

# JOURNAL OF ISLAMIC LAW REVIEW

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## **SEXUAL MORALITY DEFACED AND DEFIED: SOCIO-LEGAL AND RELIGIOUS PERSPECTIVES**

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*It is not correct to say that traditionalists, who are spiritual and love to practice social traditions based on their religions, are opposing homosexuality (gay-sex) and wish to retain it as an offence. They simply want to uphold religious norms vis-à-vis social norms. On the other hand, people with progressivism as well as modernism are pleading for demolishing the parting wall between heterosexuality and homosexuality by declaring gay-sex as morally as well as legally acceptable in the name of sexual equality and protection of rights of LGBT communities; and stressing for decriminalising homosexuality. In between the two, there exists a modest class, which wants to retain the criminal character of homosexuality but wish to enforce the law only in extreme cases, where there is a danger that social morality will erode because of homosexual behavior in particular cases. The Indian Supreme Court in its recent judgment declared section 377 of the Indian Penal Code to be violative to the equality clause and the clause guaranteeing dignity to citizens, thus, ultra vires to the Constitution. Some say it is a purely technical decision merely enforcing 'constitutional morality' without taking into consideration the 'social morality', which considers it as a despicable and socially deviant human behavior. It has actually defied and defaced the sexual morality of the Indian society. On the contrary, the Apex Court of Singapore enforced 'social morality' and ruled to retain section 377A of the Penal Code of Singapore. And the Policymakers of the country took mild stand on the enforcement of this criminal provision. The paper discusses the social and religious aspects, and the judicial solicitude on the matter of sexual*

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*morality and concludes that courts acting as the 'guardian of morality', should give due consideration to the religious, social and moral aspects of homosexuality in the society.*

## INTRODUCTION

A society's 'legal rights' and 'cultural and moral identity' are significant for its unity and camaraderie. Among the two, 'cultural and moral identity' is more important as it reflects the 'values of the society' and enshrines 'public interest'. Morals are just and good rules governing human relations and human behaviors, which develop in a very long time span. They develop with the gradual development of the society and become part of human interactions internally and with people outside the domain of the society. If the society has a belief and professes a religion reverberating with that, most of its moral rules are derived from the religion and long social practices. Even if there is more than one religion in practice there, a large number of moral rules remain common and are practiced with or without minor variations by the followers of each religion. For example, exploitation of the poor by the rich is not moral for all religions, but Islam on the top of that specifically prohibits usury (*sud*). Generally speaking, the concepts of *dharma* and *taqwa* have different sources but have many common rules. They are actually moral rules in a secular society, but the followers of them, as they are so much sacrosanct and internalised by the society that people cannot even think of derogation or dereliction from them. Most of them are practiced as rites appended to social functions. For example, most of the crimes are also, at the same time, immoral acts in most of the regions around the world.

In the inception, moral rules and legal rules were one and the same. The dichotomy among them came into being when some rules were enforced by enacting law, and some others were left with the society to be practiced or not to be practiced. But there has always been cogent relationship between moral rules and legal rules. There have always been instances where moral rules cannot be defied or defaced by law because they are so deep rooted and internalised by the society that doing that might result in social

outrage. For natural law thinkers, who believed in absolute sources of law, human reason or religion, maintained 'morality as the basis of law', 'morality as the test of law' and 'morality as the end of law'. They believed that natural laws are moral laws, as reasons or religions have always been just and good.

Even though the basic idea on natural law has been tarnished by the positivists, some basic rules have been pleaded to be retained as 'minimum content of natural law' of Hart, or as 'common good' of Finnis, or 'internal morality' of Fuller. These propositions may not be so clear, but it is clear that for maintaining the cultural identity or for that matter fostering consolidation of the society, the deep-rooted moral rules that have history of development with or without amalgamation of religious rules, have to be maintained by the three popular wings of the state, no matter the state is secular or theocratic. The modern sociological principle that law can be used as an instrument of social change cannot be used to tarnish the innate values of the society, which are actually for the good of the society. If certain social practices like *sati*, child labour, child marriage and dowry, which society wanted to practice but were not good for it, were abolished and because of that society flourished. On the contrary, perpetrating obscenity in the name of freedom of choice, or allowing pornography in the guise of freedom of information, or legalising homosexuality (hereinafter, it refers to gay-sex or same-sex marriage)<sup>1</sup> in the appellation of equality before the law and equal protection of the law, the equality clause of constitutions of some so-called civilised countries, are outrageous and incompatible with the popular religious values.

So far homosexuality is concerned, all religions are against it, and it has failed to gather support of majority of the people of the world, especially in developing countries in general and Muslim countries and countries in East and South-East Asia in specific, because it is unnatural, prohibited by religions and does not accomplish the purpose of making sex, i.e. fulfilling sexual desire and procuring children. The judicial decisions and statutory dictates around the world, including the recent decision of the Supreme Court of India, which has delineated homosexual behavior as legal

or have decriminalised it in the garb of granting opportunities of sex-making to homosexuals equal to heterosexuals. Homosexuality in commonwealth countries was first decriminalised on the basis of recommendations of the Wolfenden Report of 1957 on homosexuality and prostitution<sup>2</sup> strongly supported by Hart for it was simply a misdemeanor which might have some undesired results like blackmailing by one partner to another partner. This could happen there in spite of strong opposition feigned by Lord Devlin. This brashness although not in public interest got gradual support especially in the Western world. It was thought that because of value difference this disease would not spread in the Southern and Eastern part of the world. This idea became strong when the Supreme Court of India reversing the decision of the *Naz Foundation* case ruled that section 377 of the Indian Penal Code is *intra vires* to the Constitutions of India. And the Apex court of Singapore reiterated this view. But the recent decision of the Supreme Court of India has tarnished this perception. It has actually defied and defaced the social perception on heterosexuality and family values.

The purpose of writing this paper is to critically appraise the question of legalising homosexuality among consenting adults in private in the name of providing equal sex opportunity to the LGBT community and to offer certain practicable suggestions within the framework of public interest within the religious confines.

### WHY TO HAVE SEX?

Before we venture into the proposition of maintaining *status quo* or decriminalising homosexuality, it is necessary to know as to why and for what reasons, at all, sex is a part of human life. Demographers, sociologists and religious experts have ascertained a number of reasons for it. Some of them are briefly discussed below.

#### *Social Reasons*

In the nature, sexes are male or female with a very few exceptions of bisexuals (hermaphrodites) and transgender(s). In order to have continuity of the species, all reproduce, and reproduction is the union of male and female special cells known as eggs and sperms

in animals and pollens and female gametes in plants. Their union, which is known as fertilisation, is necessary for forming zygotes having full number of chromosomes, which further develop into the offspring. Thus, Bisexual and transgender are actually ghettoisation. In plants and in very few animals, bisexual species are there and they reproduce that way. The main reason of making sex is, therefore, meeting of male and female special cells to reproduce. Heterosexual relations thus has a reason, homosexuality has no justification for it, and thus stands to be an aberrant behavior. Homosexuality is thus a deviant behavior and cannot be justified even on the ground that it is practiced in some animals around the world.<sup>3</sup> The phenomena of mating among animals prove it. A large number of animals have mating time(s) or season, and large number of trees have flowering time(s). In fact, they teach us to be heterosexual; homosexuality is actually *piccatum contra naturam* (sin against nature). A large number of animal species, especially birds and four-legged animals unite, establish compatibility, copulate, and make a small place to lay eggs or deliver their babies. Perhaps man learnt from them to do the same. To live together and to have family are also teachings emanating from the nature. This is how man has become gregarious and lives in group and shares joys and owes among them. In a closely related society, this is strong; whereas, in a cosmopolitan society, this social bonding is fading. But the natural urge to have own family is present in all kinds of societies.

