

**“A Socio-Legal Analysis of Same Sex Marriages in India- Prospects and Challenges”**

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By  
**Gaurav Mittal**  
(SAP ID-500071982)

**GUIDE**

**Dr. Balwinder Singh**  
(Associate Professor)



**Department of Law**  
**School of Law (SOL)**

**UPES**

**Dehradun- 248007: Uttarakhand**

**NOVEMBER-2023**

## Declaration

I declare that the thesis entitled "A socio-legal analysis of same sex marriages in India: Prospects and challenges" has been prepared by me under the guidance of **Dr Balwinder Singh, Associate Professor, School of Law, UPES**. No part of this thesis has formed the basis for the award of any degree or fellowship previously.

Gaurav Mittal

Scholar Name- Gaurav Mittal (SAP ID- 500071982)

School of Law (SOL)

UPES.

Dehradun-248007, Uttarakhand

Date: 21-11-2023

**Certificate**

I certify that **Gaurav Mittal** has prepared his thesis entitled “**A socio-legal analysis of same sex marriages in India: Prospects and challenges**”, for the award of PhD degree of the UPES, under my guidance. He has carried out the work at School of Law, UPES.

*B. Singh*

**Dr Balwinder Singh**

**School of Law (SOL)**

**UPES.**

**Dehradun -248007, Uttarakhand**

**Date: 21.11.2023**

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**Gaurav Mittal**

# **“A Socio-Legal Analysis of Same Sex Marriages in India- Prospects and Challenges”**

## **ABSTRACT**

The social and legal implications of same-sex marriages have been the topic of intense study and controversy around the world. The subject of whether to legally recognize and authorize marriages between people of the same gender has been debated even in India, a country famed for its rich and varied cultural and social fabric. Researching the background, the evolution of the law, public opinion, and the consequences of possible legalization are all essential parts of a socio-legal analysis of same-sex marriages in India. This thesis aims to do just that, go deeply into these dimensions, and hopefully shed some light on the topic's inherent complexities.

## **Historic Context**

The rich history of gender and sexual diversity in India is reflected in the prevalence of depictions and references to same-sex relationships in both ancient literature and art. However, Indian law and perspective on homosexuality were greatly influenced by Victorian era British morality during the time of British colonial authority. Section 377 of the Indian Penal Code, which was introduced in 1860, criminalizes “unnatural offences,” which includes homosexual behaviour. For many years, the LGBTQ+ community struggled under the weight of this colonial past, which affected their legal protections and social acceptance.

## **Recent Advances in the Law**

There have been several watershed moments in India's legal system's march toward full recognition of LGBTQ+ rights. Consenting homosexual behaviour between adults was decriminalized in a landmark 2009 judgement by the Delhi High Court in the Naz Foundation case. This ruling was a win for LGBTQ+ rights and a step in the right direction for how we talk about these topics in our culture. However, the Supreme Court ultimately decided to reinstate Section 377 in 2013, which was a big setback for advocates and campaigners.

In the 2018 case of Navtej Singh Johar, the Supreme Court ruled that Section 377 was unconstitutional and subsequently knocked it down. This decision, which upheld the worth and rights of the LGBTQ+ community, was a landmark in more ways than one. The issue of same-sex marriages was not solved by the legalization of homosexuality, even though this was a great stride forward.

## **Attitudes within Society**

Marriages between those of the same gender face a complicated and ever-changing social climate in India. An attitude that is resistant to change can develop, especially in older generations, when people stick to traditional beliefs and conservative habits. Attitudes are

shaped in large part by factors such as religious upbringing, socioeconomic status, and family structure. However, there has been a noticeable shift, especially among young people and in urban regions, toward a more accepting and inclusive attitude toward those of different backgrounds.

Education, the media, and international discussion have all played a role in shaping these new perspectives. The Indian film industry, known as Bollywood, has been praised for its progressive portrayal of LGBTQ+ characters and topics. Social media has given members of the LGBTQ+ community and their allies a voice, making it simpler to have dialogues that test long-held beliefs and assumptions.

### **The Implications of Making Marriages Between People of the Same Gender Legal**

In India, making same-sex marriages legal would have substantial repercussions, which would touch on many different elements of law and culture, including the following:

**Legal Rights and Protections:** Marital partners are granted legal recognition and protections through the institution of marriage. These rights and protections include inheritance rights, the ability to make medical decisions together, and spousal benefits. If gay marriage were made legal, members of the LGBTQ+ community would have the same legal protections as heterosexual spouses. The legal acknowledgment of LGBTQ+ relationships and identities would contribute to the social acceptance of these types of relationships and identities. It would convey a clear signal that the state honours and respects all different kinds of love and friendship, which is an important message to express.

Concerning the family and the children, same-sex couples frequently have difficulties in issues pertaining to adoption, surrogacy, and child custody. Through legalization, families and their children would experience greater stability, which would protect both their rights and their future.

**Economic Benefits** Marriage can result in several financial advantages, including joint ownership of property, reduced, or eliminated tax obligations, and increased inheritance rights. It would be beneficial to couples' financial stability to extend these benefits to those of the same sexual orientation.

**Concerns Regarding Culture and Religion** The legalization of marriages between people of the same gender could be interpreted as being in opposition to several aspects of culture and religion. It would be a difficult undertaking to strike a balance between the rights of individuals and the sensitivities of different cultures.

The introduction of a legal framework for marriages between people of the same gender would involve revisions to a few different laws, such as those pertaining to family law, inheritance law, and adoption law, to make such laws both inclusive and comprehensive.

**The Obstacles That Wait:** Even after legalization, societal prejudices would not disappear immediately. Individuals who identify as LGBTQ+ may still experience discrimination and hostility from their relatives and communities. It would be important to make ongoing efforts to educate and increase awareness of the situation.

### **Concluding remarks**

The socio-legal analysis of same-sex marriages in India sheds light on the complex relationship that exists between India's history, legal system, cultural norms, and societal attitudes. The transition from criminalization to decriminalization has been a monumental triumph, but the fight for full recognition is not over yet. If weddings between people of the same gender were made legal, it would represent a significant step toward equality, bringing LGBTQ+ people on par with heterosexual couples in terms of the rights, protections, and social acceptance they enjoy. Even though difficulties still exist, changing attitudes and a spirit of inclusiveness point to a potentially fruitful way forward. India is in a position where it can seize the chance to celebrate variety while also upholding the principles of justice and equality for all people.

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## List of Abbreviations

APA: American Psychiatric Association

CHRO: Chief Human Resource Officers

DSM: Diagnostic and Statistical Manual

FBI: Federal Bureau of Investigation

HC: High Court

HR: Human Resource

IPC: Indian Penal Code

KRA: Key Result Area

LGB: Lesbian, Gay, Bisexual

LGBT: Lesbian, Gay, Bisexual, Transgender

LGBTQ: Lesbian, Gay, Bisexual, Transgender, Queer

LGBTIQA: Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual, Allies LGBTQ+:  
Lesbian, Gay, Bisexual, Transgender, all other queer/non-normative identities MSM: Men who  
have sex with men.

NALSA: National Legal Services Authority

NGO: Non-governmental organisation

OHCHR: United Nations High Commissioner for Human Rights

SC: Supreme Court

STEM: Science, Technology, Engineering, and Mathematics

TISS: Tata Institute of Social Sciences

THTS: Telangana Hijra Transgender Samiti UN: United Nations

US: United States

ABVA: AIDS Bhedbhav Virodhi Andolan

AGS: Attitude to Gay Sexuality

AGSS: Attitude to Gay Sexuality Scale

AIDS: Acquired Immune Deficiency Syndrome

CSW: Community Based Organization

DSM: Diagnostic and Statistical Manual of Mental Disorders

GLSEN: Gay Lesbian School Education Network

GOI: Government of India

GSA: Gay Straight Alliance

HIF: Homosexual Identity Formation

HIV: Human Immunodeficiency Virus

HST: The Humsafar Trust

LGBT: Lesbian Gay Bisexual Transgender

MSM: Men who have Sex with Men

PIL: Public Interest Litigation

QAM: Queer Azaadi March

SOD: Sexual Orientation Disturbance

STI: Sexually Transmitted Diseases

TG: Transgender



## **Chapter 1**

### **Marriage As An Institution**

#### **1.0. Introduction**

Marriage benefits society uniquely because it is the bedrock of the family and the fundamental building block of society. It gives human connections enormous solidity and meaning. It continues to be the optimum environment for child rearing. It is critical for passing on culture and civilization to future generations. Marriage is not only a private transaction, but a significant social institution which, establishes the relationship between man and woman. "An animal reproduces, but a man marries." That is, mating is a biological process, whereas marriage is a social and cultural one. Marriage entails a ceremony that persons entering a partnership must perform. Throughout history and throughout the world, every human culture has viewed marriage as critical to the society's welfare. Marriage is a fundamental institution in contemporary culture. The prehistoric human society was nomadic. Before the dawn of civilization, there may have been just a herd-instinct form of marital bond. With time, nomadic humans changed into agricultural societies, and it became vital to determine the paternity of infants. If the sex interaction remained unregulated, the only thing that could be known was maternity. The paternity of the child could not be established. It is plausible to assume that at some point during human growth, a need for delineating possession and ownership of material possessions evolved as a natural result of human conduct, and the human male was overcome with the desire to know his children. This would not have been conceivable if sexual promiscuity remained the norm. Only when the sex relationship could be transformed into an exclusive union between one man and one woman was it possible to establish paternity for offspring. Thus, it appears as though the seeds of paternity are sown in man's attempt to determine the paternity of infants of the marriage institution(Özyiğit, 2017, pp. 680–685)

Marriage is also significant from an individual standpoint. For lawful sexual relations provide him or her with the maximum amount of physical fulfilment and mutual peace. Sexual desire is normal, and there should be natural and simple ways to satiate it. Marriage enables this. However, marriage is not merely a relationship between a man and a woman for the purpose

of legalising desire. Additionally, it is a relationship between parents and children that is geared on preserving and strengthening the community. If it had been a private rather than a social affair. It would not have been prioritised in human customs and laws. Marriage is the most fundamental of all social institutions; it is the one that protects and refills the life stream. The history of human society is nothing more than the evolution and spread of diverse institutions aimed at the perpetuation, preservation, and survival of society. Marriage is a unique institution within the domain of institutions. It is this institution responsible for the perpetuation of human civilization through the control of conjugal and filial ties. Marriage is an institution that predates the creation of the planet. Since time immemorial, it has taken many forms as a social institution in various societies(Ahuja Ram, 1992)

### **1.1. Definitions of Marriage**

Marriage is one of the most important institutions of human society. It has been variously defined by sociologists as well as by legal luminaries. Westermarck has defined marriage as a durable connection between male and female, lasting beyond the mere act of propagation till after the birth of the offspring. In *The Future of Marriage in Western Civilization* (1936), he rejected his earlier definition, instead provisionally defining marriage as "a relation of one or more men to one or more women that is recognized by custom or law"(Edward Westermarck, 1909).

George A. Lundberg defined marriage as a set of rules and regulations, which define the rights, duties and privileges of the husband and wife with respect to each other(GEORGE A. LUNDBERG et al., 1958). According to sociologist Mazumdar, "marriage is a socially sanctioned union of male and female for the purpose of establishing (a) household (b) entering into sex relations (c) procreating and (d) providing care for the offspring"(Sameena Banu, 2018). According to J.D.M. Derrett, "marriage sometimes signifies the ceremony or event by means of which the common intention of a man and a woman to marry is publicly contracted, acknowledged & announced, sometimes the status or estate or state of affairs which prevails when, after undergoing or partaking in the public acknowledgement or announcement, the parties acquire and continue in the condition of having married each other(Derrett, 2019.)

B.P. Beri while explaining the object of marriage says that it is the source of every domestic comfort from infancy to old age; it is necessary for the preservation and well-being of our

species; it awakens and develops the best feelings of our nature; it is the source of important legal rights and obligations and in its higher forms it has tended to raise the weaker half of human race from a state of humiliating servitude.(shafi Shazia, 2021)

The Hon'ble Supreme Court of India (*Shobha Rani vs Madhukar Reddi on 12 November, 1987*) (1988 SCR (1)1010) has held that the relationship in marriage is love, affection, care and concern between the two spouses. Marriage is a matter of status and legal consequences of a marriage affect not just the two parties but also innocent third parties—children. Therefore, matrimonial adjudication law tends to touch the domain of human rights. No institution in society more efficiently transmits the core values of civil society than marriage, especially when it is reinforced by church and other institutions. Having and raising children within the bounds of marriage is a powerful protection against poverty and welfare dependency. Research by The Heritage Foundation demonstrates that two-thirds of children living in poverty today would be lifted above the poverty line immediately if their mother married their father. The benefits of marriage are enormous and transcend the purely economic(Robert, 2012, pp. 1–19).

Research begun at The Heritage Foundation and recently updated at Family Research Council underscores the benefits the public derives from marriage in terms of higher educational attainment, reduced sexual activity and pregnancy outside of marriage, lower crime rates, increased personal happiness, and many other social goods. Marriage has "more to do with the morals and civilization of a people than any other institution"(Robert, 2012, pp. 1–19).

*"When men and women fail to form stable marriages, the result is a vast expansion of government attempts to cope with the terrible social needs that result. There is scarcely a dollar that the state and federal government spends on social programs that is not driven, in large part, by family fragmentation: crime, poverty, drug abuse, teen pregnancy, school failure, mental and physical health problems"- Maggie Gallagher*

## **1.2. Concept of Marriage under Different Personal Laws**

Marriage among Hindus is one of the sixteen Sanskar – a sacrament, indissoluble union of flesh with flesh, bone with bone, to be continued over in the next world. It is thought to be a '*janam–janmantar ka bandhan*' viz. the marital tie once created is supposed to continue throughout life i.e., in this world and it could not be broken on any pretext, excuse or grounds. Sanskar literally means impressions gathered during life but in Hindu tradition, it means the value system.

Sanskar comprise values imbibed since birth enabling one to deal skilfully and wisely with any type of relationship and situations that one comes across in life. These are a combination of value system, social skills and inherent traits that help in the development of one's character. Manu, the seer, who is regarded as the expounder of Hindu Law, explains the thesis of the sacred relationship of marriage: 'Let mutual fidelity continue until death'. This may be considered the summation of the highest law for husband and wife (Pratishtha Yadav, 2018, pp. 406–411).

Hindus have attempted to idealise and sanctify the institution of marriage, conjugal loyalty is regarded as a woman's ultimate virtue, and it is this quality that has safeguarded the Hindu race and religion throughout history. The purity of the soil and seed—the sperm and ovum—alone adds to the purity of a race, and it is with this aim in mind that our scriptures place such a premium on women's chastity and fidelity. Thus, marriage—a form of man-woman relationship as a responsible one-to-one unit of society—evolved into a distinct human family system. Its fundamental components were sexual relations, child procreation, and cohabitation with mutual obligations and responsibilities for the care of offspring. The traditional Hindu family was an institution, a joint family system, defined by the proximity of parents, grandparents, sons and daughters, their wives, and even uncles and aunts. Each member of the family had a separate identity and was aware of his or her ancestors. Marriage establishes women's respectability, promotes their own pleasure and welfare, and provides family support and companionship. (Borah Liza, 2018)

Muslim Marriage unlike Hindu marriage, where proper ceremonies are sine qua non of valid marriage, no special marriage ceremony is prescribed under Muslim Law except a religious discourse by a Qazi. However, in Muslim society, a marriage proposal by the male and its acceptance by the female is necessary for a valid (Sahih) marriage. According to Paras Diwan from the concept that a Muslim marriage is a civil contract, flows another notion of Muslim law, namely, that for a Muslim marriage no elaborate ceremonies or religious rites are prescribed. The only essential requirement of form is that a contract of marriage must come into existence. The Prophet of Islam is reported to have said, "Marriage is my Sunna and those who do not follow this way of life are not my followers and there is no mockery in Islam". Muslim marriage is potentially a polygamous marriage as the husband is allowed to have up to

four wives, as polygamy is a part of personal law of the Muslims.(Abhishek Kumar Pandey, 2015)

Jainism rejected the sacramental notion of marriage but accepted many of the marriage customs of the Hindus that is how intermarriage between the Hindus and Jains slowly came into practice. In Sikhism, too, marriage is a sacramental bond for life. The concept of eternal marital bond has an echo in Gurbani "*Nanak Satgur Tinaah Milaya Jinnah Dhuron Paya Sanjog*", meaning thereby that it is with God's grace that the marital bond is created from the very beginning of life. Buddhist marriage is a simple ceremony, and it is purely a social contract. According to Buddhist law, as soon as the girl attains the age of 20 years, she has the privilege of an independent choice of husband. The Buddhists have no inhibitions regarding caste or consanguinity. Divorce by mutual consent is permissible(Singh, 1999).

There is a fundamental difference between the nature & character of the Buddhist view of marriage. Buddhists considers marriage a secular affair and as such, it is not considered a sacrament. Buddhists are expected to follow the civil laws regarding marriage laid out by their respective governments. Whereas, Hindus and Muslims consider marriage, as in the former case it as sacramental union and in the later cases as purely a contractual union. Christian Marriages are just as sacrosanct and binding as any Hindu marriage. Marriage vows conducted in the church by a priest are equally as serious and meaningful as a marriage around the fire in a Hindu Vedic ceremony. Both are legally contractual. One can get married in a church or in a registry office. The priest in a church is authorized to legalize the marriage but all marriages must be registered. Non-Christians can get married at their own places of worship, but the marriage must be preceded by a civil ceremony where the official registrar is present to legalize the marriage. Church does not condone divorce but remarriage after divorce is normal practice.(Pratishtha Yadav, 2018)

According to Cheshire the form of marriage recognized by English law is generally described as a "Christian Marriage". Here the reference to religion is misleading. Whatever may be the religion of the parties or of the country in which they marry, their union is a marriage in the English sense provided that, in the eyes of the relevant law, it possesses two attributes of indefinite duration and the exclusion of all other persons. The English matrimonial law was adapted to the Christian marriage. Under the English domestic law marriage is defined as a voluntary union for life between one man and one woman to the exclusion of all others. English

courts have adopted this very concept of marriage to the conflict of law cases, which has come in conflict with respect to polygamous marriages under different personal laws of the marrying parties.(Pratishtha Yadav, 2018)

### **1.3. Significance of Marriage**

Every religious tradition and culture emphasise the importance of marriage as a responsible adult act with social and spiritual implications. Even in a society where celibacy is regarded as a religious virtue, it is assumed that one must first experience marriage and parenthood before becoming a celibate ascetic. Without the other, neither man nor woman is considered complete(William Little, 2012). In the macrocosm, the sacred essence is referred to as Purusha (the male), while the cosmic force is referred to as Prakriti or Shakti (the feminine). It is the primary rite that prepares a man or woman for life. It is intended to strengthen the link between two persons. Marriage expresses the partners' loving connection and serves as a means of population on the earth and child rearing.

*"Marriage is the mother of the world it sustains kingdoms and populates towns, churches, and even Heaven itself." It is to that situation that God has fashioned the world's current constitution"- Jeremy Taylor*

Marriages that are strong and secure are the best approach to ensure that children grow up to be responsible members of society. It benefits men and women's health and lifespan; it provides access to a more active and satisfying married life; it raises money and assets; it increases children's chances of success; and it improves men's work performance and earnings. When an institution is abolished entirely, numerous negative consequences ensue. It is not only the union of two people its success or failure has an equal impact on society. When a family disintegrates, the community suffers because the children of such a family are more likely to become delinquents. On the contrary, when a family is strong, the entire community benefits. Each child who leaves a stable, happy household is a blessing to the community, able to contribute rather than being a drain on it. A family is simply a support structure, a group of people who live in proximity and create a permanent alliance. Because most human beings cannot survive without assistance, when they leave one alliance, they attempt to join another. Marriage has traditionally been viewed as the defining element of all types of human society. It establishes

the social structure. It is one of the most vital social institutions in all the world's societies. There is no more significant family occasion than a wedding, conjuring every potential social obligation, kindred link, traditional value, passionate sentiment, and economic resource.

