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Existence and Subsistence of Homosexuality in Homo Sapiens: A Comprehensive Study through the Lens of Science, Evolution, Religion and Law

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ABSTRACT

“Having a homosexual orientation is neither a choice nor a post-birth environmental cum familial affect but one is born as such. Currently the right to homosexual marriage is the talk of the season, people are fighting for it and against it. Several points and arguments are coming up in court enlightening the public about the concepts. So here is my contribution as a research paper towards the community this pride month. My primary aim with this paper is to explain the reason behind the emergence and subsisting of homosexuality in humans with the help of biological, environmental (prenatal and postnatal), religious, psychological, evolutionary, social and legal standpoints. I analyzed the claims and myths related to homosexuality and tried to accept or debunk them wherever necessary.

Throughout the manuscript I extensively scrutinized famous studies and surveys like Twin Study, Xq28 study, Chromosomal study, Finger digit ratio survey, study of older brother effect, effect of prenatal stress survey etc. Additionally I emphasized upon the contribution of homosexuality towards evolution and natural selection along with the reasoning about how the existence of homosexuality is justifiable within mankind. The role and importance of homosexuals towards society and family is also discussed within the paper. I also elaborated on the facts and evidence of homosexuality in Hinduism. Towards the end of the manuscript, I examined the day-wise details of the ten day long hearing held by a five-judge bench in the Supreme Court upon the plea of the legalization of same-sex marriage in India along with the judgement. In conclusion of the paper I have attempted to derive the importance of change in the mindset of people and why the acts of discrimination, abuse and ostracization against them are unacceptable. Also the importance of inculcating the real meaning of love, care, acceptance and freedom.

Keywords: *Biological Perspective, Evolutionary Perspective, Environmental Perspective, Religious Perspective, Prenatal Environment, Postnatal Environment.*

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I. INTRODUCTION

Humankind often despises what is beyond their understanding. It is undoubtedly a habitual practice, when something complex, unusual or uncommon comes up we treat them as a threat to us and to the society. We consider it disparaging by showing disapproval of it. Though Humans are indeed the most intelligent and social living being on the surface of earth. But often a question which arises is, do we really understand the meaning of this small yet significant word 'SOCIAL'? Homosapiens require companionship and togetherness, they like to live in groups, they possess morality, kindness, compassion and the utmost important trait of acceptance. Though a coin has two sides and here the outcome is the same as some percentage are filled with negative traits. But our survival of so many decades alone is proof that we are destined to evolve. So why unacceptability towards the minority groups, why aggressiveness for material things and why fighting for control. Why not learn to understand what's alien, why not show acceptance and grant freedom to those whose lives depend upon it, why not evolve for good?

Similarly there are several minorities existing in current society asking for approval and acceptance and one of them is the community of Homosexuals. The term homosexuality simply could be understood from the scope of companionship with one another. Those individuals who like to connect romantically, emotionally and physically with the same sex could be understood as homosexuals. Man connected to a man is termed as GAY and women connected to women is LESBIAN, being the two most important characterizations. They are not new to society nor are they a part of western culture. Every continent, country, state and social community has a minority percentage which associates themselves with such orientation. Surviving through the eons of evolution, they are still fighting against all kinds of abuse, harassment, cruelty, discrimination and inhumanity at large. After such a long time when society is developed and people have achieved so much in every field, human rights and privacy are actually looked upon in a real sense then why are homosexuals restrained from their right of choosing a partner to love, marry and build a family. In my opinion it's not that hard to accept them. They are no threat and not an agenda holding group. Rather some people in power are afraid to lose their sense of control and hence they create issues with every different aspect in the society which is minority based. Below are some explanations upon various perspectives which could possibly affect this change in human behavior along with the conditions of homosexuals with the current legal system in India indicating that the myths should be eradicated and reality must be accepted.

II. BIOLOGICAL PERSPECTIVE

In current times, India being a developing country is still not aware about the biological factor which actually is one of the main reasons behind the sexual orientations of homosexuals. Most individuals consider it as an acquired factor from the outer environment and address it as a choice. Scientifically the biological perspective of a thing is determined after studying the brain, genetics and body functions and the same has been conducted for determining the biological factor that relates to homosexuality.

(A) Twin Study

The very initial and the most important study in here is **TWIN STUDY**. Before interpreting the results of the study it will be better to understand the types and causes of the birth of twins. The two types of twins are;

1. **Identical or monozygotic twins:** These types of twins are born when a single egg cell (Ovum) is fertilized by a single sperm cell and after formation of zygote the cell multiplication starts from one to two to four to eight and further resulting into the formation of a blastocyst (a cluster of cells). In case the blastocyst splits into two and forms different embryos then both the different embryos become different babies. But since their DNA is from the same cells of the parents hence almost 100% of their genes match making them identical. Though the reason behind the splitting of blastocyst at later stages is still not explained clearly.²
2. **Fraternal or dizygotic twins:** When two different egg cells (ovum) are fertilized with two different sperm cells at the primary stage and both become different embryos and further different babies then they are called Fraternal twins. Being a different DNA from different cells of the parents there is a chance of 50% matching genes. The reasons behind the production of more than one egg cell in a woman are dependent on the age, race, family history, height, diet and even on the number of previous pregnancies.³

Now returning back to the study which was conducted in 1991 by a Psychologist J. Micheal Bailey and a Psychiatrist Richard C. Pillard in which they have enrolled and interviewed a total of 161 male homosexuals asks along with that also enquired the same thing from their identical or fraternal twins and adoptive brothers. The results of the study were actually very convincing. Out of total numbers of twins and adopted brothers; 52% of identical twins were also

²*Twins - identical and fraternal*, BETTER HEALTH CHANNEL (Aug. 08, 2014), <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/twins-identical-and-fraternal#>.