Families come into existence on the basis of marriage, i.e. union of two opposite sexes, and reproducing or adopting in case of infertility. In the whole process of this social institution, family identity is important for determining rights and duties of the members of the family. At many places, marriage is considered a sanctimonious and religious performance, based on certain religious and customary rites, e.g. in Hinduism, *sapt padi* (seven rounds of the holy fire) and *kanyadan* (gift of the daughter) are important rites for solemnisation of a marriage; in Islam, *ijab* (offer) *qubul* (acceptance) and *meher* (consideration) are necessary rites for solemnisation of the marriage contract. It is notable here that

in Islam, marriage is not simply a civil agreement. It is a religious performance, as it is ordained by Allah (s.w.t.) and practiced by the Prophet (s.a.w.). It gets strength from the fact that there are methods prescribed for repudiation of marriage, i.e. *ahsan*, *hassan* and *rajai*; *triple talaq* is *talaq-e-bidai* and *mughalleza*, thus does not have public interest (*maslahah mursalah*) in it. The concept of family and social structure around the world is founded on union of two opposite sexes. Families cannot be established on the basis of group marriage, *de facto* marriage or on the basis of live-in relationship prevalent in some parts of the world. However, in all these, rights and duties of male and female partners and rights of maintenance and inheritance of off springs may be granted on compassionate grounds. They do not have and cannot have in all times to come religious or social sanctions.

#### *Other Reasons*

There are some other reasons for having sex that have justly been established by anthropologists, sociologists and psychologists. They are briefly discussed as: It is showing love to one's partner; it is a matter of pleasure to both the partners; it alleviates their depression and enhances their moods; it fulfills the natural, physical and biological needs of the partners; it carries emotional benefits; it is a workable tool of stress management; it fosters intimacy beyond bedrooms; it promotes confidence among the partners; it provides a good aftermath sleep; it gives feeling of completeness; it provides a good physical exercise; and it makes relationship stronger.<sup>4</sup> All of them may not and cannot be true to anal-sex partners. On top of all, anus is to pass stool, it is a dirty part of the human body, and not meant for sexual intercourse. On the contrary, vagina is clean, secured and meant for making sex. People are arguing for same-sex marriage in the name of equality before the law and eradication of sex-discrimination, and many western countries have legalised it, in spite of the fact that marriage is union of two opposite sexes usually for making sex and generally for procuring children. All these cannot be achieved by same-sex marriage.

Thus, allowing same-sex marriage leading to homosexuality



*per se* is outrageous, corrupting the morality of the society and demeaning the religious delineations of human relations, thus, a despicable act. They may not be justified and legalised on the basis of the personal behavior known as *androphilia* or in the name of removing sex-discrimination. The classification as males, females and third genders are reasonable classifications, based on intelligible differentia in order to achieve the assigned objective. Their rights and duties according to their status may well be fixed and guaranteed. But allowing 'lesbian, bisexual, gay and transgender' (LGBT) to engage in homosexuality may not and cannot be an objective of this classification. It will be a grave violation of the very basic idea of sex making.

### RELIGIOUS INJUNCTIONS

Religiously speaking, most of the morals - just and good rules governing human relations and human behaviors for establishing a morally strong and religiously compatible society - to be practiced by human beings are derived from the Holy Books of the popular religions of the world and laws revealed by God to man through the nature. Some morals are developed on the basis the human reasons, but in order to be practiced popularly, they have to be in conformity with the religious injunctions. The religious solicitude on homosexual human behavior are very clear, at least in Christianity and Islam, and the religious views on it have been repeatedly stressed by religious clerics. They have expressed their views time and again on various occasions and have given their submissions to the courts deciding on the issue pertaining to homosexuality. One thing is common among all religions that man is by birth homophobic. In the Divine creations, homosexuality is considered as a sin of grave nature; and those who practice it, will end up to the hellfire. Islam and Christianity have specific mention about the destruction of the *Ummah* of Prophet Lut (*a.s.*) for practicing sodomy (Islam, Qur'an: 11:50-57; 23:53-54; 46:24-25; 69:6-7), and the story of Sodom (Jews and Christians, Ezek, 16:49-50; Gen, 19:8-9). For both the religions sodomy is an abominable and socially deviant human

behavior. In Islam, they are considered as transgressors. In Christianity, the argument that in the Old Testament drinking wine was prohibited and circumcising male child was necessary, but they were later abandoned, cannot justify homosexuality as it has been classified as a big sin. With this background, we would first discuss about the Christian viewpoint on homosexuality and same-sex marriage. The Islamic and perspective of some other religions' perspectives will follow it.

### *Christianity*

Christianity derives its sexual morality from its religious books and their interpretations given by Catholic clerics. The teaching pertaining to homosexuality can be outlined as:

- (a) In Catholicism, there is a clear message that in the eyes of God all are equal and He loves them all equally and showers mercy on to them, as they are loving children of God. The LGBT people, who consider themselves indigent marginalised, God loves them more.
- (b) To be a transgender is not a sin, as in it there is no fault on their part. But to practice homosexuality is a sin for sure.
- (c) Homosexual acts are 'intrinsically and objectively disordered' and 'contrary to natural law'. (Gn 19:1-29; Rom 1: 24-27; Cor 6:10; Tm 1:10).
- (d) In the words of Saint Aquinas, a seed is ordered to become a tree. Likewise, a child is ordered to become an adult. In the same plane, all sex is ordered to meet with opposite sex for affective and generative purposes. Thus, homosexuality is a 'disordered' act.
- (e) Gay people should also work to attain 'Christian perfection' through chastity, a holy life.
- (f) All kinds of unjust discrimination against gays must be avoided. They should be treated on the basis of 'respect, mercy, and compassion'.

- (g) Pope Francis made three valuable points: (i) same-sex marriage is prohibited; (ii) there should be no discrimination against them; and (iii) We should adopt oral guidance ordained by God.<sup>5</sup>

Based on the above points, we can conclude that Christianity prohibits homosexuality and same-sex marriage. It at the same time prohibits all kinds of discrimination practiced against them. The authors are of the opinion that LGBT people are like us. They have some deficiency in them, physical or psychological. They need our sympathy rather hatred. Social hatred multiplies their mental agony. For handicap people there are lots of supportive incentive-based measures to ameliorate their conditions in the society. LGBT people deserve even more such compassionate assistance.

