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## HOMOSEXUALITY: a tussel between law and morality

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### ABSTRACT

Homosexuality is a hotly debated topic and has gathered huge attention of the people all around the globe. It is sexual attraction or romantic attraction between members of same sex or gender also commonly known as LGBTIQ community. This community has been treated as a taboo as it is against the social beliefs and morals. Despite of various conventions there are still certain countries where homosexuals are not considered to be equal. This has laid to the injustice towards this community as they are being deprived off from selecting their partners and live their life with dignity. However, with the passage of time people are analyzing and acknowledging the existence of a separate gender known as homosexuals or LGBTIQ Community. And in fact, many countries are removing the illegality of LGBTIQ community including India. In 2018, Supreme Court of India in its verdict pronounced that consensual gay sex is no more a crime and abrogated section 377IPC. The judgment acts like a shield or blanket for the protection of LGBTIQ against the harshness and brutality of the society towards them. The reason behind this transformation is the doctrine of equality enshrined in the constitution of India that clearly highlights the fundamental rights to make a choice freely. But still it is observed that the LGBTIQ community is not getting equal status in the society and there are still countries that has termed homosexuality as crime and imposed penalty along with death punishment. Even in India also the laws are still not clear for the rights of the community like rights related to marriage, adoption, etc. This paper broadly highlights the condition and history of LGBTIQ community in India, how they are being tortured and discriminated, also the societal perception towards them and the condition of LGBTIQ community during pandemic. Further it also focuses on sensitization of public and coming generation, as with the contemporary society the young generations are more supportive and understands much better than old generation. The paper also provides some suggestion required to be covered by the government in providing true Independence to the community.

**KEY WORDS:** Homosexuality, Primitive thinking, Mental disorder, Scientific Evidence, Equality, Pandemic situation

## INTRODUCTION

The whole world is a creation of almighty and every person is a child of him no matter what gender. Even in the holy books it is clearly stated that every individual is equally precious and loveable for God. But it is really disappointing to bring up that the society has segregated every individual in terms of gender, sex, race, caste, religion, and place of birth or on other various factors. This discrimination has created an injustice along with inequality towards the weaker section of the society and has violated the rights of an individual. Further, to maintain the harmony and doctrine of equality numerous treaties were signed by the countries such as Universal Declaration of Human Rights (UDHR) was established on 10<sup>th</sup> December 1948 to ensure the protection, rights and freedom given to all human beings. The basic principle is to provide freedom, peace and justice to the human beings<sup>1</sup>. Moreover, India being a member of this declaration has also given the prominence to the concept of equality and justice as enshrined in the constitution of India<sup>2</sup>. Moreover, India being a secular and democratic nation has always made laws for justice, equality along with fairness for the betterment of the society. However, the people in the society have misunderstood the concept of the holy books like Ramayana, Quran, Bible, Jain Agamas and Guru Granth Sahib. The main motive of the books was to guide the people and destroy evil nature activities from the society. In these holy books there is nothing written related to any hatred towards any specific religion or gender. But it really disheartening to say that people have used these books as a weapon to divide the society either in the name of religion or gender like male and female. This separation has created a huge gap and with the time it is widening in the society. Therefore, to remove the discrimination the government along with judiciary is taking all positive and effective steps for the protection of minorities as clearly visible in the LGBTIQ community case.

The discrimination on the basis of gender is examined in the case of LGBT rights community also known as homosexuality. The word “Homosexuality” means that it is a sexual attraction or sexual behavior towards the same sex. It is an “enduring pattern of romantic, emotional or sexual attraction towards people of same sex”. Moreover, their identity is based on those attraction and because of it they are separately identified and generally termed as “LGBTIQ” which stands for Lesbian (women is attracted towards another women), Gay (men is attracted towards another men), Bisexual (attraction towards both male and female), Transgender (gender identity is different from biological sex), Inter-sex (not identified by their genital) and Queer/Questioning (not clear with their gender identity). This community is treated as a single population under umbrella term “LGBTIQ”. Further the community has always been treated as a taboo and had never received the acceptance or courtesy from the society. Rather than getting respect they are harassed by the people for their gender and are advised to maintain silence regarding their gender identity. The actual reason behind this is the primitive thinking of society due to lack of knowledge about homosexuality. According to the reports of the researcher it was observed that people think homosexuality as a psychological disease. Although the Indian Psychiatric Society (IPS) has stated that it is “The time to stop looking homosexuality as mental illness” also there is no scientific evidence that can ensure the sexual orientation can be alter by any treatment<sup>3</sup>. Moreover, the International classification of disease by WHO and American psychiatric association removed homosexuality from the list of psychiatric disorder in 1973 and 1992 respectively. However, the rights and legality of the homosexuality is blur in many countries like, in Singapore the court recently dismissed the appeal to overturn a law that Prohibits gay sex. The presiding judges stated that the ban was important for public sentiments and beliefs. According to the law of Singapore the men found guilty of homosexuality in public or private will be punished with imprisonment for two years. Moreover, the report says that “across much Africa, gay people face persecution, discrimination and potentially even death”. Homosexuality is a capital punishment in Sudan, Northern Nigeria, Mauritania and Southern Somalia. Even in 2019 a man in Iran was hanged after found guilty of same sex relationship with another man. Homosexuality is termed as a crime punishable by death after

