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TITLE: TOOTHLESS LEGALITY OF HOMOSEXUALITY IN INDIA

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ABSTRACT

The biggest news of the year 2018 was the striking down of a discriminatory colonial-era law which criminalised same-sex sexual relations. The main objective of this paper is to see whether the society has become more open and accepating of the LGBT community after the judiciary made the landmark decision of legalising gay sex, or whether this community is still looked down upon and treated differently. After a brief introduction, the paper first tries to make the concepts of sexuality and sexual orientation clear. Thereafter, the different types of sexual orientations are enlisted. Next, the paper will shed light on the historical evolution of the concept of homosexuality and the rights available to homosexuals. For the purpose of this research paper, a questionaire was circulated which included questions regarding people's views on sexuality. The answers of the questionnaire were recorded and analysed. Upon analysis, it was observed that the young generation of India (16-35) is more open and accepting of the LGBT community as compared to those above the age of 35 years.It was also observed that majority of the respondants were in favour of the legalisation of sexual attraction between persons of the same gender and supported the legalisation of gay marriage too. Possible amendments are also proposed in this research paper which will make the legal system more inclusive with regard to the homosexual population. Lastly, a conclusion was drawn based on all the data that even though the legal system is in favour of same-sex relationships, there is still a long way to go before the society accepts these people as who they are without subjecting them to hatred or indifference.

INTRODUCTION

"Homosexuality" refers to the sexual or romantic preference of a person for another of the same gender. It can be understood as a desire, identity or behaviour. Same-sex romantic contact has been seen across various cultures and eras. This is the reason why it becomes difficult to give one

general definition to the term "homosexuality" as it may vary from society to society, culture to clture and time to time. The meaning and implication of the term "homosexuality" has undergone drastic transformation within the past few centuries. Currently, the discussion regarding homosexuality focuses primarily on the experiences of women and men who identify themselves as "homosexuals", or more distinctively as "gay", "lesbian" or "queer".[1] In India, homosexuality has been a subject of debate since ancient times.The Rigveda (which is considered to be one of the sacred texts in Hinduism), reads at one point, "Vikriti Evam Prakriti" which, when translated literally, means "what seems unnatural is also natural". These words of the Rigveda have been construed by some scholars to mean the recognition of homosexuality as a dimension of human life, similar to various other diversities in the universe.[2] Historical evidence clearly demonstrates that homosexuality was prevalent in India throughout history. It also indicates that the homosexual population of India was not considered inferior or looked down upon until the 18th century during British Raj.[3] The government of India, in one of its reports submitted to the Supreme Court of India in 2012, stated that there were nearly 2.5 million homosexual people in India at that time. Not to mention, these numbers only included those people who explicitly declared themselves as homosexual to the Ministry of Health. In reality, there are still millions of others who feel the need to hide their identity because of the stigma attached to homosexuality in India.[4] Homophobia (dislike or prejudice against homosexuals) is prevalent in India to a great extent. Even discussing about homosexuality makes people uncomfortable. However, a slight shift in trends can be observed in modern times with respect to the opinions of the youth of the country regarding homosexuality. The reason behind it could be that nowadays, there are more discussions related to homosexuality in the media[5] and its depiction in movies or TV shows.[6] Even before the colonial-era law criminalizing same - sex relationships was struck down in India, various organizations and support groups expressed their support for decriminalizing it and raised their voices for a greater tolerance, acceptance and equal treatment of the LGBT community. Although India has adopted and accepted the social element of a third gender legally, however, the LGBT community still

[1]Cohler, Hammack, *Encyclopedia of Applied Psychology*, 2004.
[2]Stephen Hunt; Andrew K. T. Yip, *The Ashgate Research Companion to Contemporary Religion and Sexuality*, Ashgate Publishing, Ltd. p. 368.
[3] Ruth Vanita; SaleemKidwai, *Indian Traditions of Love*, Tehelka.
[4] India has 2.5m gays, *Government tells Supreme Court*, BBC News.
[5] *Fear and loathing in gay India*, BBC News
[6]Gopinath, Gayatri, *Queering Bollywood: Alternative sexualities in popular Indian cinema*, Journal of Homosexuality, p. 39 (3 - 4).