³*Id.* at 1.

homosexuals, 22% of the fraternal twins were homosexuals and 11% of the adopted ones were homosexuals too. It clearly indicated that homosexuality is indeed genetic and the proof that the identical twins do have more than half a chance for being homosexuals as their genes are the same. Just in case their genes would have been different then the chances must have been lower. So if homosexuality largely would have arisen due to any environmental factor then both the twins in such a high percentage of cases would not have recognised them as gay as there is a high chance that their environment must have been different. This study determined that the genetic component of homosexuality is somewhere between 30-70% in a human being which is still leaving a large amount of percentage for other factors though.⁴

Another twin study was conducted by F L Witham, M Diamond, J Martin in which they asked the participants to fill a questionnaire of eighteen pages which was upon the topic of Sexuality of Twins. In result it turned out that out of 34 pairs of male identical twins and 4 pairs of female identical twins, 65.8% were the ones who were concordant and share the same attributes. Out of 33 pairs of fraternal twins, 30.4% pairs of twins were concordant for homosexuality. Apart from this, three sets of triplets were also studied in which two sets contained a pair of identical twins and the third one was fraternal and the third set contained all three as identical twins. In result it turned out that in the first two sets the identical twins were sharing the homosexual traits and the fraternal was discordant and in the last set all three identical twins were sharing the homosexual traits. So this study also definitely toughens the fact that sexual orientation of a homosexual is not decided by the environmental factor but rather by the biological factor⁵.

(B) Study of ‘Gay Gene’

The groundbreaking study in the field was upon the gene structure and the finding of what they called ‘Gay Gene’ which was **Xq28**. A scientist named Dean Hamer conducted this study in 1993. In this study, a total of 114 families of men who were homosexual were taken into account and the result showed that the number of people with homosexual orientation are in larger numbers at mother’s side in comparison to father’s side. It was deduced that since men get their X chromosome while determination of sex at birth by their mother and the relatives who are largely of homosexual orientation are also from mother’s side then there must be some linked genes on X chromosome. Then the genetic markers of this chromosome were studied with the help of gay brothers of 40 families and the result turned out that the rate of consistency of the genetic markers from Xq28 region is comparatively higher in gay brothers. So in conclusion

⁴Constance Holden, *Twin study links genes to homosexuality*, 255 SCIENCE 33, 33 (1992).

⁵F L Whitam et al., *Homosexual orientation in twins: a report on 61 pairs and three triplet sets*, 22 ARCH SEX BEHAV 187, 187-206 (1993). <https://pubmed.ncbi.nlm.nih.gov/8494487/>.

it was deduced that homosexuality was linked to this X chromosome and Xq28 genetic region and later on in the media it became popular with the name of gay gene.⁶

(C) Study of other chromosomes and associated genes

Later on after many studies and research, in 2019 another study was conducted at a very large scale (largest till date). Here a total of 4,93,001 people were studied and it was declared that at least thousands of genetic variants are there which indicate about homosexuality. They also concluded that they didn't find any individual genetic variants related to homosexuality on Xq28 or remaining X chromosome. This study declared that there is no such particular thing as a single Gay Gene. Rather there are various chromosomes along with several genes associated with sexual orientation in both the sexes such as **X chromosome, Chromosome 1, Chromosome 4, Chromosome 7, Chromosome 14 etc.**⁷

III. RELIGIOUS PERSPECTIVE

Before understanding the term homosexuality through the eyes of religion, one must understand the major types of religious systems which are monotheistic, polytheistic and anti-theistic religions. Monotheistic religion refers to those religions who believe that there is a single creator or god whereas polytheistic religions are those who believe in more than one god. And after these there come those who don't believe in a creator called as God which can be considered as anti-theistic religions.

Generally homosexuality is considered sinful and prohibited in a monotheistic system. Most of the anti-theistic religion doesn't talk about the matters of homosexuality and polytheistic system has multiple beliefs which are either positive, neutral or negative.

- **Homosexuality and Hinduism**

Hinduism is a religion followed by 1.35 billion of the population and it is the 3rd largest religion in the world. There are many gods and deities which are followed and worshiped on several occasions and also there have been several instances and proofs for homosexuality and the concepts related to LGBT community and about their acceptance in the past. Here are some prominent examples; Boramdeo Temple, Chhattisgarh has a sculpture which displays homosexual nature between two men holding each other's male organ in their mouth lying on one another. Lakshmana temple Khajuraho sculpture in which two men are indulging in oral

⁶Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321, 321-327 (1993).

⁷*Biology and Sexual Orientation*, WIKIPEDIA THE FREE ENCYCLOPEDIA (Jul. 06, 2023, 12:34 PM), https://en.wikipedia.org/wiki/Biology_and_sexual_orientation.

intercourse with each other. Kandariya Mahadeva, Khajuraho sculpture shows the physical relationship between three females and one male together. Lord Shiva and Goddess Parvati are depicted in the form of Ardhanarishvara which is half-man and half-woman and much more⁸. There are texts such as Kama Sutra, third gender Hindu sects, sculptures and religious arts depicting LGBT community as ones who are not inspired through the western culture but rather it has always existed in society in concealment due to the fear of social stigma, shame and unacceptance. It can be observed that homosexuality has been a part of Hindu religion and society since initial years in spite of the fact that it is not considered as normal now and the people's mentality has become heteronormative.