### *Islam*

Islam is strappingly opposed to lewdness and homosexuality. They are considered as transgression beyond bounds. It rather prescribes stringent penalty as a strong deterrence for sodomy. There are a number of Qur'anic *ayaat* [verses; singular of *ayaat* (verses) is *ayat* (verse)] and *ahadith* (Prophetic traditions; singular of *ahadith* is *hadith*) to this effect. They can be eloquently presented as follows:

- (a) If two men are guilty of lewdness, punish them both. (Qur'an: 4:16).
- (b) People of Lut (*a.s.*) were engaged in buggery. It was an act of blatant and serious transgression (a crime). So, Allah destroyed them by showering brimstone on them. (Qur'an: 26:165; 27:54; 29:28).
- (c) The Prophet (*s.a.w.*) condemned and cursed effeminate men and asked for turning them out of the house. (*Bukhari*: 8:82:820; *Bukhari*: 7:72:2774). So is the case if a woman dresses like a man. (*Abu Dawud*: 32:4087) (*Ibn Majah*: 3:9:1904).
- (d) There is death penalty by 'stoning to death' for homosexuals. (*Abu Dawud*: 38:4447- 4448). There is

another hadith, "...kill the doer and the receiver. (*Trimidhi*: 1:152) and (*Ibn Majah*: 3:20:2562).

- (e) A man should not lie with another man and a woman should not lie with another woman without covering their private parts. (*Abu Dawud*: 11:2169).

Based on the above Qur'anic *ayaat* and *ahadith*, Ibn Kathir writes that the Messenger of Allah (*s.w.t.*) said, 'whoever you catch committing the act of Lut, kill both parties to the act'. It would be killing by stoning. Ibn Qayyam supports this and states that homosexuality and fornication are immoral and sinful acts that go against the commands of Allah (*s.w.t.*) because they (both the partners) become incorrigible and shameless. It may be noted here that there looms controversy about the punishment to which it is done, the recessive partner.

It is beyond doubt that Islam considered homosexuality as one of the worst sins and subjected to death penalty. There has been a controversy among *sahaba* (Companions of the Prophet) on the mode of killing, killing by stoning or killing by throwing into a cliff or by throwing a wall on them. In authors' humble opinion, the idea is to kill, but how may the matter to be decided by the policymakers of a State. The Islamic injunctions and penalty against homosexuality are so severe because it is a source or greater evil and harm to the society in the form of HIV/AIDS. The writing of Ibn Qayyim - 'the semen of the one who did that to him will act as a poison on his body and soul'<sup>6</sup> - can appropriately be quoted in this context. It may also be noted here that the Islamic view on the lesbianism will also be the same like homosexuality.<sup>7</sup>

### ***Hinduism***

In *Sanatan Dharm* (Hinduism), since religious scriptures are not explicit about the legal position of homosexuality (*maithuam pumsi*), the picture about its permissibility or prohibition, including its criminalisation, is not clear. Hindus around the world now are under the 'horns of dilemma', especially in those countries where sexuality is not a taboo or has recently been decriminalised. According to a group of people (castes), *Kama Sutra* is said to

allow it for the sake of enjoyment; whereas *Manusmriti* (11:174) prohibits it. It means acceptability or reception of sexuality in Hinduism depends on the context. It is also notable here that in India it was a criminal act in the Indian Penal Code for such a long time and none of the religious priests raised voice against it. The Hindu point of view on sexuality can be put under the following points:

- (a) Sex is a symbol of love, relationship and *moksha* (salvation).
- (b) *Kama* (sex desire) is a means of pleasure and devotion.
- (c) Lascivious behaviors are prohibited.
- (d) It strongly supports heterosexuality.
- (e) Sex is approved with marriage. Marriage is *Sansakara* (Sacrament), and it is solemnised for *prajaa* (progeny), *dharm*a (good deed), and *rati* (companionship).
- (f) *Srimad Bhagvatam* (Canto 3, Ch. 20, Text 23-26) states that Brahma created a group of demons. They became homosexual and demanded sex from him. He then ran away from them. It means, he considered it as unapproved act.<sup>8</sup>

Based on the above, we can conclude that according to the Hindu mythology, heterosexuality is the appropriate way of making sex, as the sex is for pleasure and procreation of children. Religious scriptures do not expressly support homosexuality. Rather, it is considered as a deviant behavior, which does not serve the purpose of making sex. Male God's female *avtars* may not justify homosexuality. *Hijras* (transgender) are not to be undermined and demeaned. They must command all rights available to a normal citizen. In *Mahabharata* (5.191-5), a transgender character by the name *Sikhnadi* played an important role, which is admired like anything.

### ***Buddhism***

There are 3 schools of thought of Buddhism: Theravada Buddhism; Mahayana Buddhism; and Vijrayana Buddhism. They are practiced in different parts of the world. But none of them has

clearly expressed views on homosexuality. Among the five Basic precepts of the religion, there is prohibition of sexual misconduct. In specific, 'I undertake the training to refrain from using sexual behavior in ways that are harmful to myself and to others. I will attempt to express my sexuality in ways that are beneficial and bring joy'. Here 'joy' refers to personal pleasure, and 'benefit' refers to procreation. It can be said that both the words should be taken conjunctively. Meaning, in short, sex is for both amusement and procreation. Segregating them may be the task of God, but not of human beings. Separating them by way of family planning will not justify homosexuality; it is still between the two opposite sexes. It may further be noted here that the word 'beneficial' has been used before the word 'joy'. It means the primary reason of sex is to procreate. It is in line with the Qur'anic injunction that: "...Who created you from a soul ... and then from that created your wife ... and from them lots of males and females..." (Qur'an, 4:1).

Dalai Lama, a Tibetan Buddhist Monk and spiritual leader, in 1997, in a press conference, he said, "...from the Buddhist point of view lesbian and gay sex are generally considered sexual misconduct".<sup>9</sup> It is clear from the above that in all the four big religions in the world, homosexuality is a religiously prohibited and socially deviant act. However, all religions strive hard to protect the LGBT from the social rigors and they should have human rights, rather more favorable than that of common men and women, as a class of people.

## **PUBLIC OPINION**

Although societal acceptance is necessary for a practice to remain in the offing, law plays a role in social change if that social practice is not in the interest of general public. In certain parts of the world, especially South and South-East Asia, in enacting such laws, religious injunctions cannot be ignored. So, there has to be a meaningful balance between social practice, public interest, and public opinion in one hand and religious injunctions in the other hand. We cannot choose one ignoring the other.