According to MacIver and Page, the family has no genesis in the sense that there has never been a period of human life during which the family was gone and then reappeared. It is largely a partnership between a man and a woman that is recognised by tradition and law and has rights and responsibilities for both parties to the union. According to Hindu mythology, the creation of male and female is not an accident or an afterthought, but the pinnacle of God's creative activity. Additionally, the sexual matching of male and female action is the creative process's peak. To reject the existence of two sexes is to deny a necessary component of God's final creating process.(William Little, 2012)

The significance of marriage is more important than any other institution one can build in this life, as it affects not only the individual's pleasure, but also the happiness of others. It has been decreed to safeguard society against filthy and immoral activities on the one hand, and to ensure the chain of society's continuation on the other. Marriage is defined by its intrinsic features of intimacy, companionship, procreation, and parenting. Marriage is not merely a celebration or an outpouring of affection. It is the most fundamental and universal institution in the world - the bedrock upon which families are built and societies perpetuate themselves. When procreation and parenting are divorced from the notion of marriage, society suffers. Because marriage links the two halves of mankind – male and female – it is the most diversified relationship known to humanity. It is not a civil right; it is a cultural and legal institution with benefits for adults, children, and society. Since the birth of civilised existence, humanity has confronted certain types of problems repeatedly, and it continues to do so today. Every human being yearns for stability. The real world is perceived by man through his senses, but his perception is not identical to the real world, as many parts of the real world are beyond the range of the senses' awareness. Man, lives in society, and over the years, he has developed a variety of social structures to accomplish a variety of goals(Sirohi Arvind, 2012).

#### **1.4. Gradual shift in the concept of marriage to live-in relationships to same sex unions**

With the rise of live-in relationships and the acceptance of same-sex unions, the idea of marriage has changed slowly over the past few decades. These changes in society show that people are becoming more open to different kinds of relationships and rethinking old rules.

As an alternative to marriage, living together has become more common. More and more people are deciding to live together without getting married. This change is caused by a number of things, like changed ideas about personal freedom, the economy, and the desire for more freedom in relationships. Live-in relationships give people a chance to see how well they get along, share financial responsibilities, and keep their freedom while still feeling emotionally close.

Another important change is that same-sex marriages are becoming more and more accepted. Societies all over the world are becoming more accepting and recognizing that people have the right to love and marry anyone they want, no matter what gender they are. This change toward progress has led to the legalization of same-sex marriage in many countries, giving LGBTQ+ couples the same legal protections and benefits as heterosexual couples. It shows that the fight for equality and the acceptance of all kinds of love is still going on.

These changes in how people think about marriage are part of a larger shift in society toward accepting differences and questioning standard norms. They show how our ideas about relationships are changing and that love, commitment, and family can live outside of traditional marriage. As these changes continue, it is important for laws, social organizations, and cultural attitudes to adapt to and support the changing landscape of partnerships. This will make sure that everyone has the same rights and chances to find love and happiness.

**a. Changes in the Forms of Marriage**

While monogamy was the predominant form of marriage in traditional Hindu society, it is worth noting that polyandry, polygamy, bigamy, and marriage by exchange were also prevalent. Over the course of time, there has been a substantial decline in the prevalence of polygamy, polyandry, and exchange marriages, with most of the Indian society currently adhering to the practice of monogamy.

**b. Shift in the Purpose and Aim of Marriage**

In traditional Hindu marriage, "dharma" refers to the fulfilment of religious duties. Historically, weddings were intended to fulfil holy tasks and functions and the primary purpose was to establish themselves as kinsmen and defenders of the family. With the introduction of numerous causes such as mainstream media, materialism, and globalisation, sacred forms of relationships are fading. The aims and purposes have shifted from respect, faithfulness, and honesty to less respect, avarice, and unfaithfulness, among other things.

### **c. Changes in the Process of Mate Selection**

In the past, parents often chose the spouse and the girl had little input. Numerous legends and documents attest to the fact that parents used to marry their daughters according to their own wishes. Due to a variety of causes such as increased education among girls, urbanisation, and economic independence, children are now consulted in marriage concerns, and even girls and boys converse and seek to understand one another's perspectives prior to performing marriage rituals. Thus, the Indian system collapsed when confronted with changing reality in the form of prolonged education for girls, which had the impact of raising marriage ages and empowering women to choose their own partner (Cadwell,1992). The marriages that were formerly arranged by intermediaries have been replaced by matchmaking agencies and advertising in newspapers and on other social networking sites (Jones,2010).

### **d. Change in the Age of Marriage in India**

When one considers the age of marriage in India, one discovers that children used to marry at a young age, particularly so in the case of girls. In other circumstances, such as Rajasthan, girls were married at a very young age, around the age of 3-4 years, even while they were unaware of the concept of marriage. In India's traditional communities, the marriage system was primarily reliant on planned marriages from an early age. Women's sexuality must be strictly regulated to preserve the family's honour. Husbands and wives should avoid becoming overly emotionally involved, as this could jeopardise the patriarchal family's unity (Jones, 2010). Early marriage helps protect young women's chastity, establishes a distinct separation from their natal families, prepares them to accept the power structure in their new family, and erodes the husband-wife tie (Reddy, 1982). There has been a sea change in recent years because of the entrance of numerous causes such as technology and increased awareness among females. Girls are legally allowed to marry at the age of 18, while guys are legally allowed to marry at the

age of 21. Additionally, with the advent of professional education, youngsters are occupied with studies for a longer period, delaying weddings by 25-30 years. Late marriage relates to socioeconomic developments that improve women's standing through more educational and employment options (Puri ,1999). It has been a significant factor in determining the population growth rate because to its relationship to marital fertility. Deferred marriage has a significant effect on lowering fertility rates. In 1970, India had a fertility rate of 5.6, which was lowered to 2.8 in 2008. (2008 World Bank Report).

**e. Changes in the Marriage's Stability (Increase in Divorce Rates)**

In bygone eras, the institution of marriage was extremely stable, with no evidence of divorce. Fear of the kinship system and strict social rules never let married couples to end their marriages regardless of whether they desired to live together or not. Divorce held a significant stigma in the past, and the pressure for the sake of the children, as well as for the sake of appearances and family honour, was quite great (Goody, 1973). Now, legislative changes, academic advancements, technological advancements, and increased awareness have altered the stability of the institution of marriage. Divorce is on the rise throughout the world's societies. There has been a 150 percent spike in divorce rates in agricultural states such as Punjab and Haryana over the last decade, while Kerala, the most literate state, has seen a 350 percent increase in divorce rates over the last decade. Marriage is today viewed as a foundational institution built on love, personal commitment, and intrinsic joy (Allen and Grow, 2001).

**1.5. Factor leading to Changes in Marriage Patterns**

- **Economic factors:** Changes in marriage institutions are inextricably linked to education's extraordinary progress, increased urbanisation, and women's participation in economic activities outside the home. People have begun "exiting the home" in search of work, and women have joined males in the quest for work and financial security. Women's self-esteem and confidence have increased as a result. These

changes have had an effect on marriage as an institution (Kapadia, 1982). Affluence materialism is another aspect. Individuals' living standards and true purchasing power have been boosted as a result of technical advancements. The principal effect of this greater prosperity associated with marriage dissolution is that people can more easily afford the costs associated with divorce, which include not just legal bills but also the cost of keeping a second residence and additional recreation for the children (Afzal,2009). All of this points to the fact that the institution of marriage is undergoing changes.

- **Social factors:** Historically, there were joint families in which family members were interdependent and the community was tightly knit. During the shift to today's highly urbanised and prosperous society, employment patterns became more differentiated, diminishing the need for communal interaction. Individualism is a result of this pattern (Sonawat, 2008). There is a sense of 'System,' which is a functional theory notion that depicts how society grows increasingly complicated because of structural differentiation and specialisation. Today's culture is highly specialised in areas such as employment, education, health care, and transportation. Prior to this specialisation, the family serviced its members economically, educationally, recreationally, health-care-wise, procreativity, protectively, and affectionately. These obligations gradually shifted away from the family and were institutionalised outside the house because of industrialisation (Sinha,1984). The institution of marriage has undergone dramatic changes in response to the profound changes in living conditions, values, norms, and traditions in the patriarchal society. In the patriarchal society, girls had no influence in family matters, particularly marital matters. Previously, they were prohibited from interfering or raising any doubts, even if their own marriages were fixed. Historically, divorce was viewed as a 'Stigma,' but attitudes have shifted. Girls are publicly expressing their thoughts on everything from partner choosing to divorce in the event of a failed marriage. Other factors, such as shifts in public opinion, are frequently referred to as 'changing times in the vernacular. People have become more self-centered in recent years, and their growing sense of individuality is luring people away from traditional marriage conventions and toward building households without legal marriage (Herzberger, 1993).

- **Psychological factors:** Historically, the greatest personal accomplishment and source of reward for women was marriage, child rearing, and maintaining an optimal home and family life. No other aspect of life can impart the same sense of self-worth. For males, self-fulfillment consisted in holding a stable job, marrying the woman of their dreams, and supporting their families financially. Men and women have well-defined roles. However, rising urbanisation, institutionalisation of family responsibilities, technological advancements in home care goods, and increased income diminished the capacity of home life to provide stimulation and a sense of value derived from gratifying personal achievements. (Hines,1997). Additionally, the individualistic ethos influenced both men and women empowering women to reach their full potential. Women's increasing economic independence prompted calls for more egalitarian family norms in areas such as child raising, decision-making, economics, and housework. These shifts in family norms and role expectations exacerbated conflict within families as established patterns were broken. Women struggle with the desire to have both a profession and children, resulting in marital conflict and a disordered home life.
- **Technological determinants:** The advent of modern technology has also been identified as a factor contributing to changes in the marriage institution. Previously, joint families existed in which grandparents and other senior relatives exercised authority over the juniors; however, nuclear families currently exist in which both parents work, and children are largely disregarded. They are not under observation, and as a result, they become isolated and rely on mass media and other technologies like as computers, mobile phones, and television. They make use of social networking sites, which isolates them from family members but connects them to the outside world (Kolenda, 1987).
- **Legislative factors:** The government's legislative actions over the last 50 years or more have aided in changing the nature of the institution of marriage, as legal safeguards are now included in marriage, which were not previously a part of traditional Hindu society. Many of the Hindu Shastrakaras's ideas, values, aspirations, and regulations of marriage have lost their original meaning, significance, and purpose.

During the British colonial period and later after independence, legislation was passed to effect desired reforms to the Hindu marriage system. The laws included the following topics:

- a) marriage age
- b) field of mate choosing
- c) Number of spouses in marriage
- d) divorce
- e) dowry to be taken and provided.
- f) remarriage. Numerous inhumane traditions related with marriage, such as sati, have been prohibited by legislation.

Not only have laws prohibited child marriages, but they have also established a minimum marriageable age for boys and girls, which is 18 years for girls and 21 years for guys. Additionally, the legislations have clarified the choosing process in marriage, i.e., who should marry whom. Additionally, they have allowed inter caste and interreligious weddings and established a registry for registered marriages. Divorce legislation has been enacted. Men and women have equal rights in this sense. (Rao,2004) Additionally, legislation has defined the conditions for divorce. Additionally, legislation has been enacted to provide special protection for women, preventing others from exploiting their helplessness and infirmities. To break the patriarchal ideals' stranglehold on joint families, legislation has also been enacted to provide equal opportunities, advantages, rights, and facilities for women(Milner Murray, 2015.)

## **1.6. Historical Background of Same Sex Marriage**

Same-sex marriage, or the legal recognition of weddings between people of the same sex, has a long and complicated history that spans the globe. While the concept of same-sex partnerships and unions has existed throughout history, approval and recognition of same-sex marriage has varied widely among cultures, locations, and time.

Same-sex relationships have been documented in different ancient civilizations throughout history. In ancient Greece, for example, same-sex partnerships were popular and frequently praised, with famous instances including the Sacred Band of Thebes, an elite military force

comprised of same-sex couples. Similarly, same-sex partnerships were common in ancient Rome, albeit they were normally considered taboo in the framework of marriage and family.

The influence of Abrahamic religions such as Judaism, Christianity, and Islam on public attitudes about same-sex partnerships and marriage grew over time. These religions generally condemned same-sex relationships, frequently using religious texts as evidence. As a result, in many places of the world that inherited these religious traditions, same-sex marriage became generally unrecognized, if not criminalized.

However, there have been times throughout history where same-sex partnerships have been accepted and even praised. Same-sex partnerships were widely welcomed and interwoven into the fabric of society in certain indigenous civilizations, such as Native American tribes and Polynesian indigenous peoples. These cultures acknowledged different gender and sexual identities and had their own versions of same-sex marriage or union ceremonies.

The present push for same-sex marriage did not acquire traction until the late twentieth century. The campaign for LGBTQ+ rights and recognition, including marriage equality, became a focal point of the LGBTQ+ rights movement as a whole. In 2001, the Netherlands became the first country to allow same-sex marriage, followed by Belgium, Canada, and several other European and North American countries.

The legalization of same-sex marriage has been slow but substantial. Many countries, including Argentina, Brazil, Ireland, and New Zealand, have recently embraced marriage equality. Furthermore, same-sex marriage has gained acceptance outside of Western countries, with countries such as South Africa, Colombia, and Taiwan allowing it.

While progress has been achieved, it is crucial to emphasize that in many parts of the world, same-sex marriage is still illegal, and LGBTQ+ people experience substantial prejudice and persecution. Same-sex partnerships are still illegal in several countries, and the fight for equal rights continues.

The global history of same-sex marriage illustrates changing attitudes and understanding of human rights and equality. As societies become more tolerant and accepting, same-sex marriage has earned legal recognition and protection. While there is still work to be done to ensure universal marriage equality, the progress accomplished thus far is a monument to the

LGBTQ+ community's and their allies' perseverance and persistence in the struggle for love, acceptance, and equal rights for all.

In India also same-sex marriages are not a new phenomenon. In India, homosexuality has a long history. Homosexuality may be traced all the way back to the Rig-Veda, which dates from roughly 1500 BC. The 'Kamasutra' also mentions Hindu aristocracy and Muslim Nawabs' harems of young boys. However, with the rise of Brahmanism and then British Colonialism, these experiences were associated with hatred. The Aryan invasion suffocated homosexuality by reigniting patriarchy's power. Homosexuals were punished, beaten, and tortured in a variety of ways. This eventually resulted in the emergence of homophobia, which evolved over time. From there, homosexuality began to erode its foundations.

### **1.7. Legal Recognition of Same Sex Marriage**

As one of the options to seek legal recognition for same-sex couples is through civil unions or partnerships rather than marriages. Numerous states in the United States of America, several Latin American and European countries, Australia, and New Zealand have approved legislation recognising civil unions (Calder, 2012). These jurisdictions have established a variety of civil union models. Certain states in the United States of America recognise domestic partnerships exclusively through municipal councils and private enterprises that provide spousal benefits to their employees' same-sex partners. Countries such as Germany have granted civil union participants only limited legal powers (*Baker v. Vermont Current Events 8 American University Journal of Gender, Social Policy & the Law 2000*). The legal benefits are limited to tax, pension, and adoption rules. Other versions, such as the one implemented in Vermont in response to a Supreme Court directive, offer partners with the same legal protections as married couples. Vermont and New Jersey's (*Baker v. Vermont Current Events 8 American University Journal of Gender, Social Policy & the Law 2000*) Supreme Courts have concluded that while same-sex couples cannot be banned from the advantages of marriage, the state can decide whether the benefits should be bestowed through marriage or through a parallel domestic partnership (Calder, 2012). These 'separate but equal' institutions should have the same legal status as marriage and should offer the same legal privileges. The advantages of this paradigm are that it confronts less opposition, at least religiously, and avoids the contentious discussion over whether 'marriage' must be heterosexual. Additionally, it served as a precursor to the recognition of same-sex marriages. France approved a legislation allowing civil

partnerships in 1999 and a law recognising same- sex marriages in 2014(Millett & Kaplan, 2014). Likewise, England and Wales recognised civil unions in 2004 but passed legislation in 2013 to recognise same-sex weddings. However, allowing just civil unions and excluding marriages for same-sex couples is discriminatory in and of itself, as it presents a class of individuals with a choice that is intrinsically lower in status than marriage. Marriage is not only a contractual arrangement between two individuals for them to obtain legal benefits and privileges from one another. It serves the critical function of legal and social acknowledgment for a relationship. The status benefits of marriage include elevating the spouse above other family members and conferring specific privileges on the spouse, such as decision- making authority in the event of incapacitation, registration of deaths, and so on. Furthermore, two institutions that embody the same legal rights are not always equivalent. Marriage as an institution carries historical, cultural, and social weight that a civil marriage does not. Marriage confers the same social standing on same-sex couples as it does on heterosexual couples. As a result, even though same-sex couples have the same legal rights, a law that allows them to enter solely into civil unions will treat them differently based on their sexual orientation. Therefore, the Connecticut Supreme Court found the state's 'separate but equal' system unconstitutional. Additionally, accepting civil unions in lieu of marriage demonstrates that same-sex relationships are not equivalent to heterosexual relationships. According to US Supreme Court Justice Ginsberg, this would entail allowing two distinct types of marriage: the 'whole marriage' and a sort of 'skim-milk marriage'.(Petri Alexandra, 2013)

If a civil union model is to be adopted in India, it will be necessary not only to enact a new law governing civil unions, but also to amend pertinent legislation such as the Indian Succession Act, 1925, the Guardians and Wards Act, 1890, the Workmen's Compensation Act, 1923, and a slew of other statutes governing succession, adoption, and pensions, to provide that a civil union partner receives the same protection as a spouse. On the other hand, legislation, particularly on such a contentious matter, is likely to be postponed. While it cannot be claimed to violate religious freedoms, it could be objected on the grounds that it legitimises non-marital live-in relationships, both heterosexual and homosexual, which is to Indian tradition. Thus, even from a tactical standpoint, pursuing legislation recognising civil unions does not appear to be the best course of action.

## **1.8. Married Couples of the Same Sexual Orientation**

Significant research(Brown, 2010) indicates that marriage increases relationship and family stability. Stability, along with the associated financial and social benefits, contributes to improved results for children raised by married parents. The broad acceptability of marriage for same-sex couples comes at a time when more of them are pursuing parenthood together through adoption and reproductive technologies and fewer are rearing children from previous different sex partnerships. Will marriage have the same stabilising effect on same-sex couples and their families as it has on heterosexual couples and their families? It is possible, as lesbians and homosexual men have a strong desire to marry and have similar ideas on the purpose of marriage as the general population.

### **1.8.1. Desire to Marry**

According to recent Pew Research Centre(*Half of Unmarried LGBT Americans Say They Would like to Wed / Pew Research Center, 2015*) studies, 56% of unmarried gay men and 58% of unmarried lesbians wish to marry eventually, compared to 45% of unmarried bisexuals and 46% of the unmarried general population. Because the vast majority of partnered bisexual men and women report having different-sex spouses or partners, bisexuals' and the general population's perspectives may be similar. At the time of the Pew poll, neither marriage nor formal recognition of a legal relationship through a civil union or domestic partnership was widespread in the United States for same-sex couples. As a result, it's unsurprising that lesbians and gay men are less likely to be married, in a civil union, or in a registered domestic partnership than bisexuals or the general population are. When current marital status was included, nearly 60% of LGBT adults in the Pew study were married or had an interest in marrying someday, compared to 76% of the general population.

### **1.8.2. Formation of Relationships**

While lesbians and gay men have a strong desire for marriage, there are distinctions in their patterns of relationship formation, as well as between LGB individuals and heterosexuals. Lesbians are the most likely to be in cohabiting relationships among LGB men and women, typically at rates quite comparable to those of non-LGB women. In general, LGB individuals are less likely to be in a married or unmarried cohabiting relationship than non-LGB individuals. According to the analysis of the 2013 NHIS, around six in ten non-LGB adults live

with a partner or spouse, compared to approximately four in ten LGB adults. However, the likelihood of cohabiting with a spouse or partner is far higher for lesbians, at 51%, than for homosexual men or bisexual men and women, where approximately one in three are partnered. The NHIS found no statistically significant difference between lesbians and non-LGB women (58 percent). In a previous work, Christopher Carpenter discovered that lesbians had a higher rate of cohabitation than homosexual males (though the data were limited to California) and that lesbians' rates of cohabitation were equivalent to heterosexual women. LGBT respondents, like the general community, said that the three most important reasons for a couple to marry were love, companionship, and making a lifelong commitment. (Gates, 2015, pp. 67–87)

According to a Pew Research Centre poll of LGBT individuals, 37 percent of LGBT adults were cohabiting with a spouse or partner, comparable with the NHIS analyses. Lesbians were also more likely than homosexual men to have a spouse or partner, according to Pew (40 percent versus 28 percent, respectively). Unlike the NHIS data, bisexual women were more likely to have a spouse or partner than LGB men and women, at 51%, compared to 30% of bisexual males. Pew showed that 58% of adults in the general population were cohabiting with a spouse or partner. Regardless of cohabitation, 40% of gay men and 66% of lesbians were in serious relationships. The figures for bisexual men and women were 40% and 68%, respectively. Pew believes that approximately 70% of the general population was in committed relationships. As previously stated, lesbians and gay men appear to be cohabiting at a higher rate than in the past. According to analyses of the 1992 National Health and Social Life Poll, a population-based survey of individuals focusing on sexual attitudes and practises, 19% of males who identified as gay and 42% of women who identified as lesbian reported cohabiting.