<sup>1</sup><https://www.un.org/en/universal-declaration-human-rights/>

<sup>2</sup> Indian constitution Act 1950 Art.14, 19,21

<sup>3</sup>Special correspondent, “homosexuality not an illness: Indian Psychiatric Society”, The Hindu, July 12 2018

the Islamic Revolution in some of the Arab countries. Also, the President of Nigeria Goodluck Johnathan signed the same sex Marriage (Prohibition) Act in 2014 and has also imposed ban on the gay societies, club or organizations supporting the LGBT community and if found guilty then the imprisonment is up to 14 years.

Moreover, Homosexuality was treated as to be an illegal and criminal offence under IPC in India. But with the advancement in the society it was observed that there could be another gender in the society that has not been identified as a legal gender and is brutality treated by the society. Finally, the government has passed the Judgment in favor of them and removed the concept of illegality in case of mutual consent. This battle of equality and legality was successful because of the NGO's who took initiative for providing healthy environment and in fighting against the criminalization of homosexuality. The NGO held that the community is facing several health disparities like physical health issues and behavioral health issues like HIV/AIDS, high rate of breast cancer, anal cancer and HPV infection NGO's such as "The humsafar trust", "Naz Foundation(India) trust" etc. have contributed a lot for the LGBT community. Naz Foundation (India) Trust, a non-governmental organization committed to HIV/AIDS intervention and prevention filed a PIL in the high court challenging sec377 as unconstitutional<sup>4</sup>. Further the High Court decriminalized homosexuality in its verdict by two judge bench but later on Supreme Court in suresh kumar Koushal case overturn the judgment of High Court<sup>5</sup>. Finally, Supreme Court of India in 2018 with five Judge Bench, led by CJI Justice Dipak Misra has pronounced its judgment in the LGBTIQ matter and declared homosexuality as decriminalized and also removed the provision of 377 IPC as it violates the basic feature of constitution<sup>6</sup>. Further, The bench declared 156-year-old tyranny of section 377 of IPC as the colonial-era legislation was unconstitutional, irrational, arbitrary and indefensible. The legality of homosexuality has raised a huge question on the law and morality. Though morality gave raise to law but still there is distinction between law and morality. The difference is law is concerned with the rules that are framed with the relationship of individuals towards each other or society and it varies from society to society where as morality is concerned with individual conscience. Therefore, law is enacted as per the societal needs and believes. But at the same time, it is essential to understand that the society needs to be more aware about the rights of the individuals. However, it is not easy to bring a drastic change in the society as the marriage of same sex and their relation is neither desirable nor natural. Moreover, people have different sentiments and traditions in the society that does not recognize the homosexuality people. Hence, the battle of homosexuality is long and has to still deal with social and psychological thinking of the society then only the time will come when they have their own space in the society.

### **HISTORY OF THE HOMOSEXUALITY**

The concept of homosexuality is not new in India it has been observed in the ancient time also like in the temples of Khanjuroho, the pictures of men displaying their genitals to other male or women erotically embracing each other show the presence of homosexuality. Also, in the Ramayana written by Valmiki has expressed that an incident where Lord Rama's devotee Hanuman has seen rakshasa women kissing another woman. Moreover, in the Ramayana there is a tale of King Dilip, who dies without leaving an heir. He had two wives who made love with each other as ordained by Lord Shiva in their dreams and got blessed with a child, who became famous King Bhagirath. Further, the Mahabharata has also an interesting story of Shikandini, a transgender who defeated and killed Bhishma. Also, according to Matsya Purana Lord Vishnu took the form of an attractive woman, Mohini to trick the demons so that the gods could drink all the Amrut (immortal Juice). Meanwhile Lord Shiva noticed Vishnu in form of Mohini and instantly fell for her and their union gave birth to Lord Ayyappa<sup>7</sup>.