We have noted above that the popular religions are against homosexuality, and they find it not in the public interest. It has also been reflected by several researchers and surveys that a vast majority of the people around the world generally oppose same-sex relationship. In many countries, peoples' views are not so rigid, yet the vast majority considers it a socially deviant behavior. The significant among them is the 'World Values Survey', which is conducted every year worldwide in over 100 countries since 1980 reflecting peoples values and beliefs about it. In India, the position is unique. The support to homosexuality in the country fell from 89 percent in 1990 to 24 percent in 2014. One motivation factor that might have been for this decline is 2009 *Naze Foundation* case<sup>10</sup>, of the Delhi High Court, in which section 377 of the Indian Penal Code that penalised homosexuality was declared to be violation of the Article 14 of the Constitutions, thus, *ultra vires* to the Constitution. It may be noted that people in most developing countries, mainly South-East Asian countries, e.g. China, Singapore, South Korea, Malaysia and Indonesia, Middle-East countries e.g. all Muslim countries, and South Asian countries other than India, perhaps due to strong religious grip and pervading fact that most of the HIV patients are suffering from HIV, have conservative view on homosexuality. Even in India, vast majority hold the view that retaining the penal provision for homosexuality is justifiable. A survey, conducted in 2017-2018, reveals that majority in India are still against homosexuality. 28 percent agreed to it and 46 percent did not agree. Yet another survey, conducted in 2016, reveals that only 24 percent of youth approved it.<sup>11</sup> CSD-KAY Youth Survey 2016 found that: 61 percent considered it wrong; 14 percent found it to be right; 10 percent said it to be somewhat right; and 15 percent could not say anything.<sup>12</sup> In view of the May 24, 2017 High Court's verdict that barring same-sex couples from marrying violated the constitution and that the government had 2 years, by 2019, to pass a corresponding law to this effect, and a section of peoples' attitude in its favour and demand of supporters liberal to it as alleged there by, some authors had softened their attitudes.<sup>13</sup> But the position there could be

clear only when referendum, as demanded by the supporters was conducted.<sup>14</sup> However, on 17 May 2019, the Taiwanese legislature enacted a law allowing registration of same-sex marriages. Thus, the country became the first country in Asia to allow same-sex marriages to be recorded under 'marriage registration' as part of the 'exclusive permanent union'. Aspirants to have this law, celebrated it; whereas, a large section of the society took it as an unfortunate gesture of the government.<sup>15</sup>

Because of a vast majority of homophobic views of the people of Caribbean countries due to HIV link to homosexuality, it is said that the law criminalising it is going to be retained in times to come.<sup>16</sup> It may be noted here that according to the Center for Disease Control and Prevention (CDC) in the United States in 2015, 67 percent of those who were diagnosed HIV had been gay or bisexual. It further observed that in the same year, African Americans had it more than whites and Hispanic/Latino gay and bisexual men. It concludes: that anal sex is the riskiest type of sex for getting or spreading HIV; and that homophobia, the idea of stigma, and discrimination, which are negative attitudes towards homosexuals, may discourage them, and in turn, may protect them from this deadly disease.<sup>17</sup>

In Taiwan, on 24<sup>th</sup> November 2018, the referendum was conducted - on the basis of the judicial decision of the Constitutional Court of the country declaring same-sex marriage in May 2017 as unconstitutional - to take public opinion of the matter in order to overturn the court's decision. It is notable here that referendum in Taiwan is binding. The referendum questions were: Do you agree that Civil Code regulations should restrict marriage to being between a man and a woman? This question was answered with a resounding yes by a vast majority of 67 percent of the Taiwanese. However it was vowed by the Government that the rights of LGBT people would not be undermined on this basis and it would protect their other constitutional and legal rights as well. Ultimately, the government has legalised same-sex marriage even when the citizens are against it perhaps in view of the 2020 general elections or in the fallacy of gender equality, as



the Taiwan's President said: "We took a big step towards true equality..."

It is clear that people generally with vast majority do not like to practice and support gay sex. However, they are commonly concerned about discrimination practiced LGBT people undermining their constitutional rights. This attitude has gathered strength with rise of education around the world. Because of it, this outlook is more prominent in the developed world. Because of prohibition of homosexuality by popular religions, religious people do not at all support it and consider it as a sin, perhaps a grave sin. It is for this reason that, in the Muslim world, homophobia is much stronger and there is very small number of supporters. The best example is Pakistan, an Islamic Republic, and Bangladesh, a secular but predominantly Muslim country. In these countries the voice in favour of homosexuality is very insignificant.

#### **HOMOSEXUALITY AS ILLEGAL**

Gay sex is illegal in many parts of the world. According to the 2017 report of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 72 countries around the world still treat homosexuality as a felony offence dealt with severe punishments; 8 countries have death penalty. Most of these countries are in Africa, Middle East, South Asia and South East Asia. Of 72, 53 are commonwealth countries, and 37 of them have criminalised it. According to ILGA, lots of people were arrested and indicted in 15 Commonwealth countries. BBC reported that in 2017, in Nigeria alone 40 people were arrested. However, due to sympathy towards gay and lesbian people, in some countries, like Jamaica, in spite of pervasive homophobia, authorities do not actively like to prosecute LGBT people. It may be noted here that some countries have criminalised women-women sex also.<sup>18</sup>

Human rights activists around the world are agitating against the law that criminalises homosexuality on the ground that it perpetrates sex discrimination. For them, right to have sex includes homosexuality. Actually, it is not the case. LGBT people's rights have invariably been denied in manifest ways. They did not have

virtually an obvious legal personality, as the law in many countries recognised only two genders, only recently various courts around the world have evolved the concept of 'third gender' for a transgender. The idea of third gender has given lot of relief to the LGBT community. They can now take up any job, adopt children, and can do many other jobs, which could previously be done only males or females. How many of them really take up jobs and stay peacefully in their jobs? If social acceptance remains the same, the rigors will continue. It is, therefore necessary to work on changing the perception of the people so that they could be considered an integral part of the society. Then only they will be able to enjoy their rights guaranteed by law. Legalising homosexuality is trivial in comparison to this.

#### **JUDICIAL SOLICITUDE AND VIEWPOINTS OF POLICYMAKERS IN INDIA AND SINGAPORE**

We have noted above that the traditional Hindu practice in India was not clearly against gay sex, it was not considered downright as a socially deviant or violating the religious norms. There is no evidence also to support such human acts. During Mughal period also the position remained more or less the same. The changed occurred when the Mughal reign was under religious rulers. They enforced Islamic law and it was subjected it to *Hadd* punishment. The British rule also criminalised it and prescribed punishment under section 377 of the Indian Penal Code. The position was the same in other commonwealth courtiers. In the Islamic Republic of Pakistan, the Islamic penal law related to it was enforced again.

The Indian courts have also expressed their views and supported the law making homosexuality as a crime even though Britain had decriminalised homosexuality between consenting adults in private based on the Wolfenden Report of 1957 and changes in law were made in several European counties, South Africa and some states of the United States. Efforts had been made from time to time to request the court to decriminalise gay sex between consenting adults in private. The main bone of contention for this had been: that it is discriminatory; it provides opportunity

to demean and harass people having homosexual behavior as long it remains a criminal act; and it violates right to privacy of such sex partners. Nevertheless, courts perhaps considering its moral aspect, religious sentiments on it, and public opinion against it, maintained status quo. Similar position was there in rest of the third world countries with very few exceptions, e.g. South Africa, which remained under the British law influence for long. In fact, the courts in the Sothern and Eastern hemisphere of the world performed commendable act as '*custom morum*' (guardian of morality) as stated by Justice Mansfield in *R. v. Delval* (1763), which was approved and affirmed by Lord Reid in *Shaw v. D.P.P.* (1962) and stated: "The court of the Kings Bench was *custodies morum* of the people and has the superintendence over the offences *contra bonos mores* (against good behavior) and this the residual power of the court, where no stature has het intervened to supersede the common law, to superintendent those offences which were prejudicial to the public welfare". Authors believe that this role of courts has to be universal unless a law in specific made by the Parliament or any other body competent to make law declares certain act to be legal. However, there have been instances where acts were clearly efforts to corrupt the morality of the society, courts instead of exercising their this right and declare the act as illegal, gave judgments purely on legal and technical grounds. One such example in India is *S. Khushboo v. Kanniammal & Anr* (2010),<sup>19</sup> where a film actress gave an affirmative statement on 'pre-marital sex', which was considered to corrupt the morality of her vast fan followers. The 3 judges of the Supreme Court of India instead of acting as the guardian of protecting the morality of the country and affirming the action against her, freed her from the charges on the ground that she had right to peach and expression.