This indicates that gay men now are roughly twice as likely to date as they were in the early 1990s. Additionally, it demonstrates that the pattern of lesbians having higher levels of coupling than homosexual men has remained throughout time (Mitchell et al., 2007).

The Pew survey also examined why people married. LGBT respondents, like the general community, said that the three most important reasons for a couple to marry were love, companionship, and making a lifelong commitment. The only significant difference between LGBT respondents and the general population on this point was that LGBT respondents placed a higher premium on legal rights and benefits as a motivation to marry than the general population did. This disparity is perhaps unsurprising considering the significant media

attention paid to the legal rights and privileges denied to same-sex couples in jurisdictions where marriage was prohibited.

Additionally, the findings indicated that lesbians and gay men were largely responsible for the fact that rights and benefits were ranked higher among LGBT respondents' lesbians and gay men rated rights and benefits, as well as financial stability, as significantly more important than bisexuals (bisexuals ranked similarly to the general population in this regard, and this portion of the analyses did not separate them).

Recall that many coupled bisexuals have different-sex partners, but most coupled lesbians and homosexual males have same-sex relationships. Given their more limited access to marriage, lesbians and gay men's rights, benefits, and financial security may be more significant.

### **1.8.3. Social Implications**

When social scientists explore the subject of same-sex marriage rights, they rely heavily on parenting and family studies. Broader public discourse and debate frequently involve more philosophical (rather than empirical) arguments about marriage as a social and legal institution and the extent to which allowing same-sex couples to marry reflects a fundamental or undesirable change to that institution (a book pitting philosopher John Corvino against political activist Maggie Gallagher, *Debating Same-Sex Marriage*, for example).

However, social scientists have undoubtedly been pioneers in tracing current changes in family formation and marital trends. Sociologist Andrew Cherlin, for example, has documented numerous of these changes, including increases in the age of first marriage; divergent patterns of marriage and divorce by education, with those with lower levels of education being less likely to marry and more likely to divorce than those with higher levels of education; and increases in non-marital births and cohabitation.

There has been some public disagreement over the extent to which these societal shifts are tied to the legalisation of same-sex marriage, where there are people who think that marriage for same sex couples has accelerated the institutional demise of marriage in Europe, to the cost of families and children. Journalist Jonathan Rauch disagrees, stating that allowing same-sex couples to marry will boost the institution's reputation and reintroduce it to the public amid a time of decline.

The empirical evidence for a causal relationship between the rise of same-sex marriage rights and broader marriage, divorce, and fertility trends is scant. According to economist Lee Badgett, trends in different sex marriage, divorce, and non-marital birth rates did not change in European countries after same-sex marriage was allowed. Another study concluded that permitting same-sex couples to marry or form civil unions had no discernible effect on state-level marriage, divorce, abortion, and out-of-wedlock births. In the Netherlands, where same-sex marriage has been legal for over a decade, neither the domestic partnership statute nor the legalisation of same-sex marriage appears to have influenced the rate of different-sex marriage. However, there appears to be a difference in effect between liberals and conservatives: the introduction of same-sex marriage was related with increased marriage rates among conservatives and decreased marriage rates among liberals.

### **1.9. Same-Sex Marriage Validity in Indian Provisions**

Every person in India has the freedom to marry under any civil code they like, regardless of their religion or group. The Hindu Marriage Act, 1955, the Muslim Personal Law, the Indian Christian Act, 1872, the Parsi Marriage and Divorce Act, 1936, or the Special Marriage Act are the Indian marriage laws. While none of these codified Marriage Acts define marriage exclusively between men and women or explicitly prohibit same-sex unions, they all have "heteronormative underpinnings" and do not recognise same-sex unions. In this case, the constitution and fundamental rights protected by legislation and the judiciary appear to be limited and violated. There is an inherent right for whomsoever to marry whomsoever they like and to marry and solemnise their love. The International Lesbian, Gay, Bisexual, Trans, and Intersex Association conducted a poll in 2016 and discovered that 35% of respondents supported legalising same-sex marriage. According to a survey conducted by the Varkey Foundation, support for same-sex marriage was highest among 18 to 21-year-olds, at 53%. Although none of them are expressly recognised by law, they have been recognised in judicial rulings. Whether it is a live-in relationship in which the partners are occasionally granted the status of married, there has been no legal precedence for same-sex relationships being granted such status.

### **1.10. Same Sex Marriage under Personal Law in India**

In India, marital relationships and weddings have a strong religious and social significance. Marriage is seen as a sacrament, and religious functions constitute an integral part of the union. This may help to explain the numerous cases of lesbian relational unions, which include performing religious ceremonies, trading festoons in sanctuaries, and in a few revealed cases, semi-le-lady friendship contracts (*maitri karar*). Vanita Ruth For instance, in 1988, two policewomen were married in a Hindu ceremony. Even though their marriages were unable to be enrolled and they were suspended from their jobs, their marriages were recognised and reinforced by their families and communities. It's noteworthy that the many proclaimed lesbian relationship unions have occurred primarily between residents of the residential neighbourhood, lower white-collar workers, and non-English speaking ladies who are not affiliated with the LGBT movement.

The most palatable course of action in this environment would be to recognise same-sex relational partnerships under Indian individual marriage rules. In India, Christians, Muslims, and Hindus all have their own set of laws on marriage, development, and so forth. The Hindu Marriage Act, which covers Hindus, Sikhs, Jains, and Buddhists, expresses that any two Hindus may marry. Additionally, the groom must be twenty-one years old, and the lady of the hour must be eighteen years old. According to the Christian Marriage Act, the man must be twenty-one years old, and the lady must be eighteen years old. Because Muslim relational partnerships are not regulated by law, there is no statutory definition of 'marriage,' yet they are frequently seen as an agreement with the end objective of procreation. All of India's individual laws appear to view marriage as a heterosexual partnership.

Because the Act is sexually neutral save for the phrases "lady of the hour" and "husband," one could argue that same-sex couples can have their marriages solemnised under the Act if one of them is portrayed as the lady of the hour and the other as they prepare. Lesbian couples have taken this method, with one partner introducing themselves as the lady of the hour and the other as the lady of the hour groom. In one of the research, the authors (Mitchell et al., 2007) discussed that it is not difficult to sustain this contention by statutory translation norms, as it strains the statute's wording and contradicts the common understanding of the phrase's lady of the hour and prep. Additionally, explanation attempts to reconcile same-sex relationships with conventional forms of marriage. When connections between heterosexual life partners are redesigned to be more equivalent, this elucidation will reinforce traditional severe sex

generalisations that sexual orientations are inherently distinct, that two people in a marriage have predetermined roles, and that even same-sex couples must acknowledge traditional roles to marry (Sheikh, 2013). They are not linked by a desire to effect specific modifications in Hindu wedding rituals. William N. Eskridge Jr. 2000 The third approach is to petition the judiciary to review the provisions of Hindu and Christian marriage laws with the goal that same-sex relational unions are perceived as legal, on the grounds that reading these laws as prohibiting such relational unions would render the applicable professional dreams illegal by segregating based on sexual introduction.

### **1.11. Same Sex Marriage under Special Marriage Act in India**

A less divisive option is to seek amendments to the Special Marriage Act, 1954 ('SMA') to permit same-sex relational unions. The Globe of Boston 2007 The SMA is a common law that promotes relationship unions between people of various religions or between those who do not wish to be bound by their own laws. In its current form, the SMA appears to apply to heterosexual couples, as it specifies that the male must be twenty-one years old, and the female must be eighteen years old. However, it is not di religion's intention to accommodate same-sex relational relationships inside the SMA system. Ghoshal, Somak It would only be necessary to amend Section 4(c) to provide that a gathering, if male, must have attained the age of twenty-one years and, if female, must have attained the age of eighteen years, and to include a specific provision allowing same-sex relational partnerships. Regardless of whether individual laws are amended to recognise same-sex relational partnerships, the SMA would need to be amended to provide a same level of recognition for connections between persons of different religions (GHOSHAL, 2008).

The issue over same-sex marriages are primarily a moral one rather than a legal one. People attempt to draw a separation between 'societal norms' and 'individual liberty,' particularly in cultures where religion is more prominent (Garg, 2021). While a shift is unquestionably the best administrative solution, it is one that may be divisive considering the BJP government's current development. While both the Congress and the CPI (M) included decriminalisation in their proclamations in support of the Lok Sabha resolutions, the BJP was unequivocal in its support— a gathering pioneer stating that homosexuality is an unnatural demonstration that cannot be accepted. More recently, the Rashtriya Swayamsevak Sangh, the BJP's ideological father, has stated that while they are opposed to lauding homosexual behaviour, it is far from

evident that it should be criminalised. While the change in question is not difficult to create and does not infringe on religious liberties, it will surely result in vocal restriction. The amendment to the SMA would be analogous to the laws permitting same-sex relational unions in several nations. Today, sixteen countries have enacted similar legislation, beginning with the Netherlands in 2000 and ending with England and Wales in 2013. Similarly, thirteen states in the United States of America have enacted legislation authorising same-sex relationship unions. In any event, there are a few individuals who are antagonistic to same-sex institutions.

Without a doubt, the main priority has been decriminalising consenting sexual conduct. However, this will not eliminate discrimination against those who are in long-term committed partnerships with others of their own sex. This would necessitate the legal recognition of long-term same-sex unions on an equal footing with heterosexual marriages. This goal of parity with heterosexual partnerships may be criticised on the grounds that heterosexual marriages and family connections are nonetheless steeped with patriarchal ideals. If a family is regarded a microcosm of society, it is impossible to seek significant social change while adhering to established family customs. There are divergent perspectives on the desirability of marriage both inside and beyond the LGBT communities—whether in an individual's personal life or about government regulations that require marriage as a prerequisite for a variety of advantages. There are, nevertheless, substantial practical reasons for same-sex relationships to be recognised socially and legally (Bonauto, 2007). Certain legal benefits offered to married couples, such as succession, maintenance, and pension rights, are not available to same-sex couples. Economic benefits under regulations such as the 1952 Employment Provident Fund Scheme (The Workmen's Compensation Act, 1923) and the 1923 Workmen's Compensation Act are only available to people who are connected by blood or marriage. Singles and unmarried couples have found it increasingly difficult to adopt since the Central Adoption Resource Authority (CARA) established adoption guidelines (Nitya, 2020).

Additionally, not all individuals involved in same-sex partnerships advocate for radical changes to society and its institutions, and many are politically conservative (Almond et al., 2013). Many of them simply wish uninhibited acceptance and the opportunity of forming a legally recognised partnership (Simpson, 2002).

A further utilitarian argument made following a thorough review of social science research on the subject is that same-sex and heterosexual relationships are fundamentally similar in their

psychosocial dimensions, that marriage confers significant psychological, social, and health benefits, and that same-sex couples and their children are likely to benefit in a variety of ways from legal recognition of it (Legal, 2022). Many same-sex couples desire marriage simply because they are part of a culture in which marriage has traditionally been viewed as the ideal structure for connection and commitment, regardless of sexual orientation. Additionally, they feel that selecting a spouse is a significant personal choice over which others, notably the state, should have no say (Bonauto, 2007). Thus, the fundamental argument in support of same-sex marriage is that if two individuals wish to enter a marriage commitment, they should be allowed to do so, and excluding one class of citizens from the advantages and dignity of that commitment demeans and insults them. It is worth noting that same-sex marriages are not prohibited in India. While Section 377(*Section 377 in The Indian Penal Code, 1860*) of the Indian Penal Code criminalizes sexual actions between people of the same sex, one may argue that same-sex weddings do not constitute the commission of such crimes. Nonetheless, India's marriage laws expressly prohibit same-sex marriages and, in fact, exhibit a strong heterosexual prejudice using terminology implying solely heterosexual partnership. Furthermore, on a more pragmatic level, if a provision in a criminal statute such as Section 377 is deemed non-discriminatory, seeking legal recognition under civil marriage rules would be irrational(*The Fundamental Right to Marry in India and Its Application to Same-Sex Marriages, 2021*)

### **1.12. Statement of Problem**

Despite the significant progress made in decriminalizing same-sex relationships in India, the unfortunate reality remains that these unions continue to face deep-rooted stigma within Indian society. In a pressing matter, the focus lies on the glaring lack of legal acknowledgment for marriages between individuals of the same sex within personal legislation. Despite the implementation of decriminalization measures, individuals within this community still grapple with a prevailing sense of unease and ambiguity.

### **1.13. Research Objectives**

The primary aim of this research can be categorized into two dimensions: one pertaining to the legal perspective and the other to the social perspective.

- 1) The objective of the current study is to enhance comprehension of the concept of homosexuality, specifically in terms of its classification as a normal or abnormal phenomenon.
- 2) To conduct a comparative analysis of the legal recognition of same-sex partnerships in India and other countries worldwide. The objective of this study is to evaluate, examine, and evaluate religious beliefs, legal impediments, and psychological challenges associated with the adoption of same-sex marriage.

#### 1.14. **Research Hypotheses**

Decriminalization of consensual homo-sex is an irreversible recognition of the rights of the LGBT community, but even after decriminalization of Section 377 of the Indian Penal Code, 1860, Homophobia is prevalent among the masses in the form of considering it a mental disorder.

Therefore,

- 1) The time has come when the law should interfere with the evolution of the institutions for solemnizing same-sex marriage.
- 2) Giving legal status to same-sex marriages may result in the removal of mental agony.
- 3) Legal recognition in the form of marriage may result in the removal of a taboo attached to same-sex relations and promote a sense of security as well as societal acceptance.

#### 1.15. **Research Design**

To validate the findings derived from doctrinal research and gain insights into the societal viewpoint on the matter, the researcher additionally undertook an empirical investigation. This involved the development of a questionnaire and the administration of an online survey.

The study utilized purposive sampling to select a sample size of 1000 respondents.

1.15.1. Universe and Sample Selection- The subject of this discussion pertains to the areas of Dehradun and West Delhi within the larger context of the universe.

- Sampling method used- non-probability sampling (Purposive/Judgmental)

1.15.2. Tools for Data Collection- In the context of the current investigation, the data were obtained from primary sources, specifically using a questionnaire, as well as secondary sources such as newspaper articles, journal articles, and reports.

## **1.16. Chapterization**

Chapter 1	Marriage as an institution
Chapter 2	Historical evolution of Homosexuality
Chapter 3	Socio- legal- psychological barriers in the acceptance of homosexuality
Chapter 4	Judicial fight for social acceptance: Impact of Decriminalization
Chapter 5	Comparative analysis of countries recognizing same sex marriage with India Scenario
Chapter-6	Analysis and Evaluation of Data
Chapter 7	Same Sex Marriages: Possibilities and Challenges (The Way Forward)
Chapter 8	Conclusion and Suggestions

### **Chapter 1: Marriage as an Institution**

The opening chapter provides an overview of the historical context and examines the progression of marriage as a societal institution. This chapter provides an analysis of the

historical progression of marriage, exploring its underlying objectives and societal significance.

## **Chapter 2: The Historical Evolution of Homosexuality**

This chapter examines the historical origins of homosexuality within human civilization, with particular attention given to the context of India. This paper provides a comprehensive analysis of the historical context surrounding homosexuality, as well as a critical examination of the assertion that homosexuality should not be classified as a mental disorder. Furthermore, it posits that same-sex relationships are inherently natural, akin to heterosexual relationships.

## **Chapter 3: Socio-legal and psychological barriers to the acceptance of homosexuality**

This chapter explores a range of obstacles that hinder the acceptance of homosexuality. Barriers encompass various dimensions, including social, legal, and psychological aspects. For instance, in the context of India, prior to the decriminalization of homosexuality between consenting adults, legal barriers were in place, rendering such relationships criminalized. These barriers, alongside social and psychological obstacles, contribute to the hindrance of certain individuals' rights and freedoms. This chapter will additionally concentrate on the sociolegal ramifications of same-sex relationships. In addition to the stringent legal landscape, individuals identifying as homosexuals also encounter social stigmatization. The concept of same-sex marriages continues to be perceived as inconceivable, as any form of sexual activity between individuals of the same gender elicits strong negative emotions of animosity and repulsion.

## **Chapter 4: The Judicial Fight for Social Acceptance: Impact of Decriminalization**

This chapter discusses the legal dispute undertaken by the community in pursuit of equal rights, as guaranteed by Article 14 of the Indian Constitution. This chapter provides an analysis of the judicial rulings made by multiple Indian courts and international tribunals. Several notable Indian legal cases include Naz Foundation vs. Govt. of NCT of Delhi (2009), Suresh Kumar Koushal Case (2013), Justice K.S. Puttaswamy vs. Union of India (2017), and Navtej Singh Johar vs. Union of India (2018), among others.

## **Chapter 5: Comparative Analysis of Countries Recognizing Same-Sex Marriage with the India Scenario**

This chapter provides an analysis and explanation of the current state of same-sex marriage in India in comparison to other countries worldwide. This chapter additionally examines the assortment of international conventions and treaties that acknowledge gender equality, such as the Yogyakarta Principles, which acknowledge the inclusion of freedom of sexual orientation and gender identity within the realm of Human Rights. In 2006, a group of esteemed international human rights experts delineated these principles in Yogyakarta.

## **Chapter 6: Analysis and Evaluation of data**

This chapter is dedicated to the examination and elucidation of the data that was collected during the research endeavour via the utilization of a questionnaire. In conjunction with the doctrinal investigation, the researcher employed the empirical research approach to validate the research outcomes.

## **Chapter 7: Same-Sex Marriages: Possibilities and Challenges**

The Supreme Court of India, in the case of *Lata Singh v. State of UP* (*Lata Singh vs State of U.P. & Another* on 7 July, 2006), rendered a significant ruling wherein it recognized the right to marry as an integral aspect of the right to life as enshrined in Article 21 of the Indian Constitution. The court saw that in a free and democratic nation, individuals who have reached the age of majority possess the right to enter into marriage with a person of their choosing. This chapter undertakes an analysis and elucidation of the diverse potentialities pertaining to same-sex marriages in India, as well as the manifold obstacles encountered in their execution. This study will undertake an analysis of the situation from both a religious perspective, specifically within the contexts of Hinduism, Islam, and Christianity, as well as a legal standpoint. The researcher will primarily examine the implications of this analysis on a range of legal rights, including but not limited to succession and property rights.

## **Chapter 8: Conclusion and Suggestions**

This chapter serves as a comprehensive overview of the thesis, encompassing a summary of the main points and offering recommendations for further exploration.

## **CHAPTER 2**

### **Historical evolution of Homosexuality**

#### **2.0. Introduction**

The LGBT(*Gender & Sexuality Terminology* 2003) or GLBT community, sometimes referred to as the gay community, is a loosely defined grouping of lesbian, gay, bisexual, and transgender (LGBT) and LGBT-supporting individuals, organisations, and subcultures connected by a shared culture and social movements. In general, these groups value pride, diversity, individualism, and sexuality. LGBT activists and sociologists view LGBT community development as a means of combating heterosexist, homophobia, biphobia, transphobia, sexualism, and other perceived conformist influences in larger society. Homosexuality is a state of mind or desire characterised by sexual attraction to people of the same sex. In popular parlance, the term gay refers to both males and females who are same sex orientated. The term 'Gay' is sometimes used interchangeably with male homosexual behaviour, but 'Lesbian' refers to a woman who is sexually attracted to another woman. When it comes to sexual orientation, a bisexual individual is sexually attracted to both men and women. Transgender people are another category who are neither a complete man nor a complete woman. They are referred as '*Hijras*' in Hindi and are jokingly dubbed 'neither here nor there'. Gays and lesbians emphasise homosexuality's cultural, social, and identity dimensions. Sexologists and sociologists are becoming aware that society cannot be segmented into homosexual and heterosexual, gay and lesbian, male and female compartments. There is a wide variety of sexual orientations available, including bisexuals, transsexuals, and transgendered individuals. Indeed, sexuality is emerging as a complex synthesis of biology, behaviour, and identity(Paul heike, 2014).

Even though homosexuality has a long history in India, the LGBT movement is still in its infancy. Until recently, most gays in India lacked social and cultural outlets for their sexuality.