faces emotional, physical, mental and economic violence on an everyday basis. The reason behind these crimes not being reported is the lack of support from family, police or society as a whole. [7]

OBJECTIVES

The main objectives of this paper are:

1. To understand the concept of sexuality, sexual orientation and various types of sexual orientations;
2. To study the evolution of homosexuality and the rights available to homosexuals;
3. To discuss the legal aspect of homosexuality;
4. To analyze the society`s perception and understanding of homosexuality; and lastly
5. To propose amendments in the laws relating to homosexuality.

METHODOLOGY

In order to satisfy the objectives of this paper, a quantitative research was undertaken. Quantitative research offers a complete description and analysis of a research subject, without limiting the scope of the research and the nature of participants` responses. Primary data such as questionnaires and original articles of various authors were referred to. Apart from that, data provided on authentic news websites were taken into account. After collecting the data, content analysis was conducted by discussing in depth the implications of the data so collected and thereafter a conclusion was drawn. Therefore, the best way to conduct research in this topic was by collecting quantitative data instead of qualitative data.

SEXUAL ORIENTATION: MEANING AND TYPES

Sexual orientation is defined to include heterosexuality, homosexuality, bisexuality and asexuality.[8] Sexuality refers to the way in which one identifies oneself, how he/she/they experience(s) romantic and sexual attraction, and their preferences regarding romantic relationships.[9] Sexuality is different from sexual orientation in the sense that sexual orientation is

[7]Priya M Menon, *Lacking support, male rape victims stay silent*, The Times of India.

[8]Marshall Cavendish, *Sex and Society*, Marshall Cavendish Corporation, ed. (2009), Pg. 82-82

[9]www.healthline.com Last accessed – 18th September, 2020.

more about one`s relationships with other persons, whereas, sexuality is a concept of self-identification. Majority of the definitions of sexual orientation include a psychological or mental aspect, like one`s erotic desires, or behavioral aspect, that has to do with the gender of one`s sexual partner.[10]

HETEROSEXUALITY

It refers to the romantic or sexual attraction, or the sexual behaviour between persons of opposite gender. It is an on-going pattern of romantic, emotional and sexual attraction to someone who is of the opposite gender. Heterosexuality may also mean how one identifies oneself based on these attractions and related behaviours. A person who is attracted to someone of the opposite gender is commonly referred to as "straight".

HOMOSEXUALITY

Homosexuality is a kind of sexual orientation in which a person is romantically and/or physically attracted to another person who is of the same gender.[11] Commonly, the term used for homosexual females is "lesbian" and that for homosexual males is "gay", however, the term "gay" is also used to refer to both male and females homosexuals.[12]

BISEXUALITY

The term "bisexuality" is commonly used to refer to human attraction towards both men and women, to denote romantic feelings. It does not necessarily refer to the equal romantic attraction to both genders. Normally, people having distinct, yet not exclusive sexual preference for one gender over the other are also termed as "bisexuals".[13]

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[10] www.apa.org Last accessed – 18th September, 2020.
[11] www.kidshealth.org Last accessed – 18th September, 2020.
[12] LeVay, Simon, *Queer Science: The Use and Abuse of Research into Homosexuality*, Cambridge: The MIT Press.
[13] Rosario, Schrim Shaw, *Sexual Identity development among lesbian, gay and bisexual youths: Consistency and Change over time*,, Journal of Sex Research, p. 46-58.

