represent a significant or positive contribution to the development of the human in society can receive specific and categorical legal recognition by the State.</p> | <p>16. Section 377 of IPC violates the right to life and personal liberty, the right to equality and the right to freedom guaranteed to all citizens as Fundamental Rights under Chapter III of Indian Constitution</p> |
| <p>17. Sodomy was illegal and was until very recently.</p> | <p>17. In countries where homosexuality is legalised sodomy law is repealed and has been considered obsolete taking into account the social dynamics.</p> |
| <p>18. Homosexuality is a disease. The Indian Psychiatric Society also acknowledges that homosexuality is a kind of mental illness.</p> | <p>18. The American Psychiatric Association has removed homosexuality from its list of mental illnesses in 1973 and the World Health Organization did the same in 1981.</p> |
| <p>19. Decriminalization may be a step towards removing some of the stigma associated with homosexuality and may have positive repercussions on relationship between homosexual and their families.</p> | <p>19. Criminalisation reinforces negative societal attitude regarding homosexuality which in turn results in greater discrimination and thus impact adversely on the self esteem of many homosexuals which often leads to deception and friction within families.</p> |

Conclusion

All the above arguments in favour and in against homosexuality suggest that Indians are not ignorant about homosexual events around the world and its legalisation but still they have some reservation about homosexual relations. Indian society, by and large, disapproves homosexuality and justifies it as a criminal offence even when adults indulge in private.

The Empirical findings amongst middle class youths although favours legalisation of homosexual marriages but they in themselves are not much attracted for such type of marriages (with an exception of 4-6% respondents who said they may/will prefer to go for homosexual marriages). This shows that Indian youth still maintains the sanctity of the marriages, as scared, heterosexual institution where homosexuality even if legalised may result only in 4-6% homosexual minority.

Although as per statistics the demand for giving social and legal recognition to homosexual marriage is limited to only 10% of the Indian Population (that is by homosexuals themselves or NGO's Supporting them). This small representation is also one of the factors responsible for exploitation of sexual minority. Even today majority of Indians are not comfortable with homosexual marriages for oneself. But at the same time the demand for legalizing homosexual marriages is grave and intense but some how not getting approval of society and is under cover. It seems as if still it is long way to go for social acceptance of the homosexual marriages in India. As the legal recognition of homosexual unions would mean not only approval of homosexual behaviour with the consequence of making it a model in present day society but may also obscure the basic values (of family, marriage, procreation and continuity of Species) which belong to common inheritance of humanity. But at the same time Indians should realize that sex orientation is biological and is a natural process it's not a disease. It's true that the acceptance of the demand for social and legal recognition of homosexuality has not been approved today but in any case homosexual community should not be exploited and mistreated.

Hence taking into consideration the present Indian societal matrix and the emerging conflict in the institution of marriage – the demand for legalizing homosexual marriage is somehow overlooked and ignored. But in near future the stereotype attitude of society for marriage as heterosexual institution associated with procreation and rearing of children may also include homosexual marriages where love between the partners will be given importance rather than the gender. Then the failure to acknowledge the changing nature of society and the family will result in more harm than good. Although it is long to go for

this to happen. But in any case the demand for legalising homosexual marriages is giving birth to a new conflict in the institution of marriage, family and Law which cannot be denied. But at the same time giving social and legal recognition is not that easy in this traditional society as it has been in the western societies but in any case to ignore this emerging conflict in the institution of family and marriage will be short sighted and can have fatal results if not handled sensitively.

So, it is high time for the Legislature, Executive, Judiciary and Society at large that they cannot demean the existence of people with same sex desires. They also need to acknowledge that by legalising homosexual relations they will not permit a mere sexual activity but will also decriminalize the lives of citizens who are connected to such sexual act.

Finally it can be said that if laws are supposed to represent socially acceptable dos and don'ts, then a new mindset is the need of the hour. Otherwise, normal human beings will continue to suffer inhuman exploitation just because nature has nourished them with the need to be different.

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