This is beginning to change, owing to increased awareness and education. Numerous males of homosexual orientation are self-identifying as 'gay' and embracing a lifestyle that defies marriage and other heterosexual social constraints. They stay essentially invisible and develop networks that avoid public scrutiny out of fear of social and familial repercussions.(Sathyanarayana Rao & Jacob, 2012)

The term 'Gay' is associated with several stereotyped images and concepts, such as their behaviour and attire. Thus, whether accurate or not, we have an awareness of gays in our psyche, such as feminine guys dressed in tight leopard designs. However, there is no authentic representation of lesbians in our collective psyche. They are denied any identification, and it is entirely possible that they do not exist at all.(K. Johnson et al., 2014) This is another type of silence that we observe. Lesbian women are unable to speak for themselves since society believes they do not exist. Female sexuality has traditionally been seen as taboo—a subject not to be addressed, a part of the "home realm." This novel perspective on female sexuality will undoubtedly be difficult to accept.(Roy, 2023) Additionally, this pierces male domination, as the need for males is rejected here. Women are compelled to marry males to "cure" them. They are strangled by ideological discourses and the exaggerated expectations placed on women as caretakers of "morals, tradition, and culture."(Copenhaver, 2002) With this milieu and backdrop, the Lesbian movement has survived and grown by crawling alongside gay endeavours. To have a better knowledge of homosexuality's multiple sides, it is necessary to examine its conceptual, cultural, social, and legal dimensions, as well as to ascertain its acceptable status in various nations.(*Understanding Sexual Orientation and Homosexuality*, 2008)

In India, opinions toward bisexuality and homosexuality have been to put it mildly, ambiguous. According to historical records, these types of behaviour patterns appear to have been allowed and applauded. The difficulty for the contemporary Indian clinical practitioner is whether homosexuality (which is frequently conflated with homosexual activity) is a Western concept that was imported into the nation during the British Raj. Frequently, politicians on both extremes of the political spectrum express this view. Interestingly, unlike in the West, it appears

that a sizable proportion of MSM in India are married. (Kalra et al., 2010) It must be determined whether this shows actual bisexuality or merely homosexual desire submissive to a socio-centric society. Even in large cities, these individuals are less likely to identify as homosexuals. Additionally, the development of the internet and access to sexual partners via the web may have resulted in an increase in secrecy, particularly among the younger age. (Kalra et al., 2010)

Ancient Buddhist and Hindu literature such as *Manusmriti*, *Arthashastra*, and *Kamasutra* all refer to same sex attraction and behaviour. As seen in the Karle pillar caves (50-75 CE), the Buddhist tradition depicts two bare-breasted women embracing one another. Bhagiratha (Madaan, 2014), for example, is born of the marriage of two women in Hindu texts. Shikhandi's gender transition is mentioned, as is *Ardhnarishwar* (half-man, half-woman). Hijras adore and honour Ayyappa (Vanita, 2009) (a dual-gender god). Numerous carvings and sculptures in Khajuraho portray same-sex activities, including reciprocal fellatio and orgiastic scenarios. Ayyappa was created after an encounter between Shiva and Vishnu, when the latter temporarily adopted the shape of a seductive woman named Mohini (Abbott Elizabeth, 2000). Numerous 14th-century Sanskrit and Bengali scriptures (among them the *Krittivasa Ramayana*) relate how King Bhagiratha was born of the union of two ladies sanctified by Lord Shiva.

In India, Hijras are significant. They would visit Hindu houses and perform dances during marriages and the birth of male children. They frequently self-identify as those who have no (sexual) interest for women. In India, they are readily distinguished from effeminate or homosexual men. According to Reddy (2005), the Hijras are not just man-minus-man, but also man-plus-woman by virtue of their significance. They dress feminine, apply makeup, have feminine names, and behave femininely—some more than others. They may be hermaphrodites or castrated at birth. Numerous sociological research indicates that a sizable proportion of residents of these structured Hijra groups engage in male homosexual prostitution. Certain members of this subculture have been discovered to be permanently attached to wealthy male homosexuals who provided for their financial demands.

In Persian and Sufi traditions, love is described as a man's love for another man, however one may argue that it is a mortal man's love for God. The presence of Muslims in India fostered the development of poetry in the form of love songs known as Ghazals, as well as the concept of a men's love for another male. According to Gupta (2008), the Mughal Emperor Babur is explicit in *Baburnama* about his indifferent love for his wife and his choice for a young guy. It is entirely likely that such ties were emotional rather than sexual in nature. Numerous paintings and literary work spanning multiple centuries represent same-sex love and grief. For instance, in Siraj Aurangabadi's poetry *Bustani-i-Khayal*, the narrator seeks comfort in the presence of courtesans who cheer him up. Numerous writers utilised feminine pen names to conceal their genuine desires in response to Victorian prejudices toward homosexuality in the United Kingdom. Although the review is selective, it reveals that same sex relationships, whether emotional or sexual, have existed in India for a long length of time and are not a Western import. Recent investigations by several experts, including Vanita and Kidwai, confirm these findings.(Kalra et al., 2010)

## **2.1 Meaning of Sexual Orientation**

Sexual orientation is a persistent pattern of emotional, romantic, and/or sexual attraction toward men, women, or both sexes. Additionally, sexual orientation refers to a person's sense of identity because of those attractions, associated behaviours, and involvement in a community of individuals who share those attractions. Over several decades of research, it has been established that sexual orientation exists on a continuum, ranging from exclusive attraction to the opposite sex to exclusive attraction to the same sex. However, sexual orientation is typically classified into three categories: heterosexual (emotional, romantic, or sexual attraction to members of the opposite sex), gay/lesbian (emotional, romantic, or sexual attraction to members of one's own sex), and bisexual (having emotional, romantic, or sexual attractions to both men and women).(Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in the World of Work: A Learning Guide, 2022)

This range of behaviours and attractions has been documented in a variety of civilizations and nations worldwide. Numerous cultures employ identity labels to refer to individuals who express these interests. Lesbian, gay, and bisexual are the most often used labels in the United States. (*Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in the World of Work: A Learning Guide*, 2022) However, some individuals may employ alternative labels or none. Sexual orientation is separate from other facets of sex and gender, such as biological sex (the physical, physiological, and genetic traits associated with being male or female), gender identity (the psychological experience of being male or female), and social gender role (the cultural norms that define feminine and masculine behaviour). (*Understanding Sexual Orientation and Homosexuality*, 2008)

Sexual orientation is frequently described as if it is same as biological sex, gender identity, or age. This view is incomplete, as sexual orientation is determined in terms of interpersonal connections. Individuals display their sexual orientation through interpersonal activities, such as holding hands or kissing. As a result, sexual orientation is inextricably linked to intense human relationships that satisfy deeply felt desires for love, attachment, and intimacy. Along with sexual practises, these bonds encompass nonsexual physical love between partners, similar objectives and beliefs, mutual support, and long-term commitment. Thus, sexual orientation is not a purely individual attribute. Rather than that, one's sexual orientation identifies the group of people with whom one is most likely to form meaningful and fulfilling romantic relationships, which are an integral part of many people's personal identity. (Morgan, 2013)

## **2.2 Homosexuality**

This is the initial, and arguably most fundamental, inquiry into homosexuality to comprehend the phenomenon of same-sex sexual relations, it is necessary to first examine the study on the roots of such desire. There are two primary ideas on the origins of homosexual attraction. One is that homosexuality is mostly determined by genetic and/or biological factors—in other words, that people are "born gay." The alternative theory is that homosexual attraction is mostly

the product of psychological and environmental effects, as well as early experiences.(Sheldon et al., 2007) In recent decades, the latter idea appeared to be losing favour in the public square, while the former gained popularity.

The new perspective is based on studies demonstrating a high prevalence of same-sex feelings and behaviours in men and women, across cultures, and in nearly all non-human primate species. Psychological tests were unable to discriminate between heterosexual and gay orientations. Additionally, research indicates that individuals who identify as homosexual do not exhibit objective psychological disorder or deficits in judgment, stability, or occupational aptitude.(Meyer, 2003) Homosexuality is increasingly considered a normal variant of human sexuality by psychiatric, psychoanalytic, medical, and mental health specialists.

### **2.2.1 Conceptual Aspect of Homosexuality**

The late twentieth century saw a transition in the concept of homosexuality away from sin, crime, and sickness and toward a normal variant of human sexuality. The American Psychiatric Association and the World Health Organization both recognised it as a normal variety in 1973 and 1992, respectively.(Drescher, 2015) Since then, numerous countries have decriminalised gay behaviour, while others have recognised same-sex civil unions and marriage.

Sexuality in humans is complicated. Accepting the distinction between desire, behaviour, and identity recognises sexuality's multifaceted character. The fact that these aspects are not always congruent in people demonstrates the issue's complexity.

While medicine and psychiatry utilise the terms homosexuality, heterosexuality, and transsexuality to refer to all connected issues, contemporary societal usage favours the phrase lesbian, gay, bisexual, and transgender (LGBT), which emphasises identities.(*Inclusion of Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ+) Persons in the World of Work: A Learning Guide*, 2022) The prevalence of homosexuality is difficult to assess for a variety of reasons, including the shame and societal repression associated with it; the unrepresentative samples used in the surveys; and the inability to separate desire, behaviour, and identity. Figures vary according to age group, geography, and culture. Anthropologists

have recorded considerable differences in the organisation and meaning of same-sex activities between cultures, as well as changes over time within specific groups. The universality of same sex expression coexists with culturally specific variances in its meaning and practise. Recent study, on the other hand, proposes that psychological and interpersonal events throughout a person's life account for sexual orientation.(Hall et al., 2021)

Adult homosexuality is unlikely to be explained by a single collection of qualities or a single pathway. The idea that homosexuality is a stable phenomenon is based on the persistence of same-sex desire, the failure of attempts to change, and the lack of effectiveness with orientation-altering treatments. There is a growing recognition that homosexuality is not a single phenomenon and that it may contain several phenomena. Once considered the norm, anti-homosexual attitudes have evolved over time in a variety of social and institutional settings throughout the western world. However, hetero sexism is also prevalent, as it idealises heterosexuality, accepts it as the standard, and denigrates and stigmatises any non-heterosexual types of behaviour, identity, relationships, and communities.(Bailey et al., 1999)

Apart from the difficulties inherent in living in a largely heterosexual world, the diversity of people of gay orientation leads in a plethora of obstacles. Sex, gender, age, ethnic origin, and religion all contribute to the complexity of the challenges. The stages of life (childhood, adolescent, middle age, and old age), family, and relationships all raise a variety of issues. In most cases, the psychiatric problems encountered by gay, lesbian, and bisexual people are identical to those encountered by the general population. The intricacies of these identities, on the other hand, necessitate tolerance, respect, and a nuanced knowledge of sexual issues. Clinical examinations should be comprehensive and go beyond standard labelling to address a variety of concerns with lifestyle choices, identity, relationships, and social support. It is mandatory to assist people in understanding their sexuality and to aid with living in a largely heterosexual world.(Institute of Medicine (US) Committee on Lesbian, 2011) Individuals who identify as homosexual confront numerous obstacles, including issues over accepting their homosexual impulses, the meaning of disclosure, and difficulties in coming out. Gay-affirmative psychotherapies have been established to assist individuals in coping with their

awareness of same-sex orientation and social stigma. (*Effective Inclusion of LGBT Persons / OHCHR*, 2015) There is no proof that sexual conversion therapies are effective. Additionally, such treatments present ethical concerns. Indeed, there is evidence that such attempts may have a detrimental effect on the individual, including melancholy and sexual dysfunction. However, faith-based organisations and counsellors pursue such conversion attempts using yardsticks that do not conform to scientific norms. Clinicians should remember the adage "first do no harm." Physicians should treat all patients with compassion and respect for their human dignity, regardless of their sexual orientation. (Sathyanarayana Rao & Jacob, 2012) In the psychiatric literature, there are a few minor case series describing homosexuality in males and its treatment with aversion therapy. It imposes responsibility on individuals without properly assessing the stigmatising and repressive social backdrop. Sexual medicalization and the political ramifications of labelling and its role in social control are frequently overlooked. Rarely is the pervasive use of illness models to study mental diseases questioned. There is a scarcity of systematic research on homosexuality in Indian psychiatric literature. (Narain & Chandran, 2015) There is a dearth of data on prevalence, emotional difficulties encountered, and available support groups and healthcare assistance. These studies are critical for enhancing our understanding of the local and regional contexts of sexual behaviour, orientation, and identity in India. (Sathyanarayana Rao & Jacob, 2012) Even though medicine and psychiatry argue that gay inclination is a natural variation of human sexuality, the mental health community and the Indian government have yet to adopt a clear position on the issues in order to remove widely held stereotypes in society. The fraternity must recognise the need of conducting research on the context-specific difficulties confronting LGBT individuals in India. Sexuality education for medical and mental health professionals must be sensitive to the challenges confronting persons of various sexual orientations and identities. Clinical services for individuals with such challenges and concerns must be holistic in nature. A conciliatory and non-judgmental attitude will go a long way toward alleviating distress. Professional associations must raise awareness of these concerns, facilitate the transfer of knowledge and skills, and create opportunities for mental health workers to build their confidence and competence in assisting persons with

diverse sexual orientations and identities. Psychiatrists and other mental health practitioners must be trained on human rights and potential abuse. The emphasis should not be solely on education, but also on attitude transformation.(Sathyanaarayana Rao & Jacob, 2012) The American Psychiatric Association is asking mental health practitioners not to abandon the belief that gays and lesbians may alter their sexual orientation through therapy or other forms of treatment, arguing that this will not succeed.(Drescher, 2015)

According to a newly adopted resolution by the association, parents, guardians, young people, and their families would also be prudent to reject sexual orientation treatments that represent homosexuality as a mental illness or developmental condition. The group adds that individuals should seek counselling, social support, and educational services instead that "give correct information about sexual orientation and sexuality, boost family and school support, and decrease rejection of sexual minority adolescents." Although researchers have not conclusively determined the extent to which homosexuality is genetically inherited, many believe it is a combination of nature and nurture.(Katz-Wise et al., 2016) However, several studies have indicated that genes may have a role in homosexuality. Glass gold stated that, while some studies have indicated that "sexual orientation is unlikely to change as a result of activities aimed for this purpose," others have concluded that "sexual orientation is unlikely to change as a result of efforts designed for this purpose." According to an APA statement, the task force recommended that mental health professionals avoid overstating the success of sexual orientation change efforts (SOCE) while assisting people who are upset about their own or another sexual orientation.(Glassgold et al., 2009)

The task force analysed 83 peer-reviewed journal articles published between 1960 and 2007 about SOCE, as well as other recent studies on the psychology of sexual orientation.

'Therapy cannot convert homosexuals and lesbians to heterosexuals'.(Meyer, 2003)

After reviewing prior research, the task committee was unable to conclude if SOCE is effective or whether the approaches are safe or detrimental. Without this knowledge, psychologists cannot anticipate the outcome of these treatments and must exercise extreme caution, as some

qualitative research indicates the possibility of harm. Practitioners can aid clients by not attempting to modify their sexual orientation or enforcing a particular identification outcome.

Additionally, the Task Force determined that some clients attempting to change their sexual orientation may be experiencing pain because of a conflict between their sexual orientation and their religious views. It recommended that licenced mental health care providers treating such clients assist them in "exploring possible life paths that address their sexual orientation reality, reduce the stigma associated with homosexuality, respect the client's religious beliefs, and consider possibilities for a religiously and spiritually meaningful and rewarding life." (*'Therapy Can't Turn Gays and Lesbians Straight'* - *Times of India*, 2015)

Homosexuality is not a new cultural phenomenon. Sappho, a Greek poet, and arts teacher who lived in the Greek city-state of Lesbos between 630 and 612 BC, was well-known for her fondness for women and had affairs with several of her female protégés at her Centre for Arts. Nonetheless, she was well regarded, both for her artistic sensibilities and for her poetry, which frequently included references to lesbian love. Plato hailed her as the tenth Muse, and her picture was engraved on coinage of her day. (Joshua J. Mark, 2021)

Homosexuality was stigmatised and relegated to the margins of conventional sexuality with the arrival of Christianity. Christianity's Meta narrative stigmatised homosexuality. Later, in the early twentieth century, it was pathologized in the West by sexological discourses. The Biblical tale of Sodom and Gomorrah's destruction is well-known throughout the Christian world. Karl Westphall, Karl Ulrichs, Richard von Krafft-Ebbing, and Havelock Ellis were all sexologists who viewed homosexuality as inversion. As a result, gays and lesbians were despised, discriminated against, and victimised. Surprisingly, lesbians and gays remained 'closeted,' and little gay/lesbian literature existed. (Barnett, 2020)

Since the mid-20th century, perceptions toward homosexuality have shifted. Not only has homosexuality/lesbianism been decriminalised but many countries, including the Netherlands, South Africa, Canada, Hungary, Iceland, Belgium, Spain, Germany, France, and Mexico, as

well as a few federal units of the United States, have legalised gay marriage.(CFR.org Editors, 2022)

The situation in India has been contradictory. The stigmatisation and erasure of homosexuality are deemed to be colonial in nature. As is homosexuality, according to right wing groups. Homosexuality, they argue, is alien to Indian society and a source of moral degeneration. In 1868, the British colonial administration enacted Article 377 of the Penal Code, criminalising homosexuality, and imposing severe penalties of fines and/or life imprisonment for sexual acts outside 'nature's order. Earlier in Indian culture, lesbianism and homosexuality were considered acceptable forms of sexuality—as evidenced by the earliest sculptural art of the Khajuraho caves and the architecture of several Hindu temples in Orissa. In India, non-heteronormative sexual identities came to be objected to and outlawed because of colonial mentality.(Sophie Whitehead, 2022)

As a result, the cultural atmosphere in India has been unfriendly to gays and lesbians. They are fearful of crossing boundaries and 'coming out' for fear of physical assault and societal rejection, and there is a dearth of literature devoted to same-sex love. Any cultural representation of lesbian/gay elicits outrage and retaliation, particularly among right-wing forces who show their abhorrence and full rejection of homosexuality through art and literature. It should also be noted here that whether in films or literary works, gays/lesbians are portrayed as borderline pests, criminals, mentally ill, or devoid of heterosexual coition.