ASEXUALITY

Asexuality refers to the lack of sexual attraction towards others or little to no desire of sexual activity. In other words, it is a kind of sexual orientation wherein an individual has very low or no romantic desire, sexual behaviors, or a combination of the two. [14]

HISTORICAL BACKGROUND

For many people the concept of sexuality begins and ends with heterosexuality. The very commonly used term used for heterosexuals is "straight". The choice of the word "straight", shows how being heterosexual is considered a state of normalcy among the society.

Karoly Maria Benkert coined the term "homosexuality" in the late 19th century. Although this term is relatively new, homosexuality as a concept existed during times as ancient as 5th century B.C.[15]

The pre-industrial societies saw the acceptance of homosexuality by the lower classes, while it was considered to be unethical. However, due to urbanization, the tolerance for homosexuality became a lot lesser and it turned out to be forbidden in certain cases. Several love poetries and paintings in the pre-modern era depicted relationships between people of the same gender. Thus, we see that homosexuality is not a recent phenomenon. Even the Hindu Mythology includes several instances of homosexuality. It is imminent from Hindu, Muslim and Buddhist literature along with modern fiction that there were same-sex relationships even in pre - historic times.Homosexuality was also referred to in various ancient texts like the Manu Smriti, Arthashastra, Kamasutra, Upnishads and Puranas.[16]

In the year 1968, homosexuality was listed under the category of mental disorders in the Second Edition of the American Classification of Mental Disorders (DSM-II).[17]

[14]Prause, Graham, *Sexuality: Classification and Characterization*, Archives of Sexual Behavior (2007), p. 341-356.
[15]Plato.stanford.edu, Last accessed on 18th September, 2020.
[16]www.delhihighcourt.nic Last accessed – 18th September, 2020.
[17]www.psychologytoday.com Last accessed – 18th September, 2020.

The gay liberation movement arose in the post-Stonewall era, wherein lesbian and gay points of view were being brought up in the open as a part of politics, philosophy and literary theory. In India, the movement for the protection of gay rights began in the year 1991 by AIDS Bhedbhav Virodhi Andolan. The legal fight to repeal Section 377, IPC was then led by the Naz Foundation (India) Trust. This activist group filed a Public Interest Litigation in the High Court of Delhi in the year 2001 with the motive of legalizing homosexual intercourse between consenting adults.[18] Ultimately, gay rights were upheld and Section 377 of the Code was repealed on 6th of September, 2018.

LEGAL TREND IN INDIA

Section 377, in India, was carved out of the Buggery Act of 1533. It was drafted by Thomas Macaulay in 1838 and was brought into effect in 1860. Today, Section 377 of the Penal Code deals with "unnatural offences" and reads "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".[19]

In the year 2001, Delhi High Court was approached by the Naz Foundation, todecriminalized sexual intercourse between consenting adults of the same sex. After dismissing the plea, on appeal the Supreme Court instructedDelhi High Court to reconsider its decision. Later, in the year 2009, the Delhi High Court gave a landmark judgment[20] decriminalizing homosexuality between consenting adults with the view that s. 377 violates Article 14, 15 and 21 of the Indian Constitution.[21] But this decision of Delhi High court was overruled as "legally unsustainable".[22]

In the year 2016, five well-known LGBTQ activists moved to the Supreme Court challenging the constitutionality of s. 377 I.P.C. and argued that their right to sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity, equality and other fundamental rights are violated by s. 377 I.P.C. The Supreme Court decriminalized homosexuality and held that on the basis of Section