The reason behind such change in the psychology of people is mainly due to the capturing of India by Mughals and Britishers and this concept of same sex relationship became taboo and the society has started to acquire and run upon their principles. Though legally it was declared as criminal activity in 1861 by introducing Section 377 inside the Indian Penal Code⁹ during the colonial period by the first law commission of India which was under guidance of Thomas Macaulay. Since then it has been decriminalized till 2018 and after that the Honourable Supreme Court of India has declared section 377 as unconstitutional resulting in decriminalizing homosexuality through the landmark judgment of "NAVTEJ SINGH JOHAR V. UNION OF INDIA (2018)"¹⁰. But even with this into effect there are no valuable results in actuality and it seems that everything has gone in vain. Even after 5 years the society has not accepted this internally. It has been left as just a judgment and the petition related to marriage rights is still not recognised, until now. Recently the Honourable Supreme Court has called for a petition and started hearing and discussing the matters of homosexual martial rights.

IV. ENVIRONMENTAL PERSPECTIVE

As it is observed that genetics plays an important role in determining the sexual orientation of any individual but it is not alone, leaving room for other factors. Apart from the biological angle, another important lens through which sexual orientation is determined is obviously the factors related to the environment. But before entering into that, one should understand the environment which is being discussed about is classified into two major categories. The first one being the prenatal environment meaning the conditions in which a person can be affected is before the birth while being inside the womb of the mother in a developing state and another one is the

⁸Krishnakant Lahangir, *Homosexuality Is Not A Sin In Hinduism*, YOUTH KI AWAAZ (Oct. 06, 2022), <https://www.youthkiawaaz.com/2022/10/homosexuality-hinduism-and-the-concept-of-sin/>.

⁹The Indian Penal code, 1860, No. 45, Acts of Imperial Legislative Council, 1860 (India).

¹⁰Navtej Singh Johar v. Union of India, A.I.R 2018 SC 4321 (India).

postnatal environment meaning the conditions to which a person is exposed after getting birth in the outer world.

- **Prenatal environment**

Also termed as hormonal influence, talks about all such states and conditions to which the baby is exposed to while being inside the mother's body in a growing stage. In certain hypothesis it was assumed that when the male baby is at fetal stage he must have been exposed to low level of hormone called testosterone resulting in lower masculinization effect and hence unattractiveness towards female but at the same time the female baby must have been exposed to the higher level of testosterone resulting in the attraction towards women. There are various other studies and surveys which conclude about the hormonal effect upon the baby during the prenatal stage which are discussed below.

- a) **Finger digit ratio and Androgen exposure**

This method is considered as an indication of sex difference and prenatal testosterone exposure. It is termed as the ratio of different finger digits of one hand which is calculated by dividing the length of one finger with the length of another finger. For instance, the ratio of 2nd finger and 4th finger as 2D:4D is to be calculated by dividing the length of the index (2D) and ring (4D) finger of one hand¹¹. The study proved that women tend to have longer 2D in most of the cases meaning less testosterone leading to longer index finger hence proving the contrary that longer the ring finger (4D) grows means the more testosterone exposure to the baby in the prenatal stage.

In the survey related to the same study, a scientist name Marc Breedlove conducted a survey with men and women and found out that women who were lesbians and volunteered had a more masculinized finger length ratio (bigger 4D) than the women who were straight, which means these women must have been exposed to more testosterone in prenatal stage as compared to straight women. But the case was not the same with the gay men and it was not deduced that gay men have a more feminine digit ratio. Though this study is highly criticized, it has been replicated on several occasions. Though the study showcased the effect of the exposure of androgen hormone in male which helps in developing male sex organs at prenatal stage and secondary sexual characteristics at the stage of puberty and in females also but in lower amounts to functioning the libido and sexual arousal and overexposure of androgen in females leads to their masculinisation further leading them to homosexual traits at adult age .

¹¹Digit Ratio, WIKIPEDIA THE FREE ENCYCLOPEDIA (Jul. 02, 2023, 05:33 PM), https://en.wikipedia.org/wiki/Digit_ratio.

b) Fraternal birth order effect

This study is primarily associated with male sexual orientation. It states that the more male children produced by a woman, the higher is the chance of the younger male children to develop a homosexual orientation. This is also a prenatal situation as it is not found in adoptive or step-brothers. It is proposed that the chance of giving birth to a homosexual male baby is increased by 38-48% after the birth of every other male child which means in most of the cases the chances of a young brother of being gay is higher than the older but it's not a necessity.

It is proposed by the scientist Ray Blanchard that with every male pregnancy when the male cells go into the blood of mother then her body starts to make antibodies to fight the foreign cells which entered her body and this is how a body works for itself. Further these antibodies remain in the body of the mother and affect the future male fetuses which may neutralize the Y protein in the male baby. Due to this the brain part which is associated with sexual orientation began to develop the female typical arrangements leading to the attraction towards another male. These antibodies possess the maximum effect on the later conceived male child as the amount of antibodies produced to fight the foreign cell will increase by every pregnancy.¹²

c) Prenatal stress

Prenatal stress can be understood as the amount of anxiety or strain felt by the mother when she is pregnant with a child. One prominent study showed the results that 34% of the homosexual individuals have faced severe prenatal stress in comparison to 3% of the mother of heterosexual which is actually very surprising. It also showcased that exposure of the mothers to severe stress while being pregnant could be a reason for altering brain development leading to the change in sexual orientation.