<sup>4</sup>Naz Foundation v.s Government of NCT Delhi &ors. 160 Delhi law times 277

<sup>5</sup>Suresh kumarKoushalv.sNaz Foundation &ors. civil appeal no. 10972 of 2013

<sup>6</sup>Navtej Singh Johar & Orsv.s Union of India thr. Secretary Ministry of Law and Justice W.P. (Crl.) no. 76 of 2016

<sup>7</sup>India Today Web Desk, "Homosexuality in ancient India:10 instances", India Today, July 10 2018

The khajuraho town of central state of Madhya Pradesh has the temples built between 950 AD and 1050 AD by Chandela Dynasty. The erotic scripture depicts the homosexuality and similar is observed in the 13<sup>th</sup> century Sun Temple in konark in the eastern state of Orrisa. Also, another scripture, the Narada Purana the Mythologist Devdutt Patnaik also explained the presence and acceptance of homosexuality in Hindusim. AlauddinKhilji's son Mubarak has a relationship with one of the noble men in his court also Babur, founder of Mughal Dynasty wrote about his love for men named Baburi.

According to historian that outlook about homosexuality started with British Raj and after Independence it became stronger also it was believed that criminalization of homosexuality is a foreign concept. It has been observed that India too have a history on homosexuality.

### **LAW VERUS MORALITY**

Same-sex relationship is recognized as unnatural relationship by the society and is against the morals. It was been noticed that despite of living in a democratic country homosexual people are really not secured and have to undergo through several harshness of the society. Even today in most of the countries the government is not taking proactive measures to remove homophobia from the society. This has led to the separation of society into heterosexual and homosexual. It completely true that the society has always accepted a marriage of two different sexes like male with female but has never thought same gender together. And that is the reason the society has performed various brutal acts towards the homosexuals. But finally, in 2018 Supreme Court of India has pronounced its verdict in favor of homosexuality and abrogated sec377. This step of Court has been supported by various personalities and educated citizens but at the same time it has faced several disappointments from the sides of various religion and society. According to the Jamaat-e-Islami homosexuality is against the nature and morality. Also, it can destroy the family system and can prevent the natural evolution of human race. Though Jamaat firmly believes in the fundamental rights and is a strong advocate of rights of minorities but at the same time with freedom, a moral responsibility comes up and no society can accept the crime<sup>8</sup>. Further it stated that the abrogation of Sec.377 will have a cascading effect on the personal Laws of various religions. Also, the All India Muslim Personal Law Board has expressed its opinion on homosexuality as against the Indian values and culture also no religion allows immorality. Moreover, the government needs to pass a bill for the protection of rights of women as they are the major victims of legalized homosexuality. According to Rashtriya Swayamsevak Sangh the verdict of Supreme Court on consensual homosexual relation in private is not a crime. But it doesn't mean that it approves homosexuality, as it is against the nature and social beliefs.

Decriminalization of homosexuality is legally correct as they also need equal status and rights in the eyes of law. Even chief Justice of India (CJI) Dipak Misra quoted Goethe's, "I am what I am, so take me as I am"<sup>9</sup> and with it abrogated sec 377IPC as it is unconstitutional and violates fundament rights of the LGBTIQ community. According to the kannada writer and LGBTQ activist Vasudhendra and author of Mohanaswamy, a collection of short gay stories called the Supreme court verdict a phenomenal one. He further added that "for me, the British rule has finally ended and in true sense the independence has achieved". Though law and morality are not much different and are similar in many ways like both set the standard behavior in society and often overlap. But still there are certain difference between moral and law like morals are not enshrined in laws also moral obligations are much harsher to omit. And because of the difference sometime law goes against the morality as nothing in the country is above the law and also the basic structure of constitution should not be violated.

Hence though homosexuality is against the morality and beliefs of the society but in the eyes of law the doctrine of equity and liberty are the basic fundamental right guaranteed under the constitution of India. So, decriminalization of homosexuality is legally correct and essential for the LGBTQ community so that they can also live their life with dignity.