The same story was repeated when in 2009 in *Naz Foundation v. Government of NTC, Delhi*<sup>20</sup> to the surprise of the whole country and rest of the people of South Asia declared section 377 of the Indian Penal Code as *ultra vires* to the constitution as it violates Articles 14, 15, 19 and 21 of the Constitution of India. The court thus accepted the argument and after quoting judgments from

various countries, including the one of the European Courts of Human Rights and relying on some international legal frameworks notably 2008 Declaration of Principles of Equality produced by the equal rights trust ruled that sexuality between consenting adults in private should be decriminalised. It should be noted here that cases were quoted from UK, US and South Africa, which are culturally very different that the culture prevalent in our region. Moreover, the moral values in the Southern and Easter part of the world are greatly different and do not subscribe to the immoral act of homosexuality. Even if people of a country subscribe to the idea, it is the duty of the court as the guardian of morality to rule against such despicable socially deviant behaviours.

This decision was appealed to the Supreme Court in *Suresh Koushal and Another v. NAZ Foundation and Others* (2013).<sup>21</sup> It was argued by the appellants that section 377 of the Penal Code was gender neutral; no specific class was targeted, thus, there was no reason of violating Article 14 of the Constitution. The section also did not violate right to privacy guaranteed by the Constitution under Article 21, and right to privacy did not include right to commit carnal sex. If section 377 of the Penal Code was declared as *ultra vires* to the Constitution, institution of marriage would be detrimentally affected and immorality would pervade. Respondents replied by saying that the section was repugnant to equal sexual rights guaranteed under Article 21 of the Constitution, and it impaired the human dignity of homosexuals and made them criminals. Homosexuals were being deprived of sex. The Court should accept the changing values and should understand the flexibility in the constitutional norms. Retaining section 377 was to continue to provide police power to harass and abuse LGBT people; it at the same time put stigma on those people. The Bench of two judges of the Supreme Court allowed the appeal and overturned the decision of the Delhi High Court on 11 December 2014. It found that section 377 of the Penal Code not in any way violative to the Constitution. The Court maintained that: "Section 377 does not criminalise a particular people or identity or orientation. It merely identifies certain acts which if committed

would constitute an offence. Such a prohibition regulates sexual conduct regardless of gender identity and orientation”. It was accepted by the Court that LGBT people are not being discriminated or denied of their human rights. The Court noted that in 150 year long span of time fewer than 200 people had been prosecuted under section 377 of the Penal Code. Referring to *Special Courts Bill* case<sup>22</sup> the Court reiterated that: “...all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed”. The Court found that classification is not ‘arbitrary’. The finally ruled that “Those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of the nature constitute different classes and the people falling in the category cannot claim that section 377 suffers from the vice of arbitrariness and irrational classification”.

It may be noted here that the Supreme Court did not take up the moral issues perhaps - even though the Ministry of Home Affairs of the Federal Government of India had expressed during the proceedings that sexuality is considered as an immoral act in India – perhaps because the appellants did not raise it. On the issue of the violation of the dignity under Article 21 of LGBT people, the Court did not say much. These two aspects according to the authors are pertinent in pertaining to criminalising or decriminalising carnal sex activities. It was happy to note that the Supreme Court stayed on its stand as it dismissed on 28 January 2014 the review petition filed by the Central Governments reiterating that, “While reading down section 377, the High Court overlooked that a minuscule fraction of the country’s population constitutes LGBT people, and in more than 150 years past less than 200 have been prosecuted for committing offences under section 377, and this cannot be made a sound basis for deciding that section *ultra vires* to Articles 14, 15 and 21”.

In the authors’ opinion, the Court should have discussed the matter to some extent on these two aspects of homosexuality. In their opinion the act should categorically be considered as despicable and socially deviant and morally corrupt. If

homosexuality is decriminalised, it will certainly corrupt the morality of the society and will certainly leave adverse undesired impacts on the institution of marriage. Allowing homosexuality would have a coronary to allow same-sex marriage and allowing that means shattering the whole concept of marriage, which is union of two opposite sexes for certain ascribed purpose. The Supreme Court could do it as "*custos morum*" of the country. The authors felt happiness because the Court overturned the decision of the Delhi High Court. But the happiness of the Indian right minded and religious people including the authors did not stay long. In February 2016, the 3-Judge Bench of the Supreme Court said all the pleas for decriminalising homosexuality be reviewed by a 5-Judge Bench. Around same time, Lok Sabha voted against a private Bill for decriminalise carnal sex. In January 2018, a Supreme Court Bench headed by the then Chief Justice held that the 2013 ruling to be sent to a larger Bench. On 6 September 2018, in *Navtej Singh Johar & Ors. v. Union of India*,<sup>23</sup> a 5-Judge Bench of the Court took the about-turn and unanimously decided to decriminalise homosexuality by declaring section 377 of the Penal Code as *ultra virus* to the Constitution. CJI Dipak Mishra said, "Section 377 is irrational, arbitrary, and incomprehensible as it fetters right to equality for LGBT community... LGBT community possesses same equality as other citizens... Social morality cannot violate the rights of even one single individual". Justice Malhotra said, "Members of LGBT community and members of their families are owed an apology from society for being denied equal rights over the years." The judges reiterated that every individual had the fundamental right to privacy, which is a part of the right to life, and sex is private. According to CJI Mishra, "the right to privacy as part of right to life applies fully to the LGBT community". Adding to it, Justice Chandrachud said, "Punishments under section 377 made the LGBT a closeted community, destroyed the identity of members and reached their dignity, all part of right to life. The state has no business to get into controlling the private lives of LGBT community members...". Reasons adduced by the Supreme Court are:

1. “Constitutional Morality”: Sticking to the ‘constitutional morality’, the Supreme Court rejected the plea of ‘social morality’, which has long just social practice in conformity with religious values. The authors are of the opinion that upholding ‘constitutional morality’ against ‘social morality’ must only be based on acute necessity and public interest. Otherwise, ‘social morality’ should prevail. For example, polygamy if not within the sphere of the religion, child marriage, child labour, triple divorce among Muslims, *sati* and many more have been struck down not for ‘constitutional morality’, but because some of them were not in public interest, and some others were based on wrong religious beliefs. Justifying the Justice Jackson’s notion, “Compulsory unification of opinion achieves only the unanimity of the graveyard”, said in *West Virginia State Board of Education v. Barnette*<sup>24</sup>, does not go well in India, and for that matter other countries of Africa and Asia because of vast difference in cultural practices and religious beliefs. Mainstream culture has tremendous sanctity in these countries.
2. “Miniscule Minority”: In 2013, while overturning the decision of the Delhi High Court decision, the Supreme 3-Judge Bench of the Supreme Court had said that LGBT people were ‘miniscule minority’ and in 150 years long span of time not more than 200 prosecutions had taken place under section 377 of the Penal Code. The Court in this case did not agree to it and ruled that for protection of fundamental rights number is ‘meaningless’. The authors are of the opinion that in such a situation the decision should be given on the basis of public interest in one hand and the interest of a group of people in the other hand. The data shows that criminalising and decriminalising homosexuality is not so significant. However, maintaining the present situation is like maintaining the cultural identity of the country. Other than sex, lots of laws are there to provide equal rights to the LGBT community.