• Postnatal environment

Though there are not many studies available upon the postnatal environment effect upon the people which determined their homosexuality. But there are some of them assertions without any evidence which needed to be brought out in light.

a) Familial environment and upbringing

Such notions that the early childhood environment and rearing style of Parent affects the mentality and behavior of a child making them inclined towards the homosexual orientation have existed in the society since a very early stage. But still there is no proof, no hypothesis and

¹²Ray Blanchard, *Fraternal Birth Order, Family Size, and Male Homosexuality: Meta-Analysis of Studies Spanning 25 Years*, 47 ARCH SEX BEHAV 1, 1-15 (2018).

no hard data which supports those statements. Even after being in the most neutral state possible and not favoring any side, I am also unable to find any study or explanations related to such comments that yes homosexuality is developed due to parental rearing or family environment. Often this is discussed that if a homosexual individual will get a chance to adopt children or conceive a baby through surrogacy then a baby who will be raised with two gay dads or two lesbian moms will turn out to be gay or lesbian themselves. But again this affirmation is baseless because there are many such cases out there in which the children are found to be straight even after having homosexual parents and no such correlation or chain of regular proofs have been found which could overturn that.

b) Child sexual abuse and early experience

Another such belief which is not scientifically proved is that a male person who is subjected to sexual abuse and molestation at early age is more likely to become homosexual. But this theory is contradictory at so many levels. Now in another scenario it is claimed that when a woman is victimized to a sexual abuse in her early years then it becomes a trauma for her and to battle the trauma she tends to bend physical and emotionally towards the gender of her own which makes her lesbian. It is sounding erroneous itself as how a man develops a soft corner to the gender by whom he has been raped and the woman does the exact opposite?

If truth be told, the concept of Gender Nonconformity plays the principal role here. Gender Nonconformity means a process of not confirming or not behaving as per the society's rules. It occurs when a preadolescent child does not act in a way socially or psychological, in which the people expect them to. In certain cases the gender nonconformity can even lead up to the association with opposite sex and gender. As we have to mind that sex is assigned to us by birth but the concept of gender is far more complex and it is connected with roles, expectation and behavior. Suppose you are born as a male gender then you must not play with dolls, you shall not wear a opposite gender specific dress, after growing up you shall act tough and masculine whereas if you are born as a female gender then you are considered as soft and enduring in comparison to male, all pink and dolls will be your world during your childhood and much more. Now when a baby doesn't act accordingly then this is considered as gender nonconformity which is also a predictor of homosexual orientation.¹³

In research it's indicated that the person targeting a child for abuse is looking for one whose behavior is mainly gender nonconforming. So instead it can be deduced that being subjected to

¹³Anabelle Bernard Fournier, *What Does Gender Nonconforming Mean?*, VERY WELL MIND (Feb. 17, 2022), <https://www.verywellmind.com/gender-nonconforming-definition-4582878>.

child abuse doesn't turn someone into a homosexual rather the children are targeted and subjected to child abuse due to their behaviour of gender nonconformity in the first place which itself is a potential a point of adult homosexuality. It can be seen through their behavior that they are going to be homosexuals later, way before the abuse and molestation. Other than it has also been observed that people who now recognise themselves as heterosexual are subjected to child abuse does changed nothing in them. Further there are proofs that the students who stay at an all boys or all girls boarding school are open to more such events related of homosexuality but that does not determine their sexual orientation after growing up.

c) **Environment of Modern Cities**

It is often observed that people belonging to cities and cosmopolitan areas are more likely to come out as gay in comparison to the people residing in a village area. So it is also associated that people who are connected to modern culture and developed cities are more likely to turn up as a homosexual. But as the studies have shown, the case is not that straightforward. In this case the reason for such observation is because of the freedom offered by the city life and the society which is less judgmental. The rate of opportunities, acceptance, expression and freedom offered by a developed city is much larger in comparison to any village. In an American study it was found that the amount of consumption of gay porn is almost equal in every state being 5% which means that urban cities lifestyle and thinking don't make an individual homosexual rather they are born in that way and they exist everywhere, even in the village. It's just that they hide in the closet and are afraid or ashamed to come out.¹⁴

V. EVOLUTIONARY PERSPECTIVE

The term evolution in a fundamental sense means the process of adaptation of different species in the changing environment by changing their traits and genetic materials over the period of time. This term is connected with the term of natural selection which means that the organisms who are better at adapting to the changing environment are more capable of survival and reproduction and they are selected by nature and others are wiped off. Now if we try to look homosexuality through the lens of evolution and try to understand the points made by the people in the society that homosexuality can not move hand in hand with the principles of evolution. It becomes very evident that homosexuals can't produce kids as well as this trait is fixed, unchangeable and very much against the idea of natural selection. So the question arises, how does homosexuality is still exist in nature? As we know that nature has the tendency to wipe off

¹⁴Seth Stephens-Davidowitz, *How many American Men are Gay?*, THE NEW YORK TIMES (Dec. 07, 2013), <https://web.archive.org/web/20191012082501/https://www.nytimes.com/2013/12/08/opinion/sunday/how-many-american-men-are-gay.html>.

the traits which are no longer required or necessary (for example the tail of a human ancestor). It must have gone extinct by now but hasn't. Instead it is existing in almost every species including animals in very small but visible fraction which must be of some importance in the eyes of humanity and evolution. This question has been raised multiple times and to answer those many theories popped out which is discussed below.