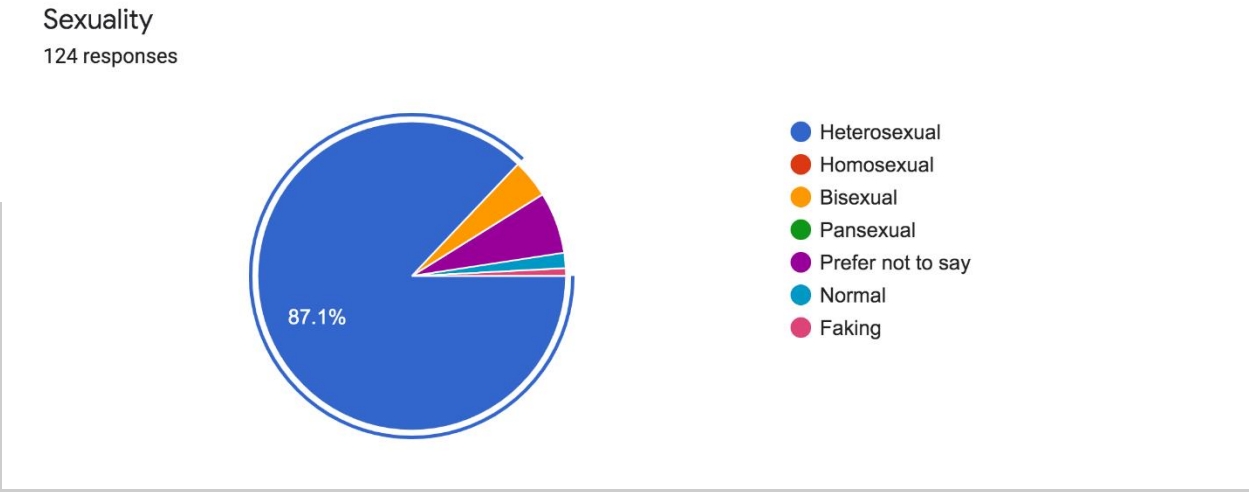
[18] *Chronology: 8-year-long legal battle for gay rights*, CNN-IBN.
[19] Section 377 of Indian Penal Code, 1860.
[20] Naz Foundation v. Government of N.C.T. Delhi, W.P.(C) No. 7455/2001.
[21] www.escr-net.org Last accessed – 18th September, 2020.
[22] Suresh Kumar Koushal & Anr v. Naz Foundation & Ors, Civil Appeal no. 10972 of 2013.

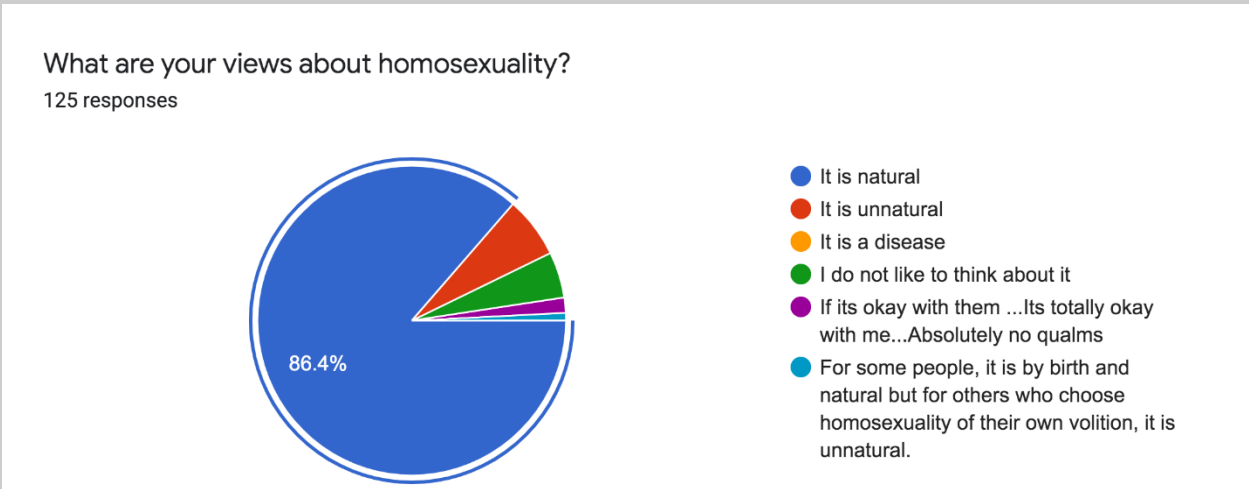
377 of the Code people are discriminated on grounds of their sexual orientation or gender identity which violates their fundamental Right to Equality,[23] Right to life, dignity and autonomy of personal choice,[24]and Right to freedom of expression.[25]