Actually, there is urgent and immediate need is to enforce those laws, most importantly, enforcing the laws preventing discriminatory practices against them like untouchability laws. Untouchability laws are enforced with great degree of determinations because Scheduled Caste constitutes a big vote bank, and they play a decisive role in the democracy.

3. “Reasonable Classification” and “Manifest Arbitrariness”: The Supreme Court did not find any nexus between intelligible differentia of classification of LGBT and non-LGBT. Justice Chandrachud did not find any intelligible differentia between ‘natural’ and ‘unnatural’. In the absence of it, there will be ‘manifest arbitrariness’ and law has to stop it. All the judges found based on a number of reasons – there is no harm to the society; s. 377 does not distinguish between consensual and non-consensual homosexuality; there is no question of stigma on the partners; LGBT people do not suffer from any mental disease; ‘sex is for procreation’ is a wrong belief; s. 377 is discriminatory and penalty prescribed by it is quite high-‘manifest arbitrariness’ in section 377 of the Penal Code. The authors simply do not agree to the arguments put forth by the Supreme Court in order to justify homosexuality on pure legal grounds. The authors reiterate that criminalising homosexuality is not a pure legal proposition. And the Supreme Court has misunderstood the whole thing.
4. “Right to Life”: Homosexuality as a crime brings stigma to those who practice it. Thus, it violates Article 21 which guarantees right to life. This is not a new argument. It has been part of debate between Lord Develin and Professor Hart. It is worth mentioning here that right-minded people upheld the argument of Lord Devlin that immorality is immorality, and if it is not taken care of however small it is will adversely affect the society.



The 5-Judge Bench of the Supreme Court while declaring section 377 of the Penal Code as *ultra vires* to the Constitution has only dwelt with pure legal and technical aspects of sexual rights of the LGBT community pertaining to sex equality. They did not look into moral, social and religious the ramifications of this. As noted above, man has gregarious nature and society has developed moral rules over a long time span. The social practices, which are not just and good for the society, they may be declared as illegal and the Supreme Court has inherent jurisdiction for doing so. So is the case of religious norms. Islam has a unique feature of the concept of *nusus* (definitive rules; singular, *nus*) and *ghair nusus* (non-definitive rules). They may be positive or negative in nature. Muslims are bound about them. They have to be accepted as it is without giving any interpretation. They can only be regulated. They will remain the same for all times to come.<sup>25</sup> As noted above, Islam and Christianity have clear prohibition on practicing homosexuality considering it a serious socially deviant, despicable and sinful act. Islam has prescribes severe punishment for this despicable act. Other religions also do not approve it as a permissible social behavior. Homosexuality is prohibited, even though practiced by LGBT people. Allowing it will corrupt the morality of the society, and will open avenue for spreading HIV/AIDS faster. It is worth mentioning here that 'preservation of public morality is a public good'. It is the Constitution that has grated freedom of religion. It may be noted here that the Supreme Court has left a part of section 377, punishing homosexuality between even non-consenting adults. Moreover, arguing to give prevalence to 'constitutional morality' over 'public morality' is narrow and destructive to the society.

Singapore's Courts and government are still firmly support section 377A of the Penal Code. On October 29, 2014, the 3-Judge Bench of the highest court of Singapore upheld section 377 of the Penal Code. It rejected the sexual discrimination under Article 12, as "it does not use the words 'gender, 'sex'" and 'sexual orientation' and violation of human rights arguments under Article 9, as "life and liberty' referred only to the personal liberty of a

person from unlawful incarnation and not to the right of privacy and personal autonomy” of the Constitution. Prior to this decision, the Apex Court accepted the deep-rooted notion that penal law is to enforce public morality.<sup>26</sup> It further ruled, “Our criminal law is in the final analysis, the public expression of communitarian values to be promoted, defended and preserved. These values include the preservation of morality, the ...”.<sup>27</sup> It may be noted here that section 377A when was originally enacted in the Straits Settlement, clearly intended to infuse public morality in matter of sexual behaviors and criminalise homosexuality. Parliamentary on it may be referred in order to confirm this.

Public opinion in Singapore is that homosexual acts are not acceptable as it is socially deviant and a despicable act. Based on a survey, the submission to the Singapore High Court in *Tan Eng Hong v. Attorney General*<sup>28</sup>, it was asserted, “Singaporean society is still largely conservative on the issue of homosexuality has been borne out by a recent academic research. It is stated in a recent article by a research team from the Wee Kim Wee School of Communication and Information at Nanyang Technological University.” 64.5 percent opined to maintain homosexuality as a crime; whereas, only 25.3 percent favoured decriminalising it. It may be noted here that a 2014 survey revealed that 78.2 percent favoured section 377A. The 2018 survey reveals that still more than 55 percent people are supportive of retaining the section.<sup>29</sup> The basis for it as understood supposedly could be, firstly, there is reasonable classification;<sup>30</sup> and, secondly, “the protection of morals in the society requires that personal conduct be circumscribed or prohibited. Private conduct never takes place in isolation; all conduct has ramifications and consequences in the broader life of society. What occurs in the bedroom can have repercussions in other daily interactions, such as family relationships, and ultimately in how society orders its institutions, such as marriage, the provision of social services and benefits, and the values that are promoted in society as a whole. This is especially so given that there is no general right of privacy recognised in Singapore law, either by case law or in statute, unlike the position in either the

United States through its cases, or in the United Kingdom through the European Convention on Human Rights". It was further submitted that it had been strongly expressed in the Parliament that section 377A preserves family values, and in absence of it, there may be perturbing consequences on familial and personal relationships, because many laws pertaining to them are founded on heterosexuality and the traditional concept of family. It may be noted here that parliamentarians suggested not enforcing the law proactively so as not be harsh to the LGBT community. The authors are of the opinion that this approach will still act as prohibition of homosexuality and will reflect the morality of the society in Singapore expressing abhorrence of a particular kind of socially deviant behavior. It will support the heterosexual family relationship, specifying that marriage is the union of two opposite sexes. Law, this way, will act as more preventive than punitive, as homosexuality is not an innate human behavior; moreover, exact causes of this behavior are not yet ascertained.<sup>31</sup> This attitude matches with the Indian practice, as there in 150 years only about 200 prosecutions took place.