a) Idea behind a strong family

The very idea of a strong family at the time of hunters and gatherers which we were initially, referred to such families who are extraordinary at the survival, adaptation and reproduction skills which are the basics of natural selection. So as per theories, earlier it was assumed that the families who are good at these are the most powerful. So it's a question of thought about what must have been the role of a gay person in that family as they are clearly not for marriage and reproduction. And there comes the play, when it was deduced that homosexuals were equally important for the groups because they are capable of providing extra support, help and care to the others in the group. Suppose there are three male individuals, out of which two are with their wives and two children and the third male is homosexual with no kids to look after. In this situation he comes in handy for looking after the four children of the family and this extra support must have provided the family with a higher chance of survival and hence a contribution to the evolution. So as being a social species it makes a whole lot of sense that unlike animals we don't only live for food, hunting and mating. We also socialize with others and form families to live together which makes it a survival of the fittest group not singularity and the part played by a homosexual here is to bond that group with togetherness and increase the survival chances.¹⁵

b) Intelligence and Talents

As multiple studies have shown that homosexuals possess more IQ and talents than a heterosexual individual. It has also been proved that homosexuals are more inclined towards art and culture and those are greatly influenced by them¹⁶. The very existence of homosexuality in nature is providing many benefits to others by their talents and special qualities. The qualities such as emotional intelligence, their understanding of freedom, love and equality in its true sense, their accepting nature, strong brain, enduring capability, compassionate behavior and

¹⁵ Andrew Barron, *Homosexuality may have evolved for social, not sexual reasons*, THE CONVERSATION (Jan. 16, 2020, 07:01 PM), <https://theconversation.com/homosexuality-may-have-evolved-for-social-not-sexual-reasons-128123>.

¹⁶Kevin Allen, *Gay men are smarter than straight men – so says history*, CALGARY GAY HISTORY PROJECT OUR PAST MATTERS (Oct. 21, 2021), <https://calgarygayhistory.ca/2021/10/21/gay-men-are-smarter-than-straight-men-so-says-history/>.

kindness are very much required for humanity. They can act as a promoter of togetherness and bonding between families as they have the trait to carry people together. Indeed it's not always the same and since humans naturally are dysfunctional so yes it goes the same with many of the homosexuals who do not fall in these category and they choose the path of deception, greediness and wrongdoings but mostly who gets a chance to live a free life and have a sense of cooperation and maintaining relationship, differentiate themselves to stand out.

c) Homosexuality in Animals

It is one another myth which is often coined by the homophobic individuals that if homosexuality is natural based then why don't animals have homosexuality in them. Though most of them are getting educated now but for those who don't know, yes it is existing in animals also. Over more than 1,500 species of animals have showed homosexual behavior which is studied by scientists till now and there must be more. But the degree of same sex activities varies from animal to animal. The primary reason for indulging in homosexual behavior is for bonding between each other, fondness, for knowing about the possible partners for mating and even for parenting reason. Starting from mammals to reptiles, birds, fish, insects and even amphibians have shown homosexuals traits till now and many of them are documented by the researchers in the camera also. The animal which is largely indulged in homosexual practice is Sheep which is near about 10% of the total male population. So leaving alone the social animals, even the non-social animals are expressing their homosexuality in the wildlife and in the open. But it is again not erased by Mother Nature which again proved that homosexuality does have its role to play in natural selection and evolution with respect to affection, bonding and population control.¹⁷

d) Nature's method of population control

All these studies based on the principles of epigenetics which may be the reason to be born as a homosexual is highly indicative that these epi-markers or the switches which work on their own in case of older brother effect, prenatal stress in mothers and androgen exposure etc may be the nature's secret way of controlling population. It may sound odd but it is so astonishing to think about why stress in mothers is sending a signal to the brain of the fetus to develop into such a brain structure which possesses the senses of togetherness and a high amount of emotional intelligence. It's very mysterious at the same time. Apart from promoting unity and care there must be other reasons that homosexuality is still existing and surviving through evolution and

¹⁷Homosexual behavior in animals, WIKIPEDIA THE FREE ENCYCLOPEDIA (Jun. 14, 2023, 12:41 PM), https://en.wikipedia.org/wiki/Homosexual_behavior_in_animals.

undoubtedly it could be nature's way to control population.

VI. HOMOSEXUALITY AND LEGAL SYSTEM IN INDIA

Earlier in the Indian legal system, homosexuality was death within Section 377 of Indian penal code which was decriminalized by the provisions of the act. The section described that this activity is “against the order of nature” and hence it should be illegal. It remained as such till 2018, though various cases of discrimination, abuse, suicide and defamation has been report over the period of these many years. Till now there are more than enough Petitions filed against Section 377 under Indian legal system which helped for a greater good today leading to decriminalization of the Victorian Law in 2018. Some of the important petitions and judgements are, NAZ FOUNDATION Vs GOVT. OF NCT & ORS.(2009)¹⁸ case in which the first petition was filed in 2001 by the NGO named Naz Foundation at Delhi, AIDS Bhedbhav Virodhi Abhiyan NGO challenged this section 377 in 1994 and the most important case is NAVTEJ SINGH JOHAR V. UNION OF INDIA (2018)¹⁹ which leads to the decriminalization. Though even after decriminalization the martial or adoption rights were not provided to them. Since 2018, many petitions have been filed to the courts seeking the martial and adoption rights for homosexuals within the ambit of the Special Marriage Act,1954²⁰.