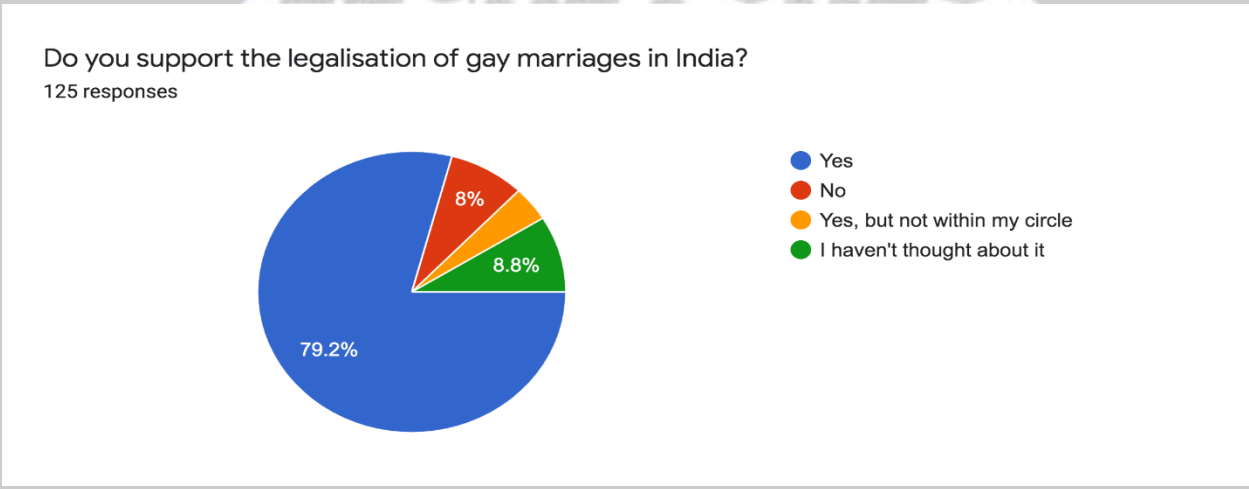
STATISTICS

A total of 125 people filled the questionnaire. Out of which 72 (57.6%) were females, 52 (41.6%) were males and 1 (0.8%) preferred not to say. 115 (92%) were between the age of 16-35 and 10 (8%) were above 35. 108 (87.1%) are heterosexual, 5 (4%) and 8 (6.5%) referred not to say. Then regarding views on homosexuality, 108 (86.4%) said its natural, 8 (6.4%) said it's unnatural and 6 (4.8%) did not like to think about it. Regarding the legalisation of gay marriage, 99 (79.2%) were in support, 10 (8%) were not in support, 5 (4%) supported but not within their circle, 11 (8.8%) did not like to think about it. Regarding comfort in watching heterosexual intimate scenes, 68 (54.4%) were comfortable, 13 (10.4%) were not comfortable and 44 (35.2%) were comfortable but not in the presence of their parents/children. Regarding comfort in watching homosexual intimate scenes, 54 (43.5%) were comfortable, 43 (34.7%) were not comfortable and 27 (21.8%) were comfortable but not in the presence of their parents/children. Regarding comfort in working with homosexuals, 101 (80.8%) were comfortable, 6 (4.8%) were not comfortable, 14 (11.2%) did not think about it and 4 (3.2%) said maybe. Regarding acceptance for their child/future child coming out as homosexual/bisexual, 76 (60.8%) said yes, 6 (4.8%) said yes but they would not disclose it in their society, 14 (11.2%) said yes but they will make him/her move to another country, 12 (9.6%) said no and 17 (13.6%) said maybe. Regarding living in a house neighbouring a homosexual couple`s house, 94 (75.8%) said yes, 4 (3.2) said yes but they would not socialize with them, 2 (1.6%) said absolutely not and 24 (19.4%) said they would take it if the house deal is good. Regarding the inclusion of the word 'sexuality' in Article 15 of the Constitution, 97 (77.6%) said yes, 10 (8%) said no, 18 (14.4%) said maybe. The last question was an open ended question asking for people's personal views regarding the topic.