In the 1990s, both lesbian and gay philosophy and the Movement placed a premium on the topic of identity. The concept of biological essentialism was discovered to be restrictive and exclusive, as it excluded non heteronormative sexualities such as trans genders, transsexuals, Hijras, Kothis, and Panthis, who are women trapped in men's bodies. As a result, the umbrella term 'Queer' came to be used to refer to all these categories. Judith Butler's theory of 'performativity', which drew on post-structuralist tools such as Jacques Derrida, Michel Foucault, and Jacques Lacan, conceptualised gender/sexuality as 'performative, that is, a role performed by the subject according to her/his choice,' which resulted in (i) gender identity

pluralism and (ii) gender/sex being considered fluid and a matter of choice.(Sara Salih, 2007) Its effect may be observed in India, where the Gay Pride Marches in Delhi, Kolkata, Bangalore, and Chennai bring together lesbians, gays, Hijras, transgender people, and others to create coalitional politics against India's homophobic society.(Singh Asst Professor of English & Ghasidas Vishwavidyalaya, 2015)

In India, homosexuality has a long history. Ancient texts, such as the Rig-Veda, as well as sculptures and relics, describe sexual actions between women as revelations of a feminine universe in which sexuality was predicated on pleasure and fertility. The Kamasutra's description of homosexual acts, the harems of young boys maintained by Muslim Nawabs and Hindu Aristocrats, male homosexuality in mediaeval Muslim history, and evidence of sodomy in Tantric rites are all examples of historical evidence for same sex relationships.(Bhakti Arora, 2021)

However, with the rise of Vedic Brahmanism and, later, British Colonialism, these experiences began to lose their significance. Giti asserts that Aryan invasions beginning about 1500 B.C. began to suppress homosexuality by establishing patriarchy's control. The Manu smriti (Das Sukla, 2022) contains references to punishments such as caste loss, hefty monetary fines, and whip strokes for homosexual and lesbian behaviour. Manu's mention of harsher sanctions for married women could imply either a widespread occurrence of such relationships among married women or a greater acceptance of similar activities among unmarried women. In either case, these comments highlight the conflicts inherent in Brahmanical patriarchy's forced heterosexuality rules. Both sexual systems coexisted peacefully, despite changes in relative repression and freedom, until British colonialism, when the systematic and open destruction of representations of homosexual expression and sexual expression in general intensified.(Ishank, 2020)

Numerous hypotheses regarding the origins of homosexuality have been advanced. Several of these explanations refer to biological issues, while others make reference to social aspects. Some argue that homosexuality is a lifestyle choice, while others argue that sexuality is socially

formed. Still others argue that homosexuality is multiple determined. Homosexuals are more likely to have non-right handedness than heterosexuals. As a result, one could argue that homosexuality in some homosexuals may have a prenatal genesis. Most gays, on the other hand, are right-handed.(Sheldon et al., 2007)

Recent studies on homosexuality concordance among identical twins have consistently demonstrated that identical twins are highly discordant for homosexuality; these studies have also consistently implicated the non-shared family environment, but not the shared family environment, in the genesis of homosexuality.(Whitam et al., 1993)

Numerous environmental factors have been implicated in homosexuality. For example, male homosexuals are more likely than male heterosexuals to report having a domineering mother. On the other hand, not all male homosexuals and some heterosexual guys describe having a dominant mother. Additionally, a sample of homosexual men diagnosed with borderline personality disorder revealed that their fathers were more loving, and their moms were more emotionally distant, the polar opposite of the dominant mother, absentee father paradigm. Another risk factor for homosexuality is childhood molestation.(Balthazart, 2011)

Homosexuals tend to be more likely than heterosexuals to have been sexually abused or assaulted as children. Several gays who were abused or raped as children, however, describe experiencing same-sex desire prior to the molestation or rape. Additionally, how is it that, while boys who have been sexually abused by males are more likely to be homosexual as adults, even girls who have been sexually abused by men are more likely to be lesbians?(Hequembourg et al., 2015)

Social constructivism as applied to the study of homosexuality is more commonly referred to as 'Queer theory,' yet queer theory is not exclusively concerned with homosexuality; rather, it seeks to invalidate any explanation that contradicts the social constructionist paradigm.(Jennifer Miller, 2020)

According to queer theorists, "The Homosexual" is a nineteenth-century social fabrication and a product of medical discourse, a view popularised by "Michel Foucault." According to queer

theorists, before this period, some people engaged in homosexual practises but did not identify as homosexual. Additionally, queer theorists emphasise the instability of certain persons' romantic objectives and the cross-cultural variety of homosexual expression to show that homosexuality is socially created. The notion that homosexuality is a relatively modern social construct has been thoroughly discredited. Individuals who sexually prefer partners of the same sex or both sexes have existed throughout recorded history in several European and non-European societies. This understanding has frequently coincided with a taxonomy of the many categories of people who have sexual interest in the same sex, and this taxonomy has frequently classified both the receptive and active parties in a male homosexual act. Middle Eastern societies even have distinct terms for various types of boy prostitutes. Certain cultures lack a taxonomy of non-heterosexual kinds or even the concept of homosexuality. However, homosexuals can still be found in such cultures—after all, a cat by any other name or no name is still a cat.(Marcus, 2005)

The social constructionists' contention that human sexuality has social origins cannot be readily refuted. Those who advocate for a biological explanation for homosexuality must surely account for cross-cultural variation in tolerance and expression of diverse gay behaviours.(Ussher, 2017)

Since time immemorial, homosexuals, lesbians, transgender, and intersex people have been described, acknowledged, and even accommodated within society. From the "*mahu*" and "*aikane*" of Polynesia to the "*berdache*" of Native American tribes; from the "*sekhet*" of prehistoric Egypt to the "*eunouchos*" of ancient Greece and Rome; from the "*saris*" of the Israelites to the Syrians "*mu'omin*" or trusted men; from the traditional third gender roles of aboriginal tribes in Africa, such as among the Mbo people of Persistent and unmistakable "*third*" or alternate gender subcultures have existed in some form or another throughout history. Since ancient times, same-sex romance and sexual desire have been documented.(*Beyond Binary Definitions of Gender: The 3rd Gender in Africa | United Belize Advocacy Movement (UNIBAM)*, 2013.)

For modern gays and lesbians, ancient Greece has long been represented as a homosexual paradise. Greek society, the most famous historical gay culture, normalised same-sex love between male and female members. Homosexual relations were supposed to be reserved for the middle class and nobility, and not for the lower classes.(Bonnie J. Morris, 2017)

### **2.2.2 Origin of Homosexuality**

The origins and development of homosexuality are difficult to trace precisely, as it was a taboo subject throughout the history. However, numerous anthropological, archaeological, and literary evidence have established the existence of homosexuality in every early society on Earth.

Even though humans have never been content with what we currently refer to as heterosexual intercourse, homosexuality has a brief history. Until the last third of the nineteenth century, the genital anatomy of one's partners—or what Freud refers to as one's "object choice"—became the decisive criterion for separating gay and heterosexual self. During the 1860's and 1970's, European public officials noticed that some people were structuring their life around various forms of sexual pleasure rather than family, household, and reproduction. This was most likely a recent development enabled by capitalism's dynamics, which tended to drive people away from their parishes and families and diminished the value of planned marriage. Officials became concerned and began examining these people, which they classified as sexual deviants and classified according to the specific acts they engaged in. One such subgroup of deviants became known as "homosexuals." Homosexuality is seen as a pernicious, foreign force coming from a decadent western world. Genealogical investigations of the institutionalisation of homophobia in numerous countries have cast doubt on these claims' communitarian credentials.(Gooß, 2008)

### **2.3 HOMOSEXUALITY IN INDIA**

Homosexuals being shunned or ignored by India's old Vedic civilization and its Sanskrit literature is neither realistic nor fair to that wonderful culture. India's ancient literatures are

densely packed with manuscripts, and their priesthood scribes were renowned for their thorough descriptions of all sciences, both divine and secular. It is improbable that they would neglect or omit any part of human nature. Rather than that, the Kama Shastra (Aditya Arya Narain, 1986) contains detailed tales of both men and women who were born "*Tritiya-prabriti*" or "third-sexed" and classified as homosexual. Northern India's contemporary "Hijra" or "eunch" class is unquestionably dominated by homosexual and transgendered people, with only a few truly intersexed individuals. Years of research and personal interviews undertaken by professionals such as Dr. Serena Nanda, an anthropology professor at the City University of New York, have established this in her novel "THE INDIA HIJRA". Sinha's 1967 study on Hijra in Lucknow, North India, accepts the Hijra's role as performers, but views recruitment to the Hijra group as primarily motivated by the fulfilment of an individual's gay desires. (*Hindu View of LGBT* © Srishti Madurai. – Srishti Madurai, 2011) Anyone familiar with contemporary GLBTI (gay, lesbians, bisexual, transgender, and intersex) societies will quickly see the parallels to the Vedic depictions of the third sex. This is because their gender characteristics and behaviours are ubiquitous and, more specifically, quite well-known these days.

Both civil society and the government in India regard homosexuality as a taboo subject. In India, public debate of homosexuality has been hampered by the fact that sexuality in all its manifestations is rarely discussed openly. However, attitudes regarding homosexuality have altered slightly in recent years. There has been an increase in portrayals and discussion of homosexuality in Indian news media and film. On 2 July 2009, the Delhi High Court decriminalised gay activity between consenting adults and declared that section 377 of the Indian Penal Code violated the Constitution of India's fundamental rights.

Religion has shaped Indian customs and traditions significantly. While homosexuality is not officially condemned in the core sacred texts of Hinduism, India's largest religion, certain interpretations have been interpreted as condemning homosexuality. Scholars hold divergent perspectives on homosexuality's place within India's major religious traditions. There have

been arguments that ancient Hindu civilization was both prevalent and accepting of homosexuality.

"The Manusmriti," which contains the earliest recommended norms of conduct for a Hindu, does include a reference to gay behaviour, but only as something to be regulated. While homosexuality was considered a legitimate element of sexual behaviours, it was not always tolerated.(Narayan, 2002.)

There were sanctions imposed for homosexual behaviour. For example, the passage related to sexual intercourse between an older woman and a virgin (woman) state, "a woman who pollutes a damsel (virgin) must immediately have (her head) shaved or two fingers cut off and be forced to ride (around the town) on a donkey," implying a severe punishment.(Narayan, 2002.)

However, the verse related to sexual encounters between two virgins offers a more lenient punishment: "a damsel who pollutes (another) damsel must pay a fine of two hundred (panas), twice her (nuptial) cost, and endure ten (lashes with a) rod."(Narayan, 2002.) These regulations, when taken out of context, appear to be homophobic, but they are concerned with the loss of virginity that renders a young woman unworthy of marriage. For example, the penalty for a forced sex act between a man and a woman is as follows: "If any man forcibly contaminates a maiden through Insolence, two of his fingers shall be immediately cut off, and he shall pay a fine of six hundred (panas)", which appears to be more severe than the penalty prescribed for the same act between two virgins. Additionally, there is no penalty for two non-virgins having sex together.(Narayan, 2002.) The lopsided treatment could have been owing to gender bias, as the Manusmriti also states that a woman's status in society is equal to (or even lower than) that of a man's land, livestock, and other belongings.

The entire modern translation of the historic Indian work Kamasutra addresses all elements of sexual life, including marriage, adultery, prostitution, group sex, male and female homosexuality, and transvestism, without ambiguity or hypocrisy. The literature portrays an enthralling vision of an India whose tolerance for sexuality resulted in a highly evolved erotic expression.(Vātsyāyana. & Daniélou, 1994)

Indeed, discrimination against gays was not without compassion in classical India. The homosexual is a member of a deficient class of males known in Sanskrit as *Kliba*, deficient in that he is incapable of producing male progeny. The term (which has been traditionally translated as eunuch but almost certainly did not mean eunuch) was used to refer to anyone who was sterile, impotent, castrated, a transvestite, a man who engaged in oral sex with other men, a man who engaged in anal sex with a recipient, a man with mutilated or deficient sexual organs, a man who produced only female children, or finally, a hermaphro. In summary, *Kliba* is a term coined by traditional Hindus to refer to a man who is sexually dysfunctional in their opinion (or in ours, sexually challenged). *Kliba* is no longer a term, but a vestige of it—the feeling of a defect, and the combination of pity, dismay, and a measure of contempt for a man who is unable to marry and produce children—remains attached to the Indian homosexual.(Sudhir Kakar, 2013)

In ancient texts, folktales, and everyday conversation, mismatched lovers, typically those with significant social status differences (a fisherman or an untouchable falling in love with a prince), are reluctantly absolved of blame and the union gradually accommodated, because it is viewed as predestined from a previous birth. When a courageous homosexual couple breaks all conventions by publicly cohabiting, the two families and the social environment often accept them within the context of the rebirth hypothesis.(Vanita & Kidwai, 2016)

This is the case despite the introduction of Islam, which categorically condemns homosexuality as a major offence. According to Muslim theologians in India, the Prophet recommended the most severe punishment for sodomy. However, Islamic culture in India had a Persian influence, where homoeroticism is praised in literature. The link between the divine and mankind was represented in homoerotic metaphors in Sufi spiritual poetry, both in Persian and later in Urdu.(Sikes, 2019)

Inevitably, the supernatural was enacted on a human scale as well. Pederasty became an acceptable outlet for a man's sensual impulses, at least among the top classes of Muslims, among "men of refinement," if he continued to fulfil his duties as a married man. Emperor

Babur's book is rather candid about his apathy toward his wife and predilection for a lad. Additionally, we know that until the mid-20th century, when the princely states were absorbed into an independent India. Numerous princely courts in north India have a strong culture of homosexuality. The gay connections were significantly more prevalent. The present notion of gay activity, especially through depictions of sodomy, appears to date all the way back to India's Muslim period. As previously stated, the classical Hindu conception of homosexual action is via the lens of fellatio. The Kamasutra, for example, discusses the fellatio technique of the closeted man of "third nature" (the Sanskrit equivalent of the Kliba).(Donald J. West, 2002)

Lesbian action is detailed in Ancient India's Kamasutra at the start of the chapter on harems, when large groups of women dwell together in the absence of men. What the queens have is only one king who is engaged with state matters. Women make use of dildos, as well as bulbs, roots, and fruits that resemble male organs. In other words, lesbian action occurred solely in the absence of the "genuine thing." Other types of lesbian behaviour are alluded to in ancient law books: The severe penalty is not for the behaviour itself, but for "deflowering," the wicked act of depriving a young girl of her chastity. Not surprisingly, female homosexuality appears to have been punished more severely than homosexuality among men, traditionalists would argue that this was done to protect women's virginity and sexual purity. Modern feminists would argue that it was done to exert control over women's sexual choice and activity.(Donald J. West, 2002)

It is amusing that reactionaries, both Hindu and Muslim, who view homosexuality as a decadent western phenomenon, adhere to the same foreign code that is so strange to Indian heritage. The Indian heritage of indifference or purposeful ignorance is also incompatible with the western gay movement's model, which is making inroads into our cities. By insisting on the politics of gay identity, on a proud or at the very least rebellious declaration of homosexual identity, this movement is compelling the rest of society to confront the problem publicly.(Donald J. West, 2002)

In contrast to the West, Hindu society does not have a concept of 'sexual orientation' that categorises males according to their desires. However, there is a strong, historical concept of third gender, which refers to persons who exhibit significant masculine and female characteristics. (*Hindu View of LGBT* © Srishti Madurai. – Srishti Madurai, 2011)

According to Sanskrit scriptures such as the Naradasmriti and the Sushruta Samhita, this third sex or gender comprises what we now refer to as homosexuals, transgender individuals, bisexual individuals, and the intersexed (LGBTI). Third genders are defined in ancient Vedic scriptures as males who possess a female nature, referring to homosexual men or males who are feminine gendered. Third genders' gender/sexual roles have historically been associated with receiving penetration from men, just as manhood's gender/sexual role has been to penetrate men, women, and third genders. The Kamasutra, on the other hand, presents third-gender males as assuming both masculine and feminine identities, as well as receptive and dominant sexual positions. (Sanyal & Maiti, 2018) While Hindu society does not explicitly recognise sexuality between males, it does recognise and accommodate sexuality between men and third genders as a variation on male-female sex (i.e., as a subset of heterosexuality, rather than homosexuality, in Western terms). Indeed, Hijras, Alis, and Kotis—the different varieties of third gender that exist in contemporary India—are all defined by the gender role of receptive anal and oral sex with men. Sexuality between males (as opposed to third genders) has nevertheless persisted, generally silently and informally, within men's settings, without being viewed as 'strange' in the way it is viewed in the West. As is the case in other non-western cultures, it is regarded as a universal component of manhood, even if it is not considered socially desirable. It is the effeminate male sexuality of men (or women) that is viewed as 'different' and classified differently. Men frequently refer to their sexual interaction with one another as 'masti'. (*Hindu View of LGBT* © Srishti Madurai. – Srishti Madurai, 2011)

A significant consequence of this has been that sexual desire between men, which was nearly universal previously, has become increasingly isolated from the mainstream, as men withdraw from it due to the stigma of effeminacy or third gender associated with the term 'gay'. (Vanita & Kidwai, 2008) '

Ruth Vanita (Vanita & Kidwai, 2008) analyses the phenomenon of same-sex weddings, many of which are performed according to Hindu customs, as reported in the Indian press over the previous thirty years and with growing regularity. Simultaneously, same-sex collaborative suicides have been documented. Most of these marriages and suicides are committed by lower middle class female couples from small towns and rural areas around the country; these ladies are not affiliated with any LGBT movements. When confronted with familial resistance, both cross-sex and same-sex couples frequently turn to elopement and marriage or to joint suicide in the hope of reuniting in the next world. Vanita looks at how Hindu teachings such as reincarnation and the gender lessness of the soul are frequently construed to justify socially unacceptable partnerships, including same-sex relationships. According to a 2004 study, most swamis – though not all – opposed the concept of a Hindu-sanctified gay marriage. However, few Hindu priests have performed same-sex marriages, believing that love is the outcome of prior birth attachments and that marriage, as a spiritual union, transcends gender (*'We Invoke a Deity Not on Its Own but as a Couple'* - *Hindustan Times*, 2011).

Numerous Hindu and Indian academics have explicitly endorsed LGBT civil rights. Certain liberal Hindu reform movements, particularly in the West, also advocate for the social acceptance of homosexuals, lesbians, and other gender minorities. According to psychoanalyst Sudhir Kakar, Hindus are more accommodating of "deviance or eccentricity" than followers of Western religions, which often view sexual diversity as "anti-social or psychopathological, requiring 'correction' or 'treatment'." Hindus, on the other hand, believe that everyone must fulfil their own destiny (svadharma) on the path to moksha (transcendence) (P. G. Johnson, 2017)

Anil Bhanot, general secretary of The United Kingdom Hindu Council, stated in response to India's legalisation of homosexuality, "The idea here is that the gay nature is a part of God's natural law; it should be accepted for what it is, nothing more, nothing less." (*Hinduism Does Not Condemn Gay People: UK Hindu Council | News Archive News, The Indian Express*, 2009)

Hindus are generally orthodox, but it appears to me that in ancient India, they even celebrated sex as a pleasurable aspect of procreation, inviting priests to their homes for ceremonies to

initiate the process. Hindu philosophy recognises the concept of a third sex or third gender (South Asia) (tritiya prakriti - literally, "third nature"). This group encompasses a diverse spectrum of individuals who possess both male and female characteristics, including effeminate males, masculine females, transgender, transsexuals, the intersexed, androgynies, and neutrois. However, the origins of third gender have nothing to do with "sexual orientation," as modern LGBT sects and the contemporary west assert. Third genders are unrelated to sex among men (which is universal). Third genders are distinct from men and females in that they contain a female regardless of who they are sexually attracted to. While "homosexuality" refers to a third-gender man's sexuality, many MTF third genders are not "homosexual" and are either exclusively drawn to women or are 'bisexual,' while many FTM transgender are attracted to males. In traditional Hinduism, such individuals are not regarded wholly masculine or female, but rather a blend of the two. By nature, they are referred to the third sex (birth). (Tasha Mathur, 2018)

## **2.4 History Of Homosexuality In The World**

Homosexuality has been a source of contention since the dawn of recorded history: ancient Greece, Rome, Egypt, and China all have a peculiar view of their own identity. Attitudes toward homosexuality vary according to a nation's type of society, culture, moral compass, and political will. Relationships between two men (or even between a man and a youngster) were regarded as the finest and most admired form of love in ancient Greece. For several centuries following the fall of the Roman Empire, Christianity dominated Europe and consolidated the reputation of 'sodomy' as prevalent and evil. Sodomy is regarded as a violation of divine law or a crime against nature in cultures influenced by Christianity and Islam. The same belief is widespread throughout countries influenced by Hinduism and Buddhism. Khnumhotep and Niankhkhnum, an Egyptian male couple who lived around 2400 BCE (*History's First Gay Couple. They Lived, Died and Were Buried... | by Kamna Kirti | Lessons from History | Medium, 2020.*), were the first record of possible homosexual couples in history. The couple is

depicted in the most intimate attitude in Egyptian art, kissing their noses, surrounded by what appear to be their successors.

Homosexual and transgender people were also prevalent throughout Latin America's pre-conquest civilizations, including the Aztecs, Mayans, Quechuas, Moches, Zapotecs, and Tupinambá in Brazil. Spanish invaders were appalled to discover open sodomy among indigenous peoples. In ancient Greece and Rome, most men engaged in at least occasional homosexual behaviour. Although it was not known by that word, homosexuality was not only accepted but glorified in the arts, drama, and cultural events. While political homophobia in Zimbabwe has some origins in traditional African culture, Marc Epprecht argues that it owes a great deal to Christian missionary propaganda, Western pseudoscience, and the demonstration effect of white Rhodesian 'cowboy' culture. Even in Colonial India, homophobia spread because of the western legal, medical, and literary discourses. (Stephen O. Murray, 2021)

According to a recent HRW investigation, the humiliation of six years of occupation has created a crisis in Iraqi manhood, which certain militants are now attempting to rehabilitate by hunting down males believed to be gay, effeminate, or otherwise subversive of established gender rules. (*Iraq: Stop Killings for Homosexual Conduct* | Human Rights Watch, 2009)

Gay rights in the United States and Europe have been set against alleged 'Islamist' ideas. Homophobia was challenged in most Muslim countries as a result of ignorance, superstition, savagery, and moral darkness. (*Gay People Are Reclaiming an Islamic Heritage*, 2021)

#### **2.4.1 Homosexuality in Africa**

Additionally, African culture has a suppressed and silent history of homosexuality. In primitive African societies, homosexuality frequently follows the same pattern as in Greece and Rome. Adolescent males frequently form pairs, engage in regular homosexual encounters, and demonstrate love for one another until the time comes to marry. They would then make a choice, renouncing their same sex lovers in favour of the wife (a female). (Sandfort & Reddy, 2013)

Though European explorers and colonialists frequently disregarded or suppressed homosexual expression in indigenous Africa, it existed and took a variety of forms.(Aldrich, 2020)

According to anthropologists Stephen Murray and Will Roscoe, women in Lesotho engaged in socially sanctioned "long-term romantic partnerships" known as Motsoaledi.(Murray Roscoe, 1998.) Evans-Pritchard also noted that male Azande warriors in northern Congo frequently took on young male lovers between the ages of twelve and twenty who assisted with home chores and engaged in sex with their older spouses.(E.E. Evans-Pritchard, 2004) By the early twentieth century, when Europeans took control of African countries, the practise had gone out, but was repeated to Evans-Pritchard by the elders to whom he spoke. African culture does have a distinct term for homosexuality, the most popular of which is 'Yan Dauda'. Among African tribes, such pre-marriage conduct is not considered sexual, as it does not involve the potential for procreation.(Mehra et al., 2019)

#### **2.4.2 Homosexuality in America**

In the United States, homosexual culture and politics have a longer history than on other continents. It is believed that during the first half of the twentieth century, economic dislocation and farm crises drove people to large cities in search of work and away from their families. Once there, they were frequently compelled to live outside typical family structures, with many living in mixed-sex environments such as military and industrial camps for extended periods of time. Individuals with gay inclination discovered one another at the same time they discovered the freedom to express themselves without fear of familial or religious rejection (Laumann, 2000).