Marriage in India is considered as a union between two individuals being a man and a woman and it has become a norm to be conducted between the people of same caste and same community. Special marriage act was introduced in the Indian system in 1954. It performs as a bridge facilitating the marital right to those facing prohibition of marriage on the basis of caste and religious indifference further allowing such inter-caste and inter-religion marriages by registration under the act. This law acts as a protection to such people and recognises their freedom to choose a partner regardless of their caste and community. The important aspect required for the registration of marriage under this act is CONSENT of the related parties and age of majority, sound mind, good intention, monogamy being some other essentials. The act also possesses a provision of a 30 days public notice period by the marriage officer, in which a person who is against the said marriage can demonstrate their objection with reasonable proof. After enquiry if the objection is considered valid then the marriage won't register in the book but if the objection is invalid then a sum upto ₹1k is charged from the concerned person and awarded to the parties engaged in the marriage.²¹

¹⁸Naz Foundation V. Govt. of NCT & Ors., 2009 160 Delhi Law Times 277 (India).

¹⁹*supra* note 9.

²⁰The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India).

²¹Rachit Garg, *Special Marriage Act, 1954*, IPLEADERS (Nov. 03, 2022), <https://blog.ipleaders.in/special->

Recently from 18th April 2023 till 11th May 2023, a batch of petitions were heard by our Honourable Supreme Court of India which was for the legal allowance to homosexual marriage in Indian society. The hearing lasted for a total of 10 days in which a number of issues related to this topic were discussed within the wide scope of the single issue of marital rights to same sex couples. The hearing was conducted by a constitutional bench consisting of five judges comprising DY Chandrachud, Sanjay Kishan Kaul, S Ravindra Bhat, PS Narasimha and Hima Kohli. Petitioner's side was represented by Senior Advocate such as Mukul Rohatgi, Menaka Guruswamy also representing the Delhi Commission for Protection of Child Rights (DCPCR), Geeta Luthra, Arundhati Katju and others. Whilst the respondent's side opposing the petition was represented by Tushar Mehta on behalf of Central government, Aishwarya Bhati represented the national child rights body NCPCR, a body of Islamic scholars called the Jamiat-Ulama-i-Hind represented by Kapil Sibal, Rakesh Dwivedi and others.²²

(A) Day wise analysis:

First day on 18th April, Solicitor General Tushar Mehta argued that Whether Supreme Court is the appropriate body to create a new right which is socio-legal or Parliament is the one which is appropriate? He additionally argued that marriage is declared as a union between two bodies i.e. man and woman in every legal statute, even in special marriage act which is asked for amendment. And from the petitioner's side, Advocate Mukul Rohatgi argued how 377 is decriminalized and homosexuals are also entitled to every right promised under constitution like right to live with dignity and right to marry and have family. He requested that such couples should be allowed to marry under SMA, 1954 and the words like man and woman or Husband and wife to be read as 'SPOUSE'. He added that under the right provided by Article 32 of the constitution²³ citizens have the right to come to the Supreme Court if they are deprived of any other right. Hence the wait for parliament to take up this matter is not possible and also said that they must not be discriminated against, just because they are a minority. He cited an example of Lord Ayappa who was born by the union of Lord Shiva and Vishnu to argue that homosexuality is not an '**urban elitist concept**' as claimed by the government earlier. Another advocate Menaka Guruswamy (also argued in Navtej Singh Johar case) added in Rohatgi's argument that marriage is not a right only but it also comes with such benefits which is very important but can't be availed without performing marriage. For example, life insurance,

marriage-act/.

²²Kanu Sarda, *Same-sex marriage: Know the petitioners for and against the case before Supreme Court*, INDIA TODAY (Apr. 18, 2023, 07:36 AM), <https://www.indiatoday.in/law/story/same-sex-marriage-know-the-petitioners-for-and-against-the-case-before-supreme-court-2361328-2023-04-18>.

²³INDIA CONST. art. 32.

medical insurance, PF, property rights etc are connected by marriage only. Upon which the takeaway observation made by the judge bench was about the absolute concept of man and women which is far more complex and is not decided by their genitals (a concept of assigned sex and gender identity).²⁴

On second day Advocate Rohatgi clarified that just amending Special Marriage Act is not sufficient rather a statement in constitution related to same sex marriage is required and added that SC recognition will play a big part in pushing the society to accept it. Advocate A M Singhvi was another who specified about the rule of 30 day notice period under Section 5 of SMA²⁵ and requested that it must be removed as it brings unwanted hurdles in those special marriages.²⁶

Likewise on day 3rd the main contention was related to the fixation of the minimum age of marriage for same sex couples upon which Singhvi proposed 18 years for lesbians, 21 for gays and for transgender it will apply accordingly upon the gender which they identify with at present. It was requested to use purposive interpretation for statutes in place of literal interpretation because homosexuals were unconsidered when the acts were enacted originally.²⁷

On Fourth day of hearing, another Advocate named Geeta Luthra came in front with her own case of homosexual marriage and declared that her marriage is registered in the USA and requested that it shall be recognised in India also under the Foreign Marriage Act, 1969²⁸. She also added that until the marriage is against International Law it is recognisable under FMA and her case is totally applicable. As well as other advocates like Vindra Grover and Saurabh Kripal added concerns about the violence and discrimination faced by the community because of their orientation. Many couples are already marrying and non-granting of martial rights will be a violation of Article 15²⁹ of the Indian Constitution.³⁰

Fifth day was primarily filled with the arguments by Tushar Mehta which was in opposition of the proposed issue. He specified that the state shouldn't be forced to make laws and it is the duty of the parliament as if the change will be permitted then other statutes will require

²⁴Moyurie Som, *Same-Sex Marriage Hearing Day 1: What Was Said At The Supreme Court On The Legalisation Of Gay Marriages*, Times Special (Apr. 18, 2023, 10:35 PM), <https://epaper.timesgroup.com/timespecial/samesexmarriage/same-sex-marriage-hearing-what-was-said-at-supreme-court-legalisation-gay-marriages/1681833511518>.