<sup>8</sup>The Hindu Net Desk, "Reaction to section 377 verdict Jamaat-e-Islami Hind expresses dismay, The Hindu, September 8 2018

<sup>9</sup> TP Nijeesh, "Homosexuality is a psychological disorder", Times of India, September 7 2019

## **SOCIETAL PERCEPTION TOWARDS HOMOSEXUALITY**

Law and society both are the two different sides of the same coin. Laws are the source to maintain harmony by regulating and framing rules to govern the society. It has been observed that there has been a dynamic change in the society in last few years. But at the same time, it is correctly pointed out that LGBT community is still depriving from their rights that are enjoyed by other section of the society and has still not given legal representation. Same sex marriage or relationship have always faced embarrassment in the society and are segregated from the other members. This has created a huge injustice and discrimination towards the homosexuality and has breakdown their confidence. Moreover, generally people take homosexuality as a psychological disease however the psychiatric experts completely denied it. This lack of awareness has created a huddle in the life of LGBT people and as forbidden them from the use of their fundamental rights. It not only violates the legal rights of people but creates problem for them to identify their sex and if they identify then they are suppressed by their families. The problem with the society is that they are unable to understand the concept of equality and also because of their primitive thinking they try to ignore same sex relationship. This problem of taking homosexuality as a crime is in both developing and developed countries such as China, Singapore and so on.... Though the countries are making changes in the law like India for the LGBT community but it is experienced that society is still not ready to accept the changes as according to them it is against the social values and beliefs. Also, this society as always imagined heterosexual relationships and not homosexual that is again a huddle for the community.

The brutal nature of the society towards the homosexuality has made their life complicated and because of their gender. Also, in most of the case if the family got to know about their gender they are killed and undergo through several injuries. Moreover because of homophobic law brought up the colonial government it was observed that the life of LGBT community a rollercoaster of controversy. Although the law commission of India in the 172<sup>nd</sup> report recommended the deletion of sec377 but it was observed that Parliament has not considered it appropriate to delete or to make amendment<sup>10</sup>.

The reason behind the denial of the government is that the society is not ready to recognize them and can create disharmony in the society.

## **WE TOO HAVE RIGHT TO LIVE “LIFE WITH DIGNITY”**

India is a democratic country and every citizen has equal rights proclaimed by the constitution. Constitution of India is weapon given to each citizen and non-citizen to ensure their rights and protect them from its violation. Also, there are numerous provisions and law is framed for the protection of minorities against any form of discrimination. These laws are amended as per the needs and changing in society as observed in LGBT case. The Supreme Court of India decriminalized homosexuality as it violates the right to equality and right to live life with dignity. However, the court held that section 377 will apply “unnatural sexual act” like sexual acts without consent and bestiality will continue to be the crime under this section. The Bench of five Judges passed a concurring opinion and declared 156-year-old provision as unconstitutional. According to Justice D.Y Chandrachud section 377 is “Macaulay’s legacy” that continued for 68 years despite a liberal constitution and this is because of manifest lethargy of lawmakers. Further he also stated that it is difficult right which is shown wrong by History but decriminalizing homosexuality is a first step for the people who want life with dignity. Moreover, the citizen cannot be pushed into obscurity by the colonial law and they have full right to choose their partner. Even CJI Dipak Misra also stated that the community needs the rainbow of hope for the sake of humanity. They should be allowed to live their life with dignity and without pretense about their identity. This verdict is a beginning of a journey towards equality, liberty and dignity<sup>11</sup>.

<sup>10</sup>Dhananjay Mahapatra, “Supreme court makes homosexuality a crime again”, Times of India, December 12 2013

<sup>11</sup>Krishnadas Rajagopal, “SC decriminalizes homosexuality, says history owes LGBTQ community an apology, The Hindu, September 6 2018

Justice Rohinton F. Nariman in his separate opinion stated that they are entitled to be treated as human being and must be allowed to imbibe the spirit of fraternity. Further Justice Indu Malhotra, the lone women judge on the constitution Bench said that “History owes an apology”.

Hence, it is important to understand that these people too deserve the right to live their life with dignity. The community doesn't require the sympathy of the society but the equality. So for that is urgent to stop the discrimination that is generally faced by the LGBT community.