The Mattachine Society, founded in November 1950 in Los Angeles, was the first known homosexual political organisation in the United States. This clandestine emancipation movement was founded by Harry Hay, a young musicologist who sharpened his organising talents in the ranks of one of the most underground political parties in twentieth-century America, the Communist Party. As Hay was aware, homosexual persecution was widespread. Police entrapped and brutalised LGBT people on a near-constant basis. Public admission of

homosexuality was sufficient to cause most persons to lose their employment and be shunned by their family and communities. By early 1953, President Eisenhower had made homosexuality a necessary and sufficient reason to terminate any federal employee. Most defence industries and others with government contracts followed suit, and the United States Postal Service aided these industries by placing tracers on suspected homosexuals' mail in order to collect sufficient evidence for dismissal and possibly arrest. The Mattachine Society gained enormous support after one of its founders, Dale Jennings, was jailed in February 1952 for "lewd and dissolute behaviour." Jennings took the unprecedented step of acknowledging his homosexuality in court while pleading innocent to the charges levelled against him, compelling authorities to draw a distinction between homosexuality and criminal activity. Although the jury was deadlocked and a retrial was ordered, the district attorney's office dropped all charges. However, publicising this victory was not easy. There was a news blackout on all information on homosexuality; no newspapers, periodicals, or radio stations received press releases. The Mattachine Society was obliged to disseminate information exclusively through posts and flyers distributed in areas known to be frequented by homosexuals. Nonetheless, the event garnered considerable, though silent, support, and the Mattachine Society's membership grew by several thousand in the weeks that followed.(Christmas, 2018)

Daughters of Bilitis, founded in San Francisco in 1955, fared little better, although both organisations maintained national circulation publications throughout the 1950's and 1960's. By 1969, there were over fifty "homophile" organisations in the United States, all of which were rather tiny.(Christmas, 2018)

The primary cause for post war America's lack of visibility was religious persecution, employment discrimination, violence, and police brutality. Non-celibate homosexuals were reviled by and excluded from most mainstream religious organisations, not just as leaders but also as members. This prompted Baptist minister Reverend Troy Perry to create the Metropolitan Community Church in 1968. Today, the MCC is the largest religious group for gay and lesbian people in the United States, and by far the largest in the South. 'Discrimination in employment' was perhaps the most perilous kind of persecution homosexual people faced

and continue to face—second only to physical assault in terms of violence but affecting a much larger population. The primary cause for post war America's lack of visibility was religious persecution, employment discrimination, violence, and police brutality.(Eskridge, 1996)

Eisenhower's executive order remained in effect from 1953 to 1993. There has never been job protection for LGBT individuals on the same level as straight white women, straight males, and women from racial and ethnic minorities now have. Employers often refuse to recruit gay persons regardless of their qualifications and terminate those who are hired while concealing their sexual orientation.

Still, the most heinous kind of prejudice was and probably continues to be gay bashing, particularly when perpetrated by public officials. For decades, police abuse and harassment have been a continuous element of gay and lesbian life. Throughout the 1950s and 1960s, lesbian and male drag queens were frequently raped and sexually assaulted by police personnel, sometimes inside police precincts. Furthermore, police were of no assistance when homosexual and lesbian people were subjected to beatings, rapes, and other indignities at the hands of civilians. Indefinite detention, public humiliation, and beatings are merely the top of the iceberg. All these activities were prevalent since the American government has taken an anti-gay stance since its inception. America unilaterally instituted the policy of 'no gay men in the military.' In the lengthy history of American governance, America implemented a policy of racial integration in 1948 by excluding gays from serving in the military. This strategy was dubbed "Don't ask, don't tell."(*Milestones in the American Gay Rights Movement | American Experience | Official Site | PBS*, 1976)

Patrons of the Stonewall Inn in New York's Greenwich Village resisted a police raid in 1969 in this atmosphere of terror and brutality. The Stonewall Inn was a working-class gay and lesbian bar popular with both sexes of cross-dressers. Police raids were common and unappealing back then. On June 29, 1969 (Elizabeth A. Armstrong, 2006.), police attempted a routine raid on the bar, but the regulars were fed up. Patrons barricaded the officers inside the building and held them there as they entered. As a result, three days of rioting began. At one

point, the gay community was estimated to control eight square blocks of the city. Word of the riots spread quickly through homophile organisations around the country. It was at that point that what had been since 1954 a rather quiet movement became rebellious.

From the 1970s onward, gay, and lesbian communities successfully lobbied for anti-discrimination legislation in a number of American cities. This movement scored a major win in December 1973, when lobbying organisations convinced the American Psychiatric Association to remove homosexuality from its list of mental illnesses or disorders. This reform eliminated an unjustifiable justification for terminating homosexual employees and another prejudiced reason for awarding custody of children to heterosexual parents rather than homosexual parents. By 1977, California had elected its first openly gay official, when Harvey Milk was elected City Supervisor of San Francisco. Nonetheless, Anita Bryant, an LGBT activist, began her anti-gay campaign in Dade County, Florida, in 1977. By regressing the LGBT movement, in 1978, California state Senator John Briggs sponsored legislation banning gays from teaching in public schools in the state. After a series of statewide debates between Briggs and Harvey Milk, the initiative was rejected in November. It appears gay rights would hold firm in California, but less than three weeks later, former city supervisor Dan White assassinated Harvey Milk and pro-gay San Francisco Mayor George Mascone. White was later sentenced to the least possible penalty on a charge of manslaughter by an all-straight jury. As a result, San Francisco's gay community was rioted, the city's golden age of pro-gay politics came to an end, and anti-gay violence increased.(Charalampos, 2017)

The United States Supreme Court declared in *Bowers v. Hardwick* that states can penalise even private and consensual sexual activity' in 1986. The court specifically stated that Georgia has the right to penalise Michael Hardwick for sodomy notwithstanding the fact that the event occurred in private. The officer who overheard and later witnessed Hardwick's behaviour had entered the house to speak with one of Hardwick's housemates over a traffic violation. Officer Bowers arrested Hardwick in his own bedroom(Elizabeth A. Armstrong, 2006).

The second March on Washington was held the following year, 1987. It was one of the country's largest civil rights marches, drawing more than 650,000 people. The following day, 5,000 demonstrators gathered on the Supreme Court steps, and ACT-UP, a group unfamiliar to the majority of lesbian, gay, and bisexual Americans, made its first national appearance. Homosexual politics, like gay lives, had altered tremendously in the thirty-seven years since Harry Hay started the Mattachine Society. (*200,000 March in Capital to Seek Gay Rights and Money for AIDS - The New York Times*, 1987) Later, because of American courts' meddling and the legalising of homosexuality in the 1990's, the LGBT Rights movement was resurrected, and homosexuals were accorded proper respect and appreciation regardless of their sexual orientation. (*Milestones in the American Gay Rights Movement | American Experience | Official Site | PBS*, 1976) In 2010, the US Congress voted to repeal the military's anti-gay ban. President Barack Obama of the United States of America lauds expanding homosexual rights in 2011. He articulated his position with a genuine understanding that homosexuals in America must be treated equally to other Americans. He also indicated a desire to abolish the prohibition on gays serving in the military and directed the Justice Department to cease defending a law defining marriage as between a man and a woman in court. (*President Obama Signs a New Executive Order to Protect LGBT Workers | Whitehouse.Gov*, 2014) As a result of presidential support, two New York grandmothers, Kitty Lambert, and Cheryl Rudd, were married on Luna Island in Niagara Falls state park, near the US–Canada border, and became the state's first same-sex couples to be legally married. (*Just Wed and First: New York Grannies - Telegraph India*, 2011) Finally, in 2012, US President Barack Obama made a courageous stand by announcing a paradigm shift in his position on homosexual rights, shifting from evolution to support for gay marriage. Prior to this declaration, he was not an outspoken supporter of same-sex marriage, however he made it permissible for homosexuals to serve in the United States military by repealing the "don't ask, don't tell" regulation. (Josh Earnest, 2012)

### **2.4.3 Homosexuality in Europe**

Even though humans have never been limited to what we now refer to as heterosexual relations, homosexuality has a brief history in Europe. Homosexuals immediately became the object of

medical, psychiatric, legal, and religious intervention in Europe, and as early as 1870, they banded together in countries like Bavaria to oppose sodomy's prohibition. Until the Nazis destroyed Magnus Hirschfeld's homosexual archives in Berlin and sent hundreds of thousands of homosexuals to prison camps, Germany's homosexual movement was widespread and influential. In terms of male homosexuality, these papers describe a world in which connections with women and adolescents were the bedrock of a normal man's love life. Same-sex relationships were a social institution that evolved over time and between cities. The formal practise, which involved an amorous yet frequently restricted interaction between a free adult man and a free adolescent, was lauded for its educational benefits and population control capabilities, though it was occasionally accused of causing disorder (Poushter & Kent, 2020).

Male sexual interest remained focused on the young male body in Ancient Rome, but partnerships were between older free men and slaves or released youths who assumed the receptive role in intercourse. Except for Claudius, all emperors had male lovers. Hadrian, the Hellenophile emperor, is famed for his friendship with Antinous, but on August 6, 390, the Christian emperor Theodosius I enacted a legislation. (Abigail Hudson, 2021)

Abolition of passive males through burning at the stake. Justinian broadened the prohibition to include the active partner near the conclusion of his reign, warning that such behaviour could result in the destruction of cities due to the "wrath of God." Despite these laws, until the end of his reign, taxes on brothels of boys accessible for homosexual intercourse remained to be collected. During the Renaissance, wealthy northern Italian cities, particularly Florence and Venice, were recognised for their extensive practise of same-sex love, which was practised by a sizable portion of the male population and built on the classical model of Greece and Rome. However, while a sizable section of the male population engaged in same-sex relationships, the authorities, acting through the Officers of the Night court, prosecuted, fined, and imprisoned a sizable portion of that community. (Jamie Gemmell, 2012)

From the second half of the 13th century, most Europe's male homosexuals faced the death penalty. Relationships between socially prominent persons such as King James I and the Duke

of Buckingham served to emphasise the issue, as did anonymously published street pamphlets: "I'm not sure how the world has changed, but men now kiss men, not women; ...(*James I and the Duke of Buckingham: Love, Power and Betrayal – The History of Parliament*, 2019)

From J. the First and Buckingham: "True, his Wives Embraces fled, to slabber his admired Ganymede" "(1691) (*Mundus Foppensis, or The Fop Exhibited*). *Love Letters between a Certain Late Nobleman and the Famous Mr. Wilson* was published in England in 1723 and was assumed to be a novel by some later researchers. A homosexual scene is included in the 1749 edition of John Cleland's bestselling novel *Fanny Hill*, but it is deleted in the 1750 edition. Additionally, in 1749, Thomas Cannon published the first comprehensive and serious defence of homosexuality in English, *Ancient and Modern Pederasty Investigated and Exemplified*, but it was almost immediately banned. Karl Heinrich Ulrich produced a series of twelve tracts between 1864 and 1880 titled *Research on the Riddle of Man-Manly Love*. In 1867, he became the first self-proclaimed homosexual to come out publicly in favour of homosexuality, pleading for a resolution urging the repeal of anti-gay laws at the Congress of German Jurists in Munich. Havelock Ellis's 1896 book *Sexual Inversion* refuted notions that homosexuality is abnormal, as well as stereotypes, and emphasised on homosexuality's universality and link with intellectual and artistic achievement. Although medical texts such as these (written in part in Latin to obscure sexual details) were not widely read by the general public, they did contribute to the rise of Magnus Hirschfeld's Scientific Humanitarian Committee, which campaigned against anti-sodomy laws in Germany from 1897 to 1933, as well as a much more informal, unpublicized movement among British intellectuals and writers led by suc Edward Carpenter, a socialist activist and poet, began writing pro-homosexual articles and pamphlets in 1894 with *Homogenic Love* and "came out" in 1916 with his book *'My Days and Dreams'*. Elisar von Kupffer produced an anthology of homosexual literature from antiquity to the early twentieth century in 1900. His goal was to widen public perceptions of homosexuality beyond a medical or biological issue to include an ethical and cultural dimension.(Rictor Norton, 1998)

#### **2.4.4 Homosexuality in East Asia**

Since the dawn of recorded history in East Asia, same-sex love has been referred to. Homosexuality has been documented in China, referred to as the 'pleasures of the bitten peach', the 'cut sleeve', or the 'southern custom', since roughly 600 BCE. These euphemism phrases referred to behaviours rather than identities. In early Chinese literature, homosexuality was referenced. The instances of same-sex affection and sexual encounters portrayed in the classical novel 'Dream of the Red Chamber' are as familiar to observers as comparable accounts of heterosexual romances from the same era. Homosexuality in Japan, variously referred to as 'shudo' or 'nanshoku,' dates back over a thousand years and was an intrinsic element of Buddhist monastic life and the samurai culture. This culture of same-sex love spawned robust traditions of painting and literature chronicling and praising such relationships. Similarly, in Thailand, for generations, 'Kathoey' or 'lady boys' have been a part of Thai society, and Thai kings have had both male and female lovers. While the term 'Kathoey' may refer to simple effeminacy or transvestism, it is most frequently used in Thai culture to refer to a third gender. They are widely accepted in society, although Thailand has never legalised homosexuality or homosexual conduct(*The Hidden Histories of Homosexuality in Asia - Fair Observer*, 2016.)

Egalitarian or age-structured homosexual activities were and continue to be popular and thinly concealed in several Middle Eastern Muslim societies. In the temperate and subtropical zone extending from Northern India to the Western Sahara, the dominant pattern of same-sex partnerships has been and continues to be gender- or age-structured, or both. Egalitarian relationships based after the western pattern have become more prevalent in recent years, yet they remain uncommon. In numerous Muslim countries, including Saudi Arabia, Iran, Mauritania, Northern Nigeria, Sudan, and Yemen, same-sex intercourse is punishable by death. A culture of art and literature developed around the construction of Middle Eastern homosexuality. Muslims, frequently Sufi poets, composed odes to the gorgeous wine boys who served them in the harems in mediaeval Arab nations and Persia. The practise persisted into modern times in several regions, as described by Richard Francis Burton, André Gide, and others. There are a few tales of Arab travellers reaching Europe in the mid-nineteenth century. Two of these travellers, Rifa'a al-Tahtawi and Mohamad-al-Safar, express surprise that the

French occasionally purposefully mistranslated love poetry about a young boy, preferring instead to a young female, to preserve their social norms and morals.(Mansoor Moaddel, 2000)

Homosexuality and homoerotic expressions were accepted in a wide variety of public spaces across Persia, from monasteries and seminaries to pubs, military camps, bathhouses, and coffee houses. Male houses of prostitution (amrud khane) were legally recognised and taxed throughout the early Safavid dynasty (1501–1723). Sa'di (d. 1291), Hafez (d. 1389), and Jami (d. 1492) were all Persian poets who penned poems with homoerotic overtones.(Cohen, 2006) Today, governments throughout the Middle East frequently ignore, deny, or prohibit homosexuality. Homosexuality is prohibited in virtually all Muslim countries. One of the rescue narratives for Muslim countries' attitudes toward homosexuality is particularly pertinent. On July 5, 2005, the Iranian authorities hung two boys, Ayaz Marhoni and Mahmoud Asgari, who were said to be between the ages of 16 and 18, in the city of Mashhad for an alleged offence involving gay relations.(Golnaz Esfandiari, 2005). Western activists were vehement in their disagreements on how to respond. Some believed the boys were executed solely for their sexual orientation and vehemently criticised the Iranian regime, pleading with western countries to take punitive action. British activist Peter Tatchell, whose organisation Outrage! Brought the event to the attention of western media, was quoted in a news release as saying: 'This is the latest act of barbarism by the Islamic fascists in Iran... The entire country is a huge prison, with Islamic rule upheld through detention without trial, torture, and state-sanctioned murder,' he continued, before claiming that the regime has slaughtered 4,000 lesbians and homosexual men since the 1979 revolution.(Matilda Davies, 2021) Iran's association with fascism was reaffirmed by Doug Ireland, a New York-based journalist, who described the Ahmadinejad government as conducting a 'major anti-homosexual campaign targeting homosexuality and gay sex'.

Iran's event has drawn widespread condemnation from human rights organisations and LGBT organisations worldwide. The Human Rights Campaign, the largest civil rights organisation in the United States, urged then-Secretary of State Condoleezza Rice to "express an immediate and strong condemnation of Iran for its execution of minors who had allegedly been tortured

and died "just for having consensual sex." It advised that 'atrocities committed by foreign governments against all people must be condemned immediately and decisively by Iranian President Mahmoud Ahmadinejad, who claimed there were no gay people in Iran during a 2007 speech at Columbia University.(RUSSELL GOLDMAN, 2009) While gay persons exist in Iran, the majority conceal their sexuality out of fear of the government or to avoid censure or rejection by their families.

## **2.5 The History of Gay Rights**

By examining the history of gay rights, prevalent prejudices against homosexuals, and the common arguments made on both sides of this issue objectively and without the emotional charge and biases associated with this contentious subject, one can think critically and approach the issue of homosexuality in a more reasonable manner. The African American Civil Rights Movement inspired homosexuals in America to organise and fight for the equality and justice they lacked in society. With the advent of gay rights campaigners, gay rights opponents emerged, and the topic of homosexual rights became a contentious legal war that is still being contested today, with neither group winning altogether. Because homosexuals frequently compare themselves to other minority groups such as Jews or African Americans, they were greatly motivated by Dr. Martin Luther King, Jr.'s African American Civil Rights Movement. His ideas, ideals, and demands for equal protection were accepted by the LGBT community, and King's triumph was a critical factor in the Gay Rights Movement's meteoric growth only a few years later. The Gay Rights Movement has its origins in the infamous Stonewall riots, which marked the first significant attempt by gays to organise and resist prejudice. In the summer of 1969, New York City police officers began raiding illegal clubs, resulting in the closure of five gay pubs due to small street disturbances. The Stonewall Inn, a Greenwich Village tavern that is not licenced and is run by the Mafia, was raided by nine police officers in the early hours of the morning(Gates & Distinguished Scholar, 2011).

June 28th, 1969, mornings while arresting and escorting five employees and customers, the police officers encountered an unusually furious and violent throng outside the Stonewall Inn,

shouting and throwing money, rocks, beer bottles, and bricks at the officers. During the next 45 minutes, the nine police officers were embroiled in a violent confrontation in which protestors were pummeling by police officers and the mob attempted to set fire to the pub with the police officers inside. As police reinforcements came, the crowd, which had swelled to approximately 400 irate protestors, dispersed, but reconvened for two extra nights near the then-closed Stonewall Inn to protest the police's discrimination against gay clubs, yelling slogans such as "Gay is good". ("Today in History - June 28," 2019) However, the significance of this small tragedy is great, and it had a profound effect on the national level. Within days, new gay rights organisations were created, Greenwich Village "Gay Power" meetings were conducted, and existing gay rights organisations launched a series of events calling for national, coordinated resistance to prejudice. ("Today in History - June 28," 2019)

This meteoric emergence of organisation over the entire country succeeded in altering, at the very least, a portion of the dominant cultural view of homosexuality. Experiments and this shifting social norm ultimately convinced the American Psychiatric Association's Board of Directors to eventually remove homosexuality off the Diagnostic and Statistical Manual of Mental Disorders in 1974, marking the LGBT community's first major victory. It paved the way for a slew of new political initiatives by organisations advocating for changes in society's perception of homosexuals and for protection against discrimination in employment and housing. (Drescher, 2015)

As homosexuality gained societal acceptance in the 1980s, gay rights organisations shifted their focus to equal political treatment. Essentially, the homosexual rights movement is described as the demand for gays to be treated equally to heterosexuals in terms of rights, benefits, and treatment. The Gay Rights Movement had progressive victories on the military problem throughout the recent decades. In 1942, the United States military adopted a position on the contentious issue of homosexuality, banning all homosexuals and denying them the opportunity to serve in the military, claiming that their presence would make heterosexual soldiers "uncomfortable" and reduce their efficiency and production. Although gays have been demanding equal rights since then, President Clinton was the first to take a pro-gay stand.