²⁵The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (India), § 5.

²⁶Khadija Khan & Aditya Jain, *SC reserves verdict on same sex marriage: Here are the arguments made over 10 days*, THE INDIAN EXPRESS (May 15, 2023, 09:46 AM), <https://indianexpress.com/article/explained/explained-law/sc-same-sex-marriage-here-are-the-arguments-over-10-days-8609177/>.

²⁷*Id.* at 19.

²⁸The Foreign Marriage Act, 1969, No. 33, Acts of Parliament, 1969 (India).

²⁹INDIA CONST. art. 15.

³⁰Khadija Khan & Aditya Jain, *supra* note 19.

amendments too, which only Parliament can do. Mehta argued about the meaning of + in LGBTQIA+ community explaining that it has almost 72 shades and categories included. If every undefined category will ask for recognition then a total of 160 laws will be affected. He also talked about people who don't recognise themselves with any gender and admitted it as mood swings. From the petitioner's side Advocate Katju argued about the matters of succession in case of homosexuals to be the same as heterosexuals.³¹

On the sixth day, Tushar Mehta additionally stretched the point of forbidden relationships like Insect saying that if homosexuals were allowed for marital rights then in upcoming years an individual will come and say that he wants to marry his sister and they both are consenting adults, what will happen then? Upon which the bench responded that even the idea of asking allowance of prohibited marriage is implausible and such autonomy in cases related to marriage is not permissible. Furthermore the Court asked that if they aren't the one to legislate then what are the steps that the government is playing to take in the matter. As it has been 5 years since decriminalisation of 377 and it is a high time that their rights and demands are fixed upon to ensure their equality and security. On which Mehta told that the issues such as insurance, banking, adoptions etc may be looked upon but without granting legal recognition to marital rights. The difference between the idea of transgender and a gay person was also discussed between Mehta and the bench and Mehta stressed on the point of recognition of a wife and a husband in a homosexual relationship as well as the recognition of mother and widow in different cases of inheritance and custody.³²

This was the seventh day of hearing the petitions. The center discussed the formation of a committee which will deal with concerns raised by homosexuals with association to marriage without legalizing it but Advocate Singhvi today argued that the real interpretation of the word Marriage could be done by the Court only and not by any committee or circular and added that though they welcome the solution but it isn't enough. Additionally Mehta said that the petitioner's arguments will be considered by the government as far as it is legally possible.³³

On day eight the Senior Advocate Rakesh Dwivedi pointed out the fact that the concept of every family is dependent on heterosexual union whether it's adoption, surrogacy or IVF and tagged it as a fundamental law of nature. He also added that the concept of marriage is less

³¹Kanu Sarda, *Same-sex marriage hearing Day 5: Centre says only Parliament can decide on equal marriage rights*, INDIA TODAY (Apr. 26, 2023, 08:09 PM), <https://www.indiatoday.in/law/story/same-sex-marriage-hearing-day-5-centre-parliament-equal-marriage-rights-2365051-2023-04-26>.

³²Kanu Sarda, *Same-sex marriage hearing Day 6: SC asks Centre to address social issues of same-sex couples*, INDIA TODAY (Apr. 27, 2023, 08:27 PM), <https://www.indiatoday.in/law/story/same-sex-hearing-day-6-supreme-court-centre-social-issues-same-sex-couples-2365521-2023>.

³³Khadija Khan & Aditya Jain, *supra* note 19.

constitutional and more related to religion, traditions and Sanskaar (human values). Calling marriage a social institution he added that a change into this must be done by the Parliament and not the Supreme Court. Advocate Kapil Sibal argued about the differentiation in class of homosexuals and heterosexuals further pointing out the legislative intent of parliament that they didn't want homosexual rights to be included in the constitution in the first place in 1950. He also included that homosexuals should get something short but meaningful. Another senior Advocate Arvind Datar argued that if SC will make law then power of parliament will be restricted as well as the Special Marriage Act can't be challenged as it is for heterosexual couples. But the bench pointed out that the institution of marriage has evolved since 1950. The law and constitution has broken several traditions which were acceptable like inter caste and religion Marriage etc and summarized the main content of a marriage which were;

- a) Cohabitation choice
- b) Choice of procreation
- c) Concept of matrimonial home
- d) Social acceptance
- e) Degree of physical relationship etc.³⁴

This was the ninth day on which the Additional Solicitor General Aishwarya Bhati appeared on behalf of the National commission for protection of child rights and submitted that the concept of gender is footed unlike the concept of 'mother and motherhood' and added that Procreation is the essentiality of marriage but adoption is exception, not a norm. She indicated that a home of a heterosexual couple would be an ideally fit environment to raise a child. Also, the Center disclosed the state wise survey of a total seven states in which Rajasthan, Assam and Andhra Pradesh were against this plea of seeking legal recognition for homosexual marriage and states like Sikkim, Maharashtra, Many and UP wanted more time to decide. From petitioner's side, Advocate Singhvi suggested that if SMA is to be amended for homosexuals then in matters of conflicts of SMA with other matters like Succession, Custody, Divorce etc; the rules for heterosexual could be applied to homosexuals. But the Bench denied the same stating that in homosexual marriage the identification of wife is impossible so will be the implementation.³⁵

Finally the long session of plea hearing has come to an end and the last day was very essential.