### **HOMOSEXUALITY IS NOT A DISEASE**

Homosexuality is a hotly debated topic that has created a huge change in the society in 2018 after the verdict of Supreme Court of India. The court has put an end to the criminalization of homosexuality performed with mutual consent. Though there is no point of doubt that the same sex people have never gained the equality and dignity amongst the other people in the society. They have been humiliated for their identity and generally people treat homosexuality as a disease that can be cured by the medical treatment and because of this lack of proper knowledge people take homosexuality in wrong a manner. According to the Indian Psychiatric Society (IPS) “it is time to stop looking homosexuality as a mental illness”. Further any attempt to alter homosexuality by any treatment may lead to low self-esteem and stigmatization. It is an urgent call for the society to understand that homosexuality has no link with psychiatric disorder and should recognize same sex as a normal variant of human sexuality. Moreover, there is no scientific evidence to prove homosexuality as a disease but because of primitive thinking, the society is continuously trying to prove it as a disease. Further, Justice Chandrachud while giving his judgment in LGBT case has clearly stated that medical science should stop to being a party to the stigmatization of homosexuality by trying to cure something that cannot be termed a disease. Their act will not only create confusion but also affects the LGBT community. However, the younger people across the globe are showing more acceptances towards homosexuality than the older people. It is delightful to announce that India is moving towards moral liberal values by providing this community equal and fair chance to live their life. But at the same time, it is observed that homosexuality is still unaccepted in the society and various countries have ban homosexuality by imposing death penalty.

Further it has been discovered that people are not aware about the difference between sex and gender. Sex is basically based on biological characteristic of male or female as indicated by chromosomes, hormones, genitals and gonad whereas gender refers to the continuum of complex psychosocial self-perception, expectation that describes the psychological sense of their gender that may or may not correspondent to the sex assigned at birth like transgender people are those whose gender identity, expression or role doesn't align to the culturally associated with their sex assigned at birth. Also, it is correct that educating the people about transgender or LGBT community is too late for those who never heard or experience it. But then with the rapid increase in modernization it is essential to understand the concept of liberty and the use of knowledge to support LGBT community by treating them equally.

### **IMPACT OF COVID ON LGBTQ COMMUNITY**

After two years of Supreme Court judgment on decriminalization of LGBTIQ community it was observed that there is an increase in threat. According to Humsafar Trust stated that the messages and email from the other parts of the country shows two things – one related to blackmailing and violence and other is related lack of acceptance that is leading to harassment and violence by both within the family and in the society. The helpline is receiving numerous complaints based on intimate partner violence among same sex couples. Moreover, there is a need to include diverse sexual and gender identities through specific provisions under the Act. Pandemic has imposed a huge challenge for LGBTIQ people at their home and also under go through violence after the family came to known about their gender identity. According to Yashwinder Singh, the reporting of cases has been observed earlier around 300 cases were received in a year but in between September in 2018 around 1002 calls received out of the total, 340cases related to discrimination in healthcare

facilities by family, landlord and workplace. Also, around 270 cases were about the violence and harassment faced at the hands of family, partner, police, workplace and friends. Further 180 calls are based on blackmailing and 92 on extortion also 23 cases are related to revenge “outing” on social media<sup>12</sup>.

### **SENSITIZATION: NEED FOR SOCIETAL GROWTH**

Despite of decriminalizing homosexuality by the Supreme Court of India people are not satisfied with the verdict and showed their dismay on it. According to the all India Muslim Personal Law Board, legalizing homosexuality is against the values, culture and morality of India. Also, the Jamaat-e-Islami Hind (JIH) has expressed its disappointment and dismayed over the verdict of the court on legalizing homosexual behavior between the two consenting adults and overturned the High court judgment. He also added that decriminalizing homosexuality and permitting the same sex marriage will destroy the family system and will prevent the natural evolution and progress of human race. However, there are millions of people who are supporting the verdict of Supreme Court as it has given a hope to the fighters in achieving justice and equality. Moreover, they have to still fight for various rights like marriage, adoption and inheritance that are not yet given. According to the Amnesty International India stated that the court’s unanimous verdict has upheld the right to equality and liberty for all the people regardless of their sexual orientation<sup>13</sup>.

Further, the Society plays an important role in the life of every individual also the laws are created keeping in mind the sentiments and beliefs of the society. Hence it is very much in need to generate sensitization in the society related to homosexuality. As there are many people in the society who are not able to distinguish homosexuality from mental illness. Moreover, it is important for the people to understand the difference between sex and gender. When we talk about sex it is related to the biological but for gender it is different from biological sex. Therefore, it should be the duty of the government along with NGOs to spread However, it not easy to bring a change in the moral society.