The top policymakers in Singapore have also categorically supported the judicial solicitude there. Prime Minister Lee Hsien Loong believes that Singaporeans would like to retain section 377A of the Penal Code, as the society is not so liberal to decriminalise gay sex. Social value about it is like that in Singapore, he asserted.<sup>32</sup> He stated in his Parliamentary speech on this matter that according to the Attorney General section 377A was not unconstitutional. He further stated that "the Cabinet and the public were in favour of its retention; perhaps Singapore is a conservative society. They consider family as the building block of the society. And family means one man and one woman marry and have children. Thus, heterosexuality is the norm here. This is what we teach in the schools and this is what most of the Singaporeans want it to be." However, he pleaded for protection of other gay rights in the country. He added, "So we should strive to maintain a balance: to uphold a stable society with traditional heterosexual family values, but with space for homosexuals to live their lives and to contribute

to the society...Homosexuals work in all sectors, all over the economy; in a public sector as well, and in the civil service as well. They are free to lead their lives, free to pursue their activities. But there are restraints and we do not approve of them actively promoting their lifestyle to others or setting the tone of the mainstream society...The Government does not act as moral policeman. And we do not proactively enforce section 377A.”<sup>33</sup> On 7 September 2018, Mr. K. Shanmugam, the Home Minister of Singapore reiterated what had been stressed by the Prime Minister Lee. He said that the vast majority in the country was opposed to decriminalising homosexuality. The growing minority wanted it to be allowed. He questioned: “Can you impose viewpoints on a majority when (the issue is) so closely related to social value system?” He further said: “In his personal opinion care has to be taken against criminalising lifestyles and sexual attitudes, and treating people involved as criminals”.<sup>34</sup>

It is clear from the Prime Minister of Singapore’s Parliamentary speech on section 377A that the Government does not want to touch the homosexuals of the country, as long their activities are not coveted outrageous. And the Government is not very keen to enforce section 377A, as long the social norm of heterosexuality is not adversely affected. His intention is like the Indian practice of enforcing the law. In India also, in about 150 years of existence of section 377 of the Indian Penal Code only about 200 serious cases were brought to the courts. It shows there also that the Government machinery is not very keen to enforce the penal law.

The Apex Court in Singapore has resonated with the Government’s policy on homosexuality. But the case in India after the latest Supreme Court decision has become different. The Supreme Court rejected the idea of ‘social morality’ and social values, which are mainly based on long social practices within the premises demarcated by the religions of the country, for ‘constitutional morality’, which is seems to be very technical and that may or may not have constructive and good to the society. The Prime Minister of Singapore has rightly said that the Government would not seriously enforce the penal law unless there

is a threat to erosion of social norms. It means if homosexuality is practiced privately among the consenting adults, there will be no problem, as the society will remain unaffected. This approach is in line of HLA Hart's view that private morality does not affect the society. Prime Minister Lee's approach of not being proactive on the matter of homosexuality practiced in private between consenting adults is a mild approach although it is against the religious delineations of total prohibition. The authors are of the opinion that we should work more on other aspects pertaining to LGBT communities, like job opportunities, opportunities in education, and changing the mindset of the people against them, and the hatred and ridicule they face. They are more important than their sexual rights. We have stated above that they are not better than Scheduled Caste people of India. The authors reiterate that their rights should be protected like the Indian Government is protecting the rights of Scheduled Caste and Scheduled Tribe people.

#### **POSITION IN TAIWAN AND KENYA**

As noted above, in Taiwan, the High Court in May 2017 ruled that it was unconstitutional to ban same-sex marriage. The ruling of the court was considered as the beam of hope to legalise same-sex marriage in the East also. But it could not be proven so. The Taiwanese Government had to seek public opinion via referendum within two years from the date of the decision. As noted above, the people of Taiwan rejected same-sex marriage to be lawful. However, there will be no effect on protection of other equal rights of the LGBT community. Rather, as the Government Taiwan is considered to be the most sympathetic, like Singapore, to them it would make sure that the community does not face discrimination and social hatred.<sup>35</sup>

In African countries, especially commonwealth countries, there is uprising against the homophobia. South Africa, Kenya and Uganda are significant among them. In Uganda and Tanzania supporters of homosexuality are demanding to decriminalise it, but the Governments are firm in order to respect the people's

opinion. In Kenya, however, a case for decriminalising homosexuality is pending before the court. Supporters of homosexuality have gained strength and have become more argumentative because of the recent decision of the Indian Supreme Court. They have been allowed to file written submission in the court based on the reasons asserted by the Apex court of India. The High Court heard submissions of both the parties on 25 October 2018. On the contrary, traditionalists, moralists and religious clerics are hopeful that the court will respect the 'social morality'. It may be noted here that a film justifying homosexuality was banned in Kenya, but a Kenyan court lifted the ban.<sup>36</sup> In March 2018 in another case, the Court of Appeal of the country ruled that forced anal examination for determining whether the person was involved in homosexuality was illegal.

## CONCLUSION

To be sexually deficient, like transgender or bisexual is from God. These Divine segregations are lessons for religious people to feel blessed and be thankful to Him. Since the popular religions of the world and societies, especially in South and East, concerning gay-sex are skeptical and reject it as sinful and a socially deviant behavior, gay-sex has to be considered as despicable behavior and should be outlawed and subjected to suitable punishments depending on the policy of Governments. Gay- sex has to be dealt with like that also because it adversely affects the sanctity of marriage and erodes the concept of family. It is for this reason that social scientists are also against such human behavior. At the same time, it has to be noted that transgender people should not be deprived of their constitutional rights. It has been done in many countries by granting them status as a third gender. In this capacity, they can take-up any job, vote in elections, contest elections, adopt children, inherit properties and take part in any other social and political activities without any discrimination. They cannot be equated to gay and lesbians, to be gay or a lesbian is a social behavior by choice. However, LGBT communities have to be accorded all constitutional rights by appropriate legislations if need be, and

they should be given protection by Government instrumentalities so that they do not face the scourge of social hatred. We have already mentioned above that in India, their rights should be protected as the protection of rights of Scheduled Caste and Scheduled Tribe people. In other parts of the world, they may be given benefits of reservations if they are as a whole socially and educationally backward.

Courts around the world are busy determining laws criminalising homosexuality even between consenting adults in private as unconstitutional on the ground of violation of equality clause and the clause guaranteeing dignity to human beings. They are too technical and do not consider the morality aspects of homosexuality at all. For them, 'social morality' is nothing if compared with so-called 'constitutional morality'. The recent decision of the Indian Supreme Court is the latest one in the series. The Court clearly ignored to play the role as *custos morum* 'guardian of morality'. This decision of the Indian Supreme Court will certainly provide strength to the supporters of gay- sex and same-sex marriage. The effect of these decisions will, thus, be erosion of morality and fading the value of marriage and family. On the contrary, Singapore Court of Appeal and the Constitutional Court of Taiwan gave much value to the social perception. In Singapore, the court maintained homosexuality as a crime. They ruled to balance the 'constitutional morality' and the 'social morality'. As authors have understood, they preferred 'social morality' on so-called 'constitutional morality'. They actually acted as the guardian of morality. In Taiwan, the court favored it but put it subject to referendum; and the referendum went in favour of retaining homosexuality as a crime. It is notable here that in both the countries, policymakers asserted that they were not very keen to enforce the criminal law. They will invoke the law only in serious cases or where it appears that it will prevail the moral perception of the society. The authors support the Singaporean viewpoint on ensuring other rights of LGBT people, perhaps via reservations, if need be, as stated above. Authors also would like that the Indian Government does not give heed to the recent ruling of its Supreme Court.