³⁴R. Sai Spandana & Joyston D'Souza, *Plea for Marriage Equality: Constitution Bench Day #8*, SUPREME COURT OBSERVER (May 09, 2023), <https://www.scobserver.in/reports/plea-for-marriage-equality-constitution-bench-day-8/>.

³⁵R. Sai Spandana, *Plea for Marriage Equality Day #9*, SUPREME COURT OBSERVER (May 10, 2023), <https://www.scobserver.in/journal/plea-for-marriage-equality-day-9/>.

Today Advocates Dr. A.M. Singhvi and Raju Ramachandran elucidated that the petitioner's are only asking for the change in provisions of SMA which relates to LBGTQIA+ community and they are not aiming to target any provision which is assigned to protect women. Advocate Saurabh Kripal added that a minimum charge to SMA will work for now and other related issues will be looked upon case by case basis when it arises. Many others reminded that the right to marry is a constitutional right and hence this minority community must not be discriminated against or deprived of that right. Finally Advocate Menaka Guruswamy appeared representing the Delhi Commission for the Protection of Child Rights. She submitted the statement of the Psychiatrist Society which proved that children raised by the people of LBGTQIA+ community showed no negative effects and the argument by NCPCR is unsubstantial. Guruswamy showed the study of psychological and psychiatric organizations of 50 countries who have declared that the children nurtured by the minority community has shown no detrimental effect. Instead they surpass the children raised by heterosexuals in matters of education and academics.³⁶

Judgment: The five judge bench of the Supreme Court has '**Reserved**' its judgment after hearing the ten days petitions related to the legal recognition of same-sex marriage.

VII. CONCLUSION

After scrutinizing all the outline and viewpoints related to homosexuality one thing which is undoubtedly true is, it's never a choice but rather people are born as such. Though the percentage of gene factor, prenatal environmental factor and epigenetic factor related to homosexuality is not fixed but flexible. Again it is definitely established that an individual can never choose to be homosexual. Homosexuals are not considered criminal in total of 134 countries around the globe but the nations allowing same sex marriage is total of 34 in number including the most prominent ones like USA, UK, Norway, Australia, Brazil, Belgium, Netherlands etc.³⁷ Though there are 64 countries left which are still to legalize it. In our nation the hearing on the petitions and request for legalizing same-sex marriage has happened recently. Several points were raised and discussed but the results are still awaited. But it's high time that the judiciary along with the legislature should look into the significance of the matter and provide the minority community with some effective solution. Being a developing nation the least India could do is to protect the freedom and life of the homosexuals against the difficulties

³⁶Ajoy Karpuram & R. Sai Spandana, Plea for Marriage Equality: Constitution Bench Day #10, SUPREME COURT OBSERVER (May 11, 2023), <https://www.scobserver.in/reports/plea-for-marriage-equality-constitution-bench-day-10/>.

³⁷Natasha Singh, *Countries that allow same-sex marriage*, TIMES OF INDIA (Mar. 14, 2023), <https://timesofindia.indiatimes.com/world/rest-of-world/countries-that-legally-allow-same-sex-marriage/photostory/98636202.cms>.

and atrocities of the society.

Today the world has evolved so much with the help of technology, humanity has come so far in bad but mostly good terms. The concept of Liberty, Privacy, Equality and better livelihood is much prevalent. Still it can be noticed exhaustively that the affair of freedom, love and life as whole here is being subjected to inhumane practices like discrimination, cruelty, mental and physical abuse, shaming others, violence, disowning and what not. Since the emergence of humanity they have seen so much in their lives, from being hunter gatherers to being ruled by monarchs and kings and from being captured by other nationalities to being a subject of world wars, battles, civil war and nuclear wars. Though these haven't stopped yet but currently the pure people are living their best life possible. The wars and capturing are less and even most countries are at peace along with people living their lives peacefully, comparatively. Nonetheless now also the members of LGBTQAI+ community are still facing such gruesome acts of civil and criminal wrongs which is very shameful and deplorable. Nobody in this world deserves to face humility and ostracized for their choice of love, partnerships and lifestyle, this basic sense of morality shall have to be cultivated in each individual. They must be accepted for their choice of love because the essence of love was never procreation but it was always about companionship, oneness and sacrifice. Though procreation was counted as an essence of marriage earlier but after seeing it through the scope of freedom and equality, it has also been changed as the choice of partners of the marital relationship as per the judiciary.

What is surprising today is that people do not understand the real sense of the word 'ACCEPTANCE' and the meaning of the simple fact that the degree of acceptance expected by every other person may be different. Homosexuality is no crime neither is a mental disorder. The class of people who believe otherwise definitely owe an explanation in both cases. For those who are believers of God and don't accept homosexuals, have you ever imagined that why the supreme power (God) who is so kind, forgiving and equal towards everyone, will create something like homosexuals to face dishonor in this society from birth? And for those who believe in facts and science, have you ever thought that if something is against the idea of nature and evolution then how is it surviving till date? It's simply as such because it's neither a shameful trait nor unnatural and the only thing which has to be eradicated from civilization is the poor mentality of the people. They aren't the polluters of societal ethics, rather they are born as an individual filled with emotional intelligence and unique talents who are also the promoters of happiness, togetherness, care, family bond and love overall. So it is highly unfair that heterosexual's bond is addressed as 'LOVE' and homosexual's bond is always addressed as 'SEX'. It is clearly pure and highly above that.