### **SUGGESTION**

Homosexuality is a not a stigma for any society they are equally important as the other genders are. After going through my thorough research on homosexuality I really wish to suggest some proactive steps that the government and NGOs should implement in providing true justice to them. It is necessary for the government to spread sensitization on sex and gender more over people should not feel ashamed of being homosexual. Also, parents should understand the situation of their child and support them to come up with their dignity. Further the parliament should enact some laws for them and also it should be the duty of the police to properly investigate the matter related homosexuality. And that can be only possible through mandatory reporting and keeping a track over the crimes against LGBTIQ community. Hence it is essential for legislation, execution and judiciary to take more steps towards the development of LGBT people.

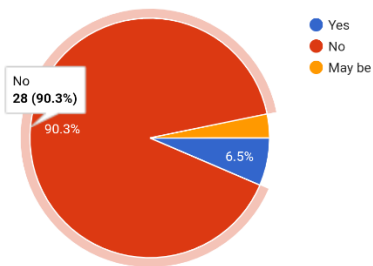
Further, I have prepared a questionnaire answered by the people regarding their opinion on this judgement and on the homosexuality.

<sup>12</sup> Ambika Pandit, “More calls to report threats to LGBTQI since Sec 377 decriminalisation, show data, Time of India, September 6 2020

<sup>13</sup>The Hindu Net Desk, “Reaction to section 377 verdict Jamaat-e- Islami Hind expresses dismay, The Hindu, September 8 2018

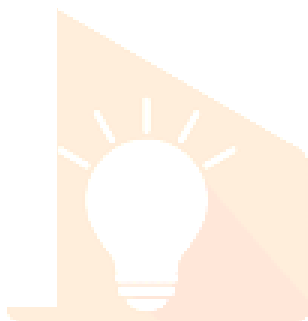
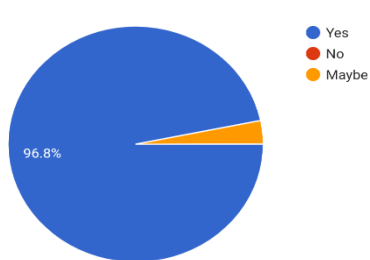
Do you think LGBTIQ as a psychiatric disorder?

31 responses



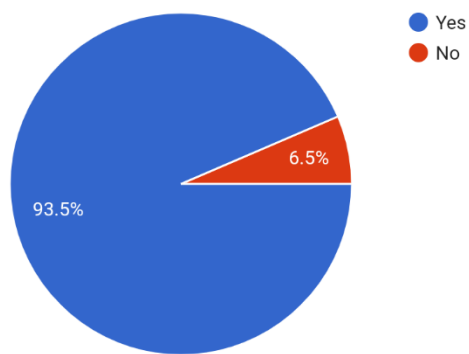
Does LGBTQ community has the right to live with dignity in the society?

31 responses



Do you support the judgement of Supreme Court to decriminalize se...n mutual consent cases ?

31 responses

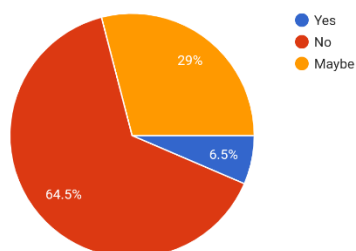


Do you support the judgement of supreme court to decriminalize sec 377IPC mutual consent cases\*\*\*



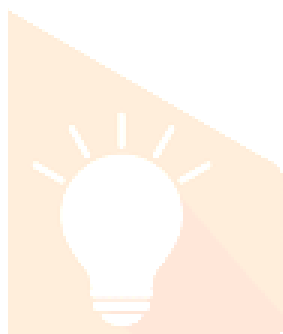
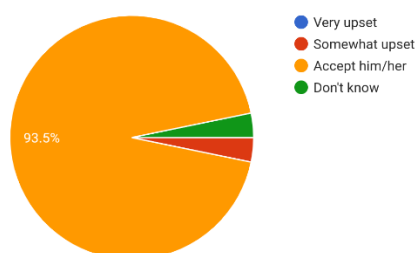
In reality do you think that the society is accepting LGBTQ or same sex marriage?

31 responses



what would be your reaction if your close friend told you if he/she is a gay or lesbian?

31 responses



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