President Clinton implemented the so-called "Don't Ask, Don't Tell" policy in response to successful gay rights activists' lobbying. While "Don't Ask, Don't Tell" does not repeal the military's ban on gays (as President Clinton promised the gay community during his campaign), it does legitimise gay troops in the military as long as they do not publicly disclose their sexual orientation ("don't tell"). Additionally, military personnel are prohibited from inquiring about troops' sexual orientation ("don't ask"). Until recently, when President Barack Obama of the United States of America publicly endorsed rising LGBT rights, US military legislation remained anti-homosexual.(Bonnie J. Morris, 2017)

INDIAN PSYCHIATRIC SOCIETY- "Homosexuality is not a disease"(IPS Position Statement Regarding LGBTQ | Indian Psychiatric Society, 2020.)- Appendix-1

## **2.6 An Insight into The First Reported Case on Homosexuality In India**

To illustrate the magnitude of the problem facing queer legal history, we attempt to re-read the 1884 decision *Queen v. Khairati (Queen-Empress vs Ghulet And Anr. on 31 July, 1884, 1884)* the earliest documented instance of Section 377 being used against a Hijra. The ironically named Justice Straight was tasked with determining if a person who frequently wore women's clothing, had been diagnosed with syphilis, and exhibited characteristics consistent with a persistent sodomite had committed the offence of sodomy. "The individual is not a eunuch in the literal sense, but he was apprehended by the police when on a visit to his village and was discovered singing disguised as a woman among the women of a certain family," the Sessions Court judge said. After being examined by the Civil Surgeon, it was determined that he possessed the characteristic mark of a habitual catamite — the distortion of the anus into the shape of a trumpet — as well as being infected with syphilis in the same region in a manner that evinces unnatural intercourse within the last few months".

While Justice Straight recognised the authorities in Moradabad's intention to put an end to these heinous practises, he was unable to convict Khairati because 'neither the individual with whom the offence was committed, nor the time or place of commission, nor the place is ascertainable'. The judgement contains just the voices of numerous authorities. The Civil Surgeon examines

the anus and determines that sodomy was committed based on the form of the anus. The district officials in Moradabad believe that Khairati's practise of singing while dressed as a woman is sufficient to warrant his detention, and Justice Straight applauds the authorities' desire to 'put an end to these repulsive acts.' The verdict is silent since Khairati's voice is not heard. We can deduce that, despite her birth as a man, Khairati identified as a woman and spent her life as one. The fact that she never rejects or justifies the fact that she 'dressed and ornamented as a lady' demonstrates how significant Khairati's chosen gender was. Even though she is imprisoned, subjected to an anal examination, and discovered to have male genitals, her chosen gender survives all attempts by her tormentors to criminalise what must have appeared 'natural' to her.

What qualifies Khairati as a possible criminal under Section 377 (K. A. Pandey, 2018) is her gender violation, which she never denies but resolutely owns. Khairati's insistence on the gender of her choice endows her with a dignity that is impossible to eradicate. Thus, creating a queer legal history entails not only examining the colonial origins of homophobia, but also reclaiming the voices of its victims. The major issue with Section 377 has been its blanket restriction of both exercise and consensual sex. The term 'carnal intercourse' is sufficiently broad to embrace any sexual actions that are not progressive in nature. The provision's broad language empowers police to randomly target queer persons. Together with the social stigma associated with homosexuality, Section 377 resembles a blackmailer's charter. Additionally, Section 377(Prof. T. Bhattacharyya, 2017.) served as a crucial symbol of second-class citizenship for LGBT people throughout the colonial period and significant portions of the post-independence era, when queer voices were completely absent. While pre-colonial scriptures like as the Manusmriti contained some restrictions on homosexuality, it is unclear if the text intended to penalise homosexuality specifically or more general sexual transgression or breach of caste norms. Only colonial law codified explicit prohibitions against homosexuality. This is enshrined in legislation such as the infamous Section 377(Prof. T. Bhattacharyya,2017) of the Indian Penal Code and the 1871 Criminal Tribes Act. On 2 July 2009, the Delhi High Court handed down a landmark judgement in Naz Foundation v NCT,

Delhi & Ors., decriminalising consensual sex between adults under Section 377 of the Indian Penal Code (IPC), 1860. The judgement was more than a legal decision; it signalled the start of the process through which LGBT individuals gained legal status. The verdict marks the time when queer people become citizens, as the Court deemed Section 377 to be violative of queer people's rights to equality, privacy, and dignity. The Court understood that what was at risk was not only decriminalising a specific sexual act, but rather decriminalising LGBT people's intimate lives. Additionally, it recognised that sexuality and identity are inextricably linked and that 'for each individual, whether homosexual or not, the sense of gender and sexual orientation is so ingrained in the individual that the individual carries this aspect of his or her identity wherever he or she goes'. The court determined that sexual expression requires a partner, whether real or imagined. It is not the state's responsibility to choose or arrange for partners, but rather for partners to choose themselves.' Comprehensive legal examinations of high court and Supreme Court decisions interpreting this provision, for example, locate only 131 examples dating all the way back to its establishment 144 years ago. That this provision has become a regular element of Indian mass media and is undoubtedly one of the most significant pieces of legislation in the country today is a remarkable phenomenon.

### **2.6.1 The Criminal Tribes Act, 1871**

While Section 377 has garnered some attention, the Criminal Tribes Act of 1871, which targeted hijras particularly, has gone relatively forgotten. The 1871 Criminal Tribes Act is the result of the British administration's hostility toward particular tribes and groups that were, in the statute's words, "addicted to the systematic committing of non-bail able offences(Criminal Tribes Act, 1871 (Section -2), 1871.)." These societies and tribes were viewed as criminals from birth, with criminal behaviour being carried down through generations. It fit well into India's hierarchical social order, in which certain communities were viewed as criminals from birth and contaminated from birth. The concept of criminal tribes was based on the idea that 'crime as a profession was passed down from one generation of criminal caste members to the next: just as a carpenter would pass on his trade to the next generation, hereditary criminal caste members would pass on this profession to their offspring (Ahuja, 2016).

The connection between sexual nonconformity and criminality was made more explicit in the 1897 modification to the 1871 Criminal Tribes Act, which was subtitled 'An Act for the Registration of Criminal Tribes and Eunuchs'. A eunuch was deemed to comprise all members of the male sex who acknowledge to being such or who obviously appear to be so upon medical examination under the criteria of this Act(Criminal Tribes Act, 1871 (Section -24), 1871.). The local government was obligated to maintain a register of all eunuchs who are' reasonably suspected of kidnapping or castrating infants, or of committing offences under Section 377 of the Indian Penal Code(Criminal Tribes Act, 1871 (Section -24-A), 1871).' Any eunuch so registered who appears in a public street clothed or decorated as a woman....or who dances or plays music or participates in any public exhibition in a public street.....may be detained without a warrant and punished with up to two years in prison, a fine, or both(*Criminal Tribes Act, 1871 (Section-26)*, 1871.). If the eunuch so registered had a boy under the age of sixteen years under his authority or dwelling in his residence, he may face up to two years in prison, a fine, or both. A eunuch was thought to be incapable of serving as a guardian, giving a gift, drafting a will, or adopting a son(*Criminal Tribes Act, 1871 (Section-27)*, 1871.). A description coined by a British commander to describe criminal tribes is equally applicable to the colonial view of the eunuchs: 'they are utterly the slime, the flotsam, and jetsam of Indian existence, deserving no more respect than the beasts of the field.'*(99+) A STUDY OF CRIMINAL TRIBES IN INDIA* / Uddesh Shukla - Academia.Edu, 2013.) Thus, the eunuch's sexual non-conformity drew heavy reprimands and sanctions from the colonial authorities. According to Narrain, being a eunuch was a criminal operation, with surveillance being a daily occurrence. The surveillance mechanism criminalised their life by making the eunuch's quotidian reality, namely cross-dressing, a criminal offence. Additionally, how eunuchs made a living, including singing and dancing, were criminalised. Thus, every facet of the eunuch's existence was monitored, with the monitoring being predicated on the threat of criminal action. Thus, the police were a daily occurrence in the lives of eunuchs. Additionally, the eunuchs' very concept of personality was abolished by depriving them of basic privileges such as giving a gift or adopting a son(Harrain Arvind, 2011). Jawaharlal Nehru reacted strongly against the Criminal Tribes Act, "I am aware

of the horrific clauses of the Criminal Tribes Act that constitute a denial of civil liberty(Dakxin Bajrange et al., 2019)..." It should be attempted to have the Act struck from the statute book. No tribe can be classified as criminal in and of itself, and the entire concept is incompatible with all civilised notions of criminal justice and offender care. However, the eunuchs had no backing from the nationalist movement and were entirely isolated. Their loathed sexuality deemed them incapable of sympathy, let alone legal protection. Although the government of independent India repealed the Criminal Tribes Act, the law remained on the books of certain states. The Andhra Pradesh (Telangana) Eunuchs Act 1329 F is an example of this, as it remains in force in Andhra Pradesh long after independence. The Act incorporated the 1897 revision to the Criminal Tribes Act. Even in states without such a statute, repeal had no beneficial effect. This is demonstrated by law enforcement officials' continued treatment of hijras as thieves, and thus as a criminal tribe(*Human Rights Violations against the Transgender Community*, 1999.). As the Peoples' Union for Civil Liberties-Karnataka (PUCL-K) noted, the contemporary perception of hijras as thieves, as well as the heinous violence inflicted against them, can be traced back to this colonial legislation, which, while repealed in theory, has persisted as part of the living culture of Indian law. The Naz verdict also recognised the invidious role played by the Criminal Tribes Act, noting that "while this Act has been repealed, the link of crime to the Hijra group endures."

### **2.6.2 Emergence of Queer Activism in India**

Opposition to this marginalisation of gays created a queer political consciousness in the crucible of legal battles. This emergence of a queer political consciousness is signalled by activist publications such as the 'Less the Gay Report' (1991), the 'Campaign for Lesbian Rights' (CALERI Report) 1997, the 'Humjinsi' (1999), and the PUCL-Karnataka reports on human rights violations against sexual minorities and the transgender community in 2001 and 2003, respectively. These texts were crucial milestones for change because they outlined a broader vision for queer rights and laid the groundwork for a demand for rights. When the AIDS Bedhbhav Virodhi Andolan (ABVA) organised a public rally against police harassment of LGBT persons in 1992, it was the first collective and public response to the myriad injustices

inflicted against queer people. This is India's first known demonstration in support of LGBT rights. Suddenly, covert and silent same-sex connection became visible, sparking outrage and a demand for rights. In a memorandum given to the police, ABVA posed the following question: When will the police overcome their homophobia?(*Human Rights Violations against the Transgender Community* 1999.) Is it illegal for two consenting adults (of the same sex) to meet in a public place, become friendly, and have a healthy discussion about sexuality or any other subject—which may or may not result in sexual action in a non-public location?(*Submissions to Justice Verma Committee by Alternative Law Forum, Bangalore Suggestions to the Justice Verma Committee on Proposed Changes in the Law on Sexual Assault Introduction*, 2013) ABVA established a prophetic vision of gay rights with a groundbreaking study on queer rights titled *Less Than Gay*. It contextualised the violence directed at gays and lesbians within a broader climate of prejudice fostered by the medical establishment, activist organisations, and even intellectual circles. The Report discussed subversive queer desire and gay men and lesbians' 'intimate feelings, concerns, and longings'. What it accomplished in 1991 was to establish an explanatory framework that was later adopted and expanded upon by LGBT activism in the following years (*Less than Gay*, 1991). The 1992 ABVA demonstration against police harassment was not the last; over the next two decades, other similar protests would occur. Queer activism was now characterised by a willingness to respond to abuses that began to garner national, if not international, notice. There were various local campaigns against police harassment and violence (much as the ABVA demonstration in 1992). These efforts gradually gained traction on a national and even worldwide level. Ten years later, when a Section 377 lawsuit was filed against personnel of an organisation that worked with HIV/AIDS, significant protests ensued. The case, colloquially referred to as the 'Lucknow four,' involves the arrest of four HIV/AIDS campaigners and the closure of two organisations that work with HIV/AIDS on suspicion of conspiring to encourage homosexuality. After more than a month in jail, the four activists were finally released following a continuous campaign that garnered support in major cities across India. Additionally, the Lucknow case proved that the mere existing of Section 377 on the law books

ensured that its use was always a possibility. Section 377 could never become a dead letter of the law if it remained on the statute books. The campaign against the Lucknow arrests exemplified a fresh activist zeal. It culminated in the foundation of People for the Rights of Indian Sexual Minorities (PRISM), one of the first political organisations in Delhi dedicated to gay rights, which eventually played a critical role in the formation of the alliance Voices against 377. As an intervener in the Delhi High Court, -Voices was instrumental in revealing Section 377's inherent violation of human rights.(Dhamini Ratnam, 2019)

### **'Like People like Us.'**

While the first public manifestation occurred during the 1992 ABVA protest, it was in 1988 when two policewomen named Leela, and Urmila chose to marry in order to get societal legitimacy for their relationship. Though both women were removed from employment on the spurious grounds of an 'extended leave of absence,' their daring deed inspired rising LGBT activism(*Hum Jinsi*, 1999). On the other hand, ABVA referred to Leela and Urmila as "frontier women" in the country's social landscape because of their bold and unique marriage( '*Less Than Gay*' – *A Citizens' Report On The Status Of Homosexuality In India*| *Countercurrents*, 2022). The much-publicized marriage of Leela and Urmila was followed by an ABVA Fact Finding Report in 1999 titled, 'Like People Like Us,' on Mamta and Monalisa's simultaneous suicide attempt. The Report demonstrated how lesbian and bisexual women frequently feel themselves imprisoned within a jail surrounded by conventional conceptions of gender and sexuality. It illustrated how patriarchal limitations confine lesbian women's manifestations of personhood to the point that suicide appears to be the only alternative left. While the study initiated a debate about some of the most pressing challenges confronting lesbian women in India, it was the controversy surrounding the film *Fire* that truly catapulted LGBT women into the national limelight. Deepa Mehta's film, directed by her, depicted a connection between two ladies with remarkable empathy. The Hindu Rights Activist advocated for the film's prohibition. The dispute shook India's Parliament, and the Supreme Court intervened to prevent the film from being banned. The Shiv Sena's decision to assault cinemas showing *Fire* transformed an intellectual debate into a violent social fight. Such flagrant attacks on the screening of *Fire*

galvanised India's civic society to defend the fundamental democratic ideal of 'freedom of speech and expression.' These radical organisations campaigned relentlessly against the screening of *Fire* and then responded similarly when another contentious film, *Girl Friend*, was released nearly ten years later. The battle to prevent the distribution and viewing of *Fire* was presented as a free speech issue, almost deliberately obscuring the film's portrayal of lesbianism. This exclusion precipitated the establishment of CALERI (Campaign for Lesbian Rights), which aimed to focus the discourse on lesbian rights. However, lesbian rights were articulated with much reluctance. As one of the proponents described it, "even as organisers prepared for the demonstration...there was tension among us...some [protesters] objected to the usage of the term 'lesbian' in the press release." (*Reports on LGBT Rights Archives - Feminist Law Archives*, 2003) There was pressure to speak about 'women-women partnerships' rather than 'women-women connections.' There were difficulties with the term 'sexuality'.... There was a claim that the individual on the street was unprepared to hear these remarks. CALERI's work, in the words of another protagonist, rebutted the idea that lesbianism was a 'personal choice' and hence not a valid topic of concern within the larger context of human rights. As a result of CALERI's activities, the mainstream human rights movement was forced to address the problem of the ban on *Fire* not just as a matter of free speech, but also as a matter of lesbian rights (*GOODRIDGE v. DEPARTMENT OF PUBLIC HEALTH (2003) | FindLaw, 2003*)

In the late 1980s and early 1990s, queer activism centred on the lesbian, gay, and bisexual communities' issues. However, as the 1990s wore on, an increasing number of eloquent transsexual women became involved in the LGBT fight. The PUCL Report on 'Human rights (*GOODRIDGE v. DEPARTMENT OF PUBLIC HEALTH (2003) | FindLaw, 2003*) (UDHR, 2003) abuses against the transgender community' was the first public acknowledgement of the transgender community's concerns.

By emphasising the tales of Hijras and Kothis, the 2003 study elevated the challenges and concerns of the transgender community, therefore expanding the definition of what it means to be queer beyond lesbian, bisexual, and gay identities. This was noteworthy since queer activism

had hitherto been mainly focused on lesbian, gay, and bisexual individuals. Additionally, the 2003 study emphasised the need of integrating gender-based demands into queer activism, such as the freedom to identify and express one's gender identity. Sexual orientation could no longer be the primary basis for queer politics, as the source of 'exceptional' violence was clearly violation of gender norms on a 'daily' basis. By focusing on the rights of hijras and kothis, the 2003 study also brings gay politics into conversation with the problem of class and economic inequities, which serve as a fundamental axis of separation in Indian culture. The demands for gender identification certificates, ration cards, and voting rights for hijras, as well as access to free healthcare and education, are the result of an inclusive queer politics that views the hijra community through many lenses of gender, sexuality, religion, caste, and class.(Bhattacharya & Ghosh, 2020)

The ABVA's first homosexual demonstration, the protests around Fire, and those surrounding the Lucknow• arrests were all pivotal milestones in the history of queer activism. The PUCL-K recorded this violence against the gay community in two different reports in 2001 and 2003. The 2001 report demonstrated that the impact of Section 377 must be understood not only in terms of decided cases, but also in terms of the filing of a FIR or the mere threat to file a FIR, as well as police practises of sexual violence, extortion, abuse, outing, and illegal detentions, all of which leave no legal trail(*Loving v. Virginia :: 388 U.S. 1 (1967) :: Justia US Supreme Court Center, 1967.*). Apart from the legislation, the 2001 study identified the numerous systems that contribute to queer oppression, including the police, the family, the medical establishment, and popular culture(*PUCL-K (2001) Human Rights Violations against Sexuality Minorities in India A PUCL-K Fact-Finding Report about Bangalore. - References - Scientific Research Publishing, 2001.*). The violence they experience daily extends to their incapacity to exercise civic rights. As a priori criminals, queer individuals are omitted from the records of who the state considers to be a citizen deserving of rights and privileges. They are not defined nor forbidden by civil law, and queer desire and its capacity to create meaningful connections are obliterated save when referred to as 'unnatural intercourse. After a thorough examination of the rules governing marriage, divorce, inheritance, labour, and insurance, we may deduce

that to profit from any of these laws, we must be connected by blood or marriage. A gay or lesbian spouse would be unable to inherit property upon his or her partner's death, as well as any labour law benefits or insurance policy advantages, as all of these privileges are reserved for members of the 'deserving' homosexual family(*Hum Jinsi*, 1999). To address the broader range of concerns that characterise the 'ordinariness of daily violence,' Section 377 remained the major legal impediment. While LGBT activists have attempted to focus on problems other than 377 at various times in time, emphasis has always returned to the infamous section since the legislation remained a significant obstacle to other legal reform(*Electronic Law Journals - LGD 2001 (2) - Narrain*, 2001).