But to the surprise of many right-minded people there and around Asia, the Taiwanese legislature on 17 May 2019 enacted a law to legalise same-sex marriage. It is still the sole country in Asia to legalise it.

### *Notes*

- <sup>1</sup> It may be noted here that homosexuality can be practiced without marriage. Thus, it should not be confused with same-sex marriage. However, it is true that homosexuality can be practiced with or without marrying.
- <sup>2</sup> See the summary of the Report at: <https://www.bl.uk/collection-items/wolfenden-report-conclusion> (Accessed on 12 September 2018).
- <sup>3</sup> See, Yago Partal, "Are there gay animals in nature? Homosexuality in the animal world", at: <https://www.zooportraits.com/animal-homosexuality/> (Accessed on 20 September 2018). Melissa writes that homosexuality among animals is very rare. See, Melissa Hogenboom, "Are there any homosexual animals?", at: <http://www.bbc.com/earth/story/20150206-are-there-any-homosexual-animals> (Accessed on 12 August 2018).
- <sup>4</sup> Susan Krauss, "The Secret Reasons Why Sex Is So Crucial in Relationship", at: <https://www.psychologytoday.com/us/blog/fulfillment-any-age/201707/the-secret-reason-why-sex-is-so-crucial-in-relationships> (Accessed on 12 October 2018).
- <sup>5</sup> See generally, James Martin, S. J., "What is the official church teaching on homosexuality? Responding to a commonly asked question", Faith and Reason, 30 April 2018; James Martin, S. J., Building a Bridge, Harper Collins Publishers, 2017.
- <sup>6</sup> Ibn al-Qayyim, Al-Da'wa wa Al-Dawa'a (Dar A-Manarah, 2010), p. 115.
- <sup>7</sup> Al-Mauasu'ah al-Fiqhiyyah, part 24, p. 253.
- <sup>8</sup> For more information, please refer to: Religious Facts, "Hinduism and Homosexuality", at: <http://www.religionfacts.com/hinduism/homosexuality> (Accessed on 20 April 2018); Hindu American Foundation, "HAF Policy Brief: Hinduism and Homosexuality", at: <https://www.hafsite.org/media/pr/haf-policy-brief-hinduism-and-homosexuality> (Accessed on 20 April 2018); Jacob Ogles, "19 LBGT Hindu Gods", Advocate, at: <https://www.advocate.com/religion/2016/9/06/19-lgbt-hindu-gods?pg=1#article-content> (Accessed on 20 May 2018).
- <sup>9</sup> Human Rights Campaign, "Stances of Faiths on LGBTQ Issues:



Buddhism”, at: <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-buddhism> (Accessed on 12 October 2018).

- <sup>10</sup> Naz Foundation v. Government of NCT of New Delhi and Others, (WP (C) No. 7455/2001; (2009) 160 DLT 277.
- <sup>11</sup> Live Mint, “Homosexuality in India: What data shows”, Sep. 14, 2018. At: <https://www.livemint.com/Politics/nLQIPpl5UICajLDXETU3EO/Homosexuality-in-India-What-data-shows.html> (Accessed on 12 October 2018).
- <sup>12</sup> Ibid.
- <sup>13</sup> See, Yen-hsin Alis Cheng, Fen-Chieh Felis Wu and Amy Adamczk, “Changing Attitudes Towards Homosexuality in Taiwan, 1995-2012”, *Chinese Sociological Review* (2016), 48(4): 317-345.
- <sup>14</sup> See, *infra*.
- <sup>15</sup> See, *The Washington Post*, 17 May 2019.
- <sup>16</sup> See Edward J. Beck at. El, “Attitudes towards homosexuals in seven Caribbean countries: implications for effective HIV response”, *Psychological and Socio-medical Aspects of AIDS/HIV*, Vol. 29, No. 12, 2017.
- <sup>17</sup> See, AIDS info, “HIV and Specific Populations, 5 April, 2018”, at: <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/25/81/hiv-and-gay-and-bisexual-men> (Accessed on 20 October 2018).
- <sup>18</sup> See, BBC, “Commonwealth summit: The countries where it is illegal to be gay”, 20 April 2018, at: <https://www.bbc.com/news/world-43822234> (Accessed on 20 September 2018).
- <sup>19</sup> AIR 2010 SC 3196.
- <sup>20</sup> 160 Delhi Law Times 277; (2014) 1 SCC 1-A.
- <sup>21</sup> Civil Appeal No. 10972 of 2013; (2014) 1 SCC 1.
- <sup>22</sup> [1979] 1 SCC 380.
- <sup>23</sup> Writ Petition (Criminal) No. 76 of 2016.
- <sup>24</sup> 319 US 624 (1943).
- <sup>25</sup> See, Abdul Haseeb Ansari, *Comparative Jurisprudence (A Comparative Appraisal of Western Jurisprudence and Islamic Jurisprudence)*, (New Delhi, Serials Publications Pvt. Ltd.) 2018, pp. 252-267.

- <sup>26</sup> See *Public Prosecutor v. Kwong Kok Hing*, [2008] SLR 684.
- <sup>27</sup> *Public Prosecutor v. Law Aik Meng*, [2007] 2 SLR (R) 814, at PP. 24, 29.
- <sup>28</sup> Civil Appeal No. 50, 2011.
- <sup>29</sup> The Straits Times, September 11, 2018.
- <sup>30</sup> The Court of Appeal also agreed to it.
- <sup>31</sup> See, Donald P. Haider-Markel and Mark R. Roslyn, “Beliefs About the Origins of Homosexuality and Support For Gay Rights: An Empirical Test of Attribution Theory”, *Public Opinion Quarterly*, Vol. 72, Issue 2, January 2008, pp. 291-310.
- <sup>32</sup> See, The Straits Times, 1 March 2017.
- <sup>33</sup> See, The Straits Times, 24 October 2007.
- <sup>34</sup> See, The Straits Times, 7 September 2018.
- <sup>35</sup> CNN, “Taiwan voters reject same-sex marriage”, at: <https://edition.cnn.com/2018/11/25/asia/taiwan-same-sex-marriage-referendum/index.html> (Accessed on 10 December 2018).
- <sup>36</sup> Reuters, “In legal battle over gay sex, Kenya court to consider Indian ruling”, file:///Users/ahaseeb/Desktop/In%20legal%20battle%20over%20gay%20sex,%20Kenyan%20court%20to%20consider%20Indian%20ruling%20\_%20Reuters.htm (Accessed on 30 October 2018).



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