[23] Article 14 and Article 15 of the Constitution of India.
[24] Article 21 of the Constitution of India.
[25] Article 19(1) (a) of the Constitution of India.







DATA ANALYSIS

The questionnaire was filled by people of different cultures, religions and regions of India.That is

the reason why the research paper consists of opinions of a diverse demography.The focus group of this research is the youth of the country. An attempt has been made to understand the public perception about homosexuality by both heterosexuals and bisexuals. When questioned about their sexuality, two respondents wrote they were "normal", even though the option of "heterosexuality" was already given. This implies the lack of awareness about the concept of sexuality, so much so that people are unaware of the term heterosexuality itself. This also implies that majority of the people in our society understand sexuality to mean the romantic attraction only between a man and a woman. This becomes evident from the fact that the commonly used term for heterosexuals is "straight" or "normal". It leads to a general perception that heterosexuality is the only acceptable kind of sexual orientation and anything that deviates from it is abnormal or unnatural, which was even believed by a bisexual himself. Even though 86.4% people believed homosexuality to be a completely natural phenomenon, only 79.2% people supported the legalisation of gay marriages in India. Others did not support it, or even if they did, they did not want someone they know to be married to a person of the same-gender. This shows that even running in the same circle as homosexuals/bisexuals causes extreme discomfort to some people. Majority of the people have no discomfort while witnessing intimate scenes between heterosexuals on screen but the problem arises when intimate scenes between homosexuals come up on screen. People are coming forward to support and accept homosexual relationships but when it comes to their own children/future children, a sense of reluctance arises. Even though, some people happily wish to accept them, some are still sceptical of the society's reaction to it. So the next cliché step is to send off your child to another country where gay marriage is legal and the society is more accepting. A very small number of respondents did not wish to even reside in a house neighbouring a homosexual couple's house or work in the same environment as them.Even if they did wish to reside neighbouring them they wish not to socialize with them but a majority would reside in that house if the house deal is good or even otherwise. The most important question was saved for the last which was, "Do you think Article 15 of the Constitution of India should be amended to read - Prohibition of discrimination on the grounds of religion, race, cast, sex, place of birth AND SEXUALITY?" and a remarkable response was recorded in its favour with only a small ratio against it. In many questions neutral options of "I don't like to think about it" and "maybe" were provided and many respondents chose to adhere to it. This shows how people don't bother to even think about such a pressing issue.

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PROPOSED AMENDMENMENTS IN THE LEGAL SYSTEM

In the year 2018, the Apex court of India repealed Section 377 of the Penal Code which was a discriminatory provision that prohibited same-sex relationships. This landmark judgment sparked high hopes among millions of homosexuals in the country. However, amidst all the cheer and celebration, even after two years since the passing of the judgment, the fact still remains that homosexuals cannot marry the person they love, serve in the Indian military force or adopt children. It makes us wonder whether homosexuality is actually legal. India is a country with approximately 2.5 million gay populations, and yet, there is open discrimination against them in the department of employment, healthcare, education and housing. [26]

The need of the hour is to make more gender-neutral laws so as to include men, transgender and intersex people under the purview of the already existing legislations. Some amendments that could be brought in in the legal system so as to make it more inclusive with regard to homosexuals are:

1. The Hindu Marriage Act, 1955 should be amended to include marriage and divorce between persons of the same sex must be fixed for the same.
2. The Hindu marriage Act, 1955, Sections 24 and 25 should be amended to incorporate maintenance and alimony cases with regard to same-sex couples, either married or living together.
3. The Special Marriage Act, 1954 should be made gender neutral to incorporate provisions for same-sex marriage and divorce laws in case of homosexual marriages and also, in cases where one spouse goes through a gender transition.
4. The Hindu Adoptions and Maintenance Act, 1956 should be amended to incorporate laws for adoption by homosexual couples.
5. The Domestic Violence Act, 2005 should be amended so as to include violence by one partner towards another in a same-sex relationship.
6. Indian Penal Code, 1860, Sections 375 to 376-D need to amended to include rape

[26] www.reuters.com Last accessed – 13th September, 2020.

committed by a person by having sexual intercourse with another of the same gender without the latter`s consent.

7. Amendment of Article 15 of the Constitution of India to read- "Prohibition of discrimination on grounds of religion, race, caste, sex, place of birth OR SEXUALITY".

What is essentially the goal of these amendments is that only one precedent set by the Supreme Court decriminalizing homosexual relationships in India is not enough. Laws need to be amended to recognise their relationship, live-in relationship, marriage, divorce, adoption, maintenance, alimony, domestic violence, dowry, and other social and marital issues faced by the heterosexual couples. These amendments will play a huge role in uplifting the social and legal status of the homosexual couples in India.

SUGGESTIONS AND CONCLUSION

LGBTQ movements all over the world have influenced the Indian LGBTQ community to a large extent. The first step for the Homosexuals/Bisexuals had to be to accept them. Without recognising one's own identity, one cannot fight for the rights of that identity. In earlier times Homosexuals were made to get treatment to "cure" it, as if it were a disease. Many psychiatric correctional centres were formed all around to world to "cure" this "mental illness" by giving shock therapy and other extreme forms of coercive methods for their aversion therapy. After homosexuality was finally taken off from the category of a mental illness, people still felt the need to hide their homosexuality thinking it is something unnatural. Then came the time when people started considering homosexuality as just a "phase", something people would 'experiment' before settling down in a heterosexual relationship. But today`s scenario is different. Today, homosexuals believe in themselves to be 'normal' and are not ashamed to admit to them about their sexuality. But despite this, there is reluctance among the Indian homosexuals to come out to the society as gay.

Over time people have become accustomed to seeing romantic movies of Romeo - Juliet, Heer - Ranjha, Sohni - Mahiwal, Ross-Rachel and Raj - Simran. For a significantly long time there were no romantic movies involving Romeo-Jacob, Heer-Radha, Sohni-Mahi, Ross-Richard and Raj-Sagar to portray love between couples of the same gender.

We live in a society that perceives any change in its norms to be "deviant". Living in such a society, what we fear the most is exclusion. This social exclusion is unbearable in the Indian culture

because everyone is in the habit of being overly involved in each other's lives. Fearing this social exclusion, even the parents of proudly gay children hide their child's sexuality. They prefer sending their children off to another country where gay marriage is legal and the society is more accepting. On being asked about their child's marriage plans (the most common question every Indian is fond of asking), they simply dodge the question by saying, "he/she is very busy with work" or "he already got married to a gora/gori (of the opposite gender)".

Sexuality is not restrictive in nature, it is fluid. People cannot be expected to conform to one type of sexuality in a restrictive manner. This belief has lead to a very recent discovery of Pansexuality. Pansexual are those people who do not feel attracted to a person on the basis of or because of someone`s gender but their personality and soul. Other types of sexualities are restricted to the physical/biological aspect of the other partner but the definition of this new term "Pansexual" is so pure in nature that it overlooks gender of any person to even be a consideration while choosing a partner. If everyone chose to conform to the idea of Pansexuality, it can not only make lives of the homosexuals and bisexuals easier but also help in reducing the problems that arise out of gender expectations. People will be seen and appreciated for their personality and soul, not their gender and how they conform to the societal stereotypical norms set with sexist expectations.

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