When ABVA organised the first public demonstration against Section 377 in 1992 there were only few people who aware of the issue. By 2006, however, Shefalee Vasudev could write in *Outlook*(*Outlook India: More than Just the News Magazine from India*, 2006) magazine that Section 377 of the IPC does not require a qualifying sentence. The longer we wait to eradicate it, the longer it will serve as a reference point for discussions about sexual minorities, human rights, and HIV/AIDS. What marked a dramatic shift in public perception was Vikram Seth and Amartya Sen's open letter calling for the decriminalisation of romantic love in 2006(*Monthly Review | LGBTQA*, 2012.). The open letter builds on more than a decade of effort by LGBT activists through Fact Finding Reports, activist intervention, conferences, and media coverage of the law's harmful consequences. Vikram Seth criticised Section 377 as a legislation that 'punitively criminalises passionate love.' Amartya Sen claimed in a letter in favour of this(*Monthly Review | LGBTQA*, 2012.): "Gay behaviour is, of course, considerably more prevalent than the instances brought to trial." This, others contend, demonstrates that Section 377 does not do nearly as much harm as we, the protestors, believe. What must be kept in mind is that whenever any behaviour is designated as a punishable offence, it vests the police and other law enforcement officers with enormous authority to harass and victimise certain individuals. As a result, the harm caused by an unfair legislation like this might be far more than would be reflected by actual prosecutions. These two letters, taken together, signalled a substantial mobilisation of public opinion in opposition to Section 377. Less than Gay noted in

1991 that just 19 of India's 80 famous intellectuals replied to a poll about homosexuality, with only a few having anything nice to say. Vikram Seth's letter garnered over 100 signatories from important figures in education, law, theatre, film, arts, academia, media, social movements, government, and medical, signalling a sea change in understanding among what ABVA referred to as 'opinion makers.' The letter itself received widespread coverage in both national and international media, contributing to the consolidation of a certain degree of public opinion in favour of homosexual and lesbian rights. Protests have been critical in establishing gay people as human beings with rights. In Bangalore, Delhi, and Bombay, protests have frequently been organised in response to local police harassment. They took on a more national aspect when the arrests in Lucknow in 2004 elicited protests in Delhi, Bangalore, and Bombay. While the protests were mostly about police brutality, the significant LGBT presence at the 2004 World Social Forum in Mumbai had a more joyful tone (*GLAD Now Stands for GLBTQ Legal Advocates & Defenders - GLAD*, 2016). The Pride marches, which began in 2003 in Kolkata on 29 June (Stonewall Day) and quickly expanded to other major Indian cities, have carried forth the celebratory spirit of the gay presence at the World Social Forum (Mumbai). The significance of 29 June is that it recalls one of the most pivotal days in worldwide gay history, when the homosexual community in New York began spontaneously protesting a police raid on a Greenwich Village club named Stonewall. It was the catalyst for the western gay movement. The nature of the Pride marches is such that, unlike earlier demonstrations, these marches became a method of honouring LGBT lives in all their diversity. On 29 June 2008, Kolkata joined Delhi and Bangalore in the Pride march, which brought national attention to the LGBT community's concerns. It was held concurrently in Delhi, Bangalore, and Kolkata (this was Kolkata's sixth Pride march). The Pride marches were unusual in that they rallied gay people around topics and dates of their choosing. Later that year, the LGBT community in Mumbai marched on 16th August, the day following Independence Day festivities, to emphasise the queer community's continued lack of freedom. Symbolically, the march began in August Kranti Maidan, the site of Gandhi's 'Quit India' appeal, reinforcing the foreign heritage of Section 377. Lesbian, homosexual, bisexual, and hijra pride marches serve as a

gathering place for lesbians, gays, bisexuals, and hijras. In a very visible way, it generated a feeling of a varied and dynamic community that transcends class and gender divides. The pride posters include messages such as 'I am the family's pink sheep' and 'Hindu Muslim Sikh Isai Hetero Homo Bhai Bhai', as well as demands such as 'Repeal 377' and 'I am a Dadi but not a Rudhivadi'.(Hamsadhwani Alagarsamy, 2019)

Thus, the Pride served as an important refutation of the assumption that sexuality was an elite obsession. The Pride marches attracted a similar number of heterosexual friends, family members, and general supporters. Since 2009, the marches have been commemorated with greater fervour and excitement, with cities like as Bhubaneswar and Chennai participating in.(Hamsadhwani Alagarsamy, 2019)

### **2.6.3 Naz Foundation**

On behalf of Naz Foundation, the Lawyers Collective HIV/AIDS Unit filed a constitutional challenge against Section 377 in the Delhi High Court in 2001 on the grounds of equality, privacy, and freedom of speech. From the start, this Public Interest Litigation was unusual in the collaborative approach employed by Lawyers Collective, who engaged and educated the community through discussions about the different choices to be made during the litigation process. However, the case was rejected by the Delhi High Court in 2004 on locus standi grounds, before any substantive concerns could be addressed. The matter was remanded to the Delhi High Court only after the petitioners filed a review petition with the Supreme Court, which was instructed to consider the matter due to the gravity of the issue presented in 2006. Others joined the case to resist the call for the legislation to be read down, including Joint Action Kannur (JACK) and B.P. Singhal, who contended that HIV did not cause AIDS and that Section 377 was necessary to safeguard Indian society. The remarks opposing Naz Foundation's petition generated a lively debate during one of Lawyers Collective's consultation meetings about how the petitioner might be better assisted. This debate culminated in the decision to submit an intervention on behalf of 'Voices against 377,' a Delhi-based alliance of sexuality, gender, and child rights organisations.

As the petition made its way through the Delhi High Court, it gained further public attention. The case's proceedings were extensively covered and closely watched by national and local press. The fact that, after seven years of filing, the last arguments began in September 2008 increased the likelihood of a change. The seven years functioned as a critical gestation phase, eliciting more public support and resulting in the formation of a more vocal LGBT political voice. For instance, when the debates began in September 2008, the country's first Pride marches were still fresh in memory. Although coincidental, the fact that the 2009 judgement was preceded by a second year of Pride marches demonstrates the campaign against Section 377's peculiarity in that it was both a political demand and a judicial battle. The decision occurred at a fortunate point of convergence in legal, political, and social thinking and attitudes. The 105-page decision has ushered in a new discourse on LGBT people, one that moves away from the vocabulary of 'carnal intercourse' and toward a new language of dignity, privacy, equality, and inclusion. The Judges effectively overturned a 154-year-old discourse that viewed homosexuality only through the lens of abnormal sexual activity. The Court determined that criminalising consensual sex between adults in private violates the Constitution's rights of dignity, equality, and freedom from sexual orientation discrimination (Articles 21, 14 and 15). In technical words, the judges read down' or construed Section 377 in such a way that consensual sex between adults in private is no longer criminalised.

It was a one-of-a-kind example of a judgement that drew heavily on LGBT community experiences and was able to represent the lived and existential realities of being queer, both in its form and reasoning. In a literal sense, the judgement cited incidents of LGBT community violence. Thus, the judgement was deeply rooted in the LGBT community's experiences, and this capacity to sympathise with the queer community's sorrow permeated the legal reasoning in the judgement. The judgement begins by adopting a concept of human dignity that places a premium on the capacity to choose how to live one's life freely.

*At its least, the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy*

*of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others (Para 26, Naz Judgment).*

The court draws a definition of privacy from this concept of dignity, stating that it '...concerns individuals rather than places.' That is, the right to privacy encompasses not only the freedom to conduct oneself in 'private settings,' such as the home, but also the ability to make decisions about how to live one's own life. Personal autonomy, both spatial and decisional, is safeguarded by privacy.

This involves the right to sexual expression, which entails the ability to choose sexual relationships free of official interference. As the Court phrased it elegantly, "[s]exual expression involves a partner, real or imagined." It is not the state's responsibility to choose or arrange for partners, but rather for partners to choose themselves' (Para 47).

The judgement unequivocally recognises that even in the absence of actual enforcement, rules like Section 377 serve to stigmatise an entire segment of society, so breaching their citizenship dignity. By making specific reference to the colonial-era Criminal Tribes Act, the judgement highlights an appalling instance of sexual minorities being criminalised. Additionally, the judges observe how Section 377 effectively criminalises all gay men.

*The fact is that these sexual acts which are criminalised are associated more closely with one class of persons, namely, the homosexuals as a class...When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because (of) what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual nonconformity, persecuted, marginalized, and turned in on itself (Para 94).*

Thus, the Justices interpret Article 15's definition of 'sex' to include not just biological or physical sex, but also sexual orientation. According to the Court:

*The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning 'normal' or 'natural' gender roles. Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex (Para 99).*

The Justices point out that the Supreme Court has interpreted Article 21's right to life to include a right to health. This right to health encompasses a variety of entitlements, including equal access to a functioning healthcare system. The Justices concluded that Section 377 violated LGBT individuals' right to health by impeding HIV/AIDS preventive efforts. The Court determined that the public's moral judgments cannot be used to justify limiting LGBT individuals' fundamental rights. The Court declares.

*Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality (Para 79)*

The Court establishes this 'constitutional morality' based on the liberal democratic ideals that underpin the Indian Constitution, not on the basis of any particular religion or cultural heritage. They take their cue from Dr. Ambedkar, who stated in the Constituent Assembly that "constitutional morality is not a natural sentiment." It must be nurtured. The Judges determine that criminalising or stigmatising homosexuals solely for their sexual orientation would violate constitutional morals. Reiterating their commitment to constitutional morality, the Judges emphasise the judiciary's responsibility in a constitutional framework as protecting the fundamental rights of those who may disagree with or vary from the majority position. Thus, the Judges affirm the judiciary's responsibility to preserve fundamental rights regardless of the legislative majority's position. Thus, the judiciary as an institution bears duty for ensuring that 'legislative majorities in a fit of rage against a minority' do not sterilize the grandiloquent

mandate' (para 125). In conclusion, the Court draws on the concept of equality that underpins the Indian Constitution and establishes an organic link between the founding fathers' objectives and the current need to ensure that LGBT individuals are not discriminated against.

*The notion of equality in the Indian Constitution flows from the 'Objective Resolution' moved by Pandit Jawaharlal Nehru on December 13, 1946. Nehru, in his speech, 28 moving this Resolution wished that the House should consider the Resolution not in a spirit of narrow legal wording, but rather look at the spirit behind that Resolution. He said, 'Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation's passion.... (The Resolution) seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve soon (Para 129). The Court goes on to say: If there is one constitutional tenet that can be said to be (the) underlying theme of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that (the) Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised (Para 130).*

In Suresh Kumar Kaushal (Suresh Kumar Koushal & Anr vs Naz Foundation & Ors on 11 December, 2013, )

Counsels representing one of the 16 (so far) distinct Special Leave Petitions (SLP) sought the Supreme Court's intervention in their strident opposition to the Delhi High Court verdict, not because consensual sex between adults is lawful, but out of concern that gays and lesbians will now marry. Their repugnance has an element of affirmation—of the right to love, which is at the heart of the queer struggle. Simultaneously, it is the 'imagined' concern that homosexuality is a threat to the institution of marriage and what Adrienne Rich refers to as the law of 'compulsory heterosexuality' that fuels the strong opposition to the Naz decision. While homosexuals are not criminals, they cannot marry and form alternate families. Legalizing homosexuality is viewed as a plot to undermine the nuclear Indian family. A single-line poster

campaign launched by the Vishwa Hindu Parishad (VHP) to rally support against the Naz decision reads, 'Agar tera baap samlaingik hota, to tu paida nahin hota' (If your father was homosexual, you would not have been born). All of this has resulted in the Supreme Court filing an appeal against the Delhi High Court's Landmark Judgment (*Suresh Kumar Koushal & Anr vs Naz Foundation & Ors on 11 December, 2013*, ). The so-called protector of Indian culture, morality, and law succeeded in recriminalizing homosexuality in India. A bench comprising Justice GS Singhvi and Justice S J Mukopadhyaya reversed the Delhi high court's historic 2009 (*Naz Foundation vs Government Of Nct Of Delhi And ... on 2 July, 2009*,) decision decriminalising adults' consenting private acts of homosexuality and upholding the constitutional validity of S.377 IPC. In *Suresh Kumar Kaushal V. Naz Foundation*, the Supreme Court declared that the "high court erred gravely in pronouncing section 377 IPC to be violative of articles 14 (The Constitution of India, 1950), 15(The Constitution of India, 1950.) and 21(The Constitution of India, 1950) of the constitution insofar as it entirely criminalises consensual sexual actions of adults in private." Additionally, the Supreme Court declared s.377 IPC obstructs homosexuals' personality development or impairs their self-esteem. The SC Bench determined that anal intercourse between two homosexuals is a high-risk conduct that exposes both homosexuals to the risk of HIV/AIDS.

Both the Judges further held that- “

*Homosexual acts are unnatural & against the order of nature. Based upon the modest medical findings, the human body is simply not designed to engage in homosexual acts. Every part of body is meant to perform a specific purpose & must be used for that purpose only; conversely the opposite is true; the sexual activity is perfectly designed to be between a man & woman. If homosexuality is legalized the instances of HIV/AIDS will increase & overall health status of people in our country will go down”.*

Finally, citing religion, society, and culture, the judges concluded that decriminalising consensual sex between people of the same sex would violate our religious beliefs and would result in male prostitution. Deviation from accepted sexual morality fosters societal

antagonism. Since this judgement was handed down in 2013, LGBT activism suffered a significant blow in their fight for fundamental rights. The war continues, but homosexuals' confidence, courage, and hope have waned and found that the HC was incorrect in observing that.

On January 5, 2018, even though the curative petition was still pending before the Court, the Supreme Court summoned a constitution bench to address the constitutional challenge against Section 377 in its entirety. This could be in response to the reasons made in the nine-judge opinion in the Right to Privacy case, which suggested that the rationale and judgement in Suresh Koushal were fundamentally faulty. The petition was heard by a five-judge bench consisted of Chief Justice Dipak Misra, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud, Justice R.F. Nariman, and Justice Indu Malhotra from July 10th to July 12th, 2018(*Global Freedom of Expression | Navtej Singh Johar v. Union of India - Global Freedom of Expression*, 2018).

On 6 September 2018, a five-judge Bench struck down a part of Indian Penal Code Section 377, criminalising same-sex relationships between consenting adults. Individuals who identify as LGBT can now engage in consensual intercourse lawfully. The Court upheld the restrictions of Section 377 prohibiting non-consensual intercourse or sexual acts on animals. The four judgments unanimously invalidated Section 377 based on a violation of fundamental rights. They determined that Section 377 violates the Constitution's Articles 14 and 15 by discriminating against individuals based on their sexual orientation and/or gender identity. Additionally, they ruled that Section 377 violates the rights to life, dignity, and personal autonomy guaranteed by Article 21. Finally, they decided that it obstructs an LGBT person from fully realising their identity by violating Article 19(1)'s right to freedom of speech (a).

The Court emphasised the importance of individual choice and the liberty that comes with it. Liberty and dignity are opposites that cannot coexist. Each human being is born with a distinct sexual orientation determined by biological traits. Only society can generate discontent. The American Psychological Association defines sexual orientation as a sense of romance, sexual

attraction toward both sexes, and identification of a person based on these inclinations, ranging from heterosexual to gay. Additionally, the Association maintains that homosexuality is not a mental or physical condition, but rather a minority group in our society.

Every individual has the right to equality and non-discrimination, the right to recognition, the right to privacy, and the right to expression and opinion freedom. Together with Articles 14, 15, 19, and 21 (*V N Shukla's Constitution of India*, 2022.), these principles declared colonial rule to be unconstitutional and repealed Penal Code Section 377. Over the last century and a half, approximately a couple hundred people have been prosecuted under this law. They caused no harm to others and were merely exercising their fundamental rights, which the legislation breaches. The Court ruled that the State has no reason for failing to repeal this law, as it breaches the fundamental framework of the Constitution. Additionally, the Navtej Singh Johar case said that because the Right to Privacy has become an intrinsic part of the Indian Constitution and sexuality is an inherent feature of privacy guaranteed by Articles 14 (*V N Shukla's Constitution of India*, 2022.), 15, 19, and 21 of the Constitution, this act is extra vires. Thus, the Court reversed Suresh Kumar Kaushal's decision, which criminalised 'carnal intercourse against the natural order' even when it occurred consensually, as described in Section 377. Furthermore, same-sex partnerships cannot be likened to bestiality or sodomy. The colonial-era act criminalising same-sex partnerships has been found to offend Articles 14 (*The Constitution of India, 1950.*), 15 (*The Constitution of India, 1950.*), 19 (*The Constitution of India, 1950*), and 21 (*The Constitution of India, 1950.*) of the Constitution. The Bench unanimously agreed to decriminalise homosexual behaviour. (*Gay Marriage Not a Fundamental Right, Wedding a Bond between Man, Woman — Centre to Delhi HC, 2021*)

The fact that they account for a negligible part of India's 1.3 billion-strong population cannot be utilised to deny them their fundamental and human rights. The Court recognised that the founding architects of our Constitution never intended it to be discriminatory on any grounds; rather, it guaranteed that everyone would be treated equally. Both the right to adjust one's opinions and the authority to protect the LGBTQ community's rights are guaranteed by the Constitution. Indu Malhotra, J., believes that history owes an apology to members of the

LGBTQ community and their families who lived in terror of persecution and punishment. For an extended period, their failure to properly apply the provision cost them dearly. Where the judgement is to be just as a start and long way to go.

## **2.7 Conclusion**

Sexuality in humans is complicated. Accepting the distinction between desire, behaviour, and identity recognises sexuality's multifaceted character. The fact that these aspects are not always congruent in people demonstrates the issue's complexity. Bisexuality, both sequential and concurrent, and disjunction between biological sex and gender roles and identities exacerbate the problem. In medicine and psychiatry, terminology such as homosexuality, heterosexuality, bisexuality, and transsexuality are used to refer to all linked issues, although contemporary societal usage favours the phrase lesbian, gay, bisexual, and transgender (LGBT), which emphasises identities.

The prevalence of homosexuality is difficult to measure for a variety of reasons, including the shame and societal repression associated with it, the small sample sizes used, and the inability to differentiate desire, conduct, and identity. Figures vary according to age group, geography, and culture. In medicine and research, the relative contributions of nature and nurture, biological and psychosocial variables to sexuality continue to be debated.

Essentialist constructions defend biology and discount the personal and social significance of sexual desire and relationships. Constructivists, on the other hand, advocate for the importance of culture and history. While essentialism and constructionism appear to be incompatible on the surface, they may function as mediators of orientation and identity, respectively.

Anthropologists have recorded considerable differences in the organisation and meaning of same-sex activities between cultures, as well as changes over time within specific groups. The universality of same-sex expression coexists with culturally specific variances in its meaning and practise. Cross-cultural research demonstrates the limitations of any single explanation for homosexuality within a given country.

Adult sexual orientation, according to classical theories of psychological development, has its origins in childhood experiences. Recent study, on the other hand, proposes that psychological and interpersonal events throughout a person's life account for sexual orientation. Adult homosexuality is unlikely to be explained by a single collection of qualities or a single pathway.

The idea that homosexuality is a stable phenomenon is based on the persistence of same-sex desire, the failure of attempts to change, and the lack of effectiveness with orientation-altering treatments. There is a growing recognition that homosexuality is not a single phenomenon and that it may contain several phenomena. Once considered the norm, anti-homosexual attitudes have evolved over time in a variety of social and institutional settings throughout the western world. However, heterosexism is also prevalent, as it idealises heterosexuality, accepts it as the standard, and denigrates and stigmatises any non-heterosexual types of behaviour, identity, relationships, and communities.

Apart from the difficulties inherent in living in a largely heterosexual world, the diversity of people of gay orientation leads in a plethora of obstacles. Sex, gender, age, ethnic origin, and religion all contribute to the complexity of the challenges. The stages of life (childhood, adolescent, middle age, and old age), family, and relationships all raise a variety of issues. In the majority of cases, the psychiatric problems encountered by gay, lesbian, and bisexual people are identical to those encountered by the general population. The intricacies of these identities, on the other hand, necessitate tolerance, respect, and a nuanced knowledge of sexual issues. It is mandatory to assist people in understanding their sexuality and to provide assistance for living in a largely heterosexual world. Individuals who identify as homosexual confront numerous obstacles, including issues over accepting their homosexual impulses, the meaning of disclosure, and difficulties in coming out (*Hinduism | Origin, History, Beliefs, Gods, & Facts | Britannica, 2023*).

The Supreme Court's ground-breaking decision declaring that Section 377 of the Indian Penal Code violates the constitution's fundamental rights was consistent with worldwide, human rights, secular, and legal developments. However, many religious and communal leaders' anti-

homosexual beliefs reflect widespread prejudice in India. Prejudice towards alternative lifestyles is ingrained in many cultures and religions and is a subject of contention in Indian society.

In the psychiatric literature, there are a few minor case series describing homosexuality in males and its treatment with aversion therapy. There is a scarcity of systematic research on homosexuality in Indian psychiatric literature. There is a dearth of data on prevalence, emotional difficulties encountered, and available support groups. These studies are critical for enhancing our understanding of the local and regional contexts of sexual behaviour, orientation, and identity in India.

Even though medicine and psychiatry argue that gay orientation is a natural variation of human sexuality, the mental health community and the Indian government have failed to adopt a clear position on the issues necessary to alter widespread prejudice in society. The fraternity must recognise the need of conducting research on the context-specific difficulties confronting LGBT individuals in India. Sexuality education for medical and mental health professionals must be sensitive to the challenges confronting persons of various sexual orientations and identities. Clinical services for individuals with such challenges and concerns must be holistic in nature. A conciliatory and non-judgmental attitude will go a long way toward alleviating distress. Professional associations must raise awareness of these concerns, facilitate the transfer of knowledge and skills, and create opportunities for mental health workers to build their confidence and competence in assisting persons with diverse sexual orientations and identities. Psychiatrists and other mental health practitioners must be informed about human rights concerns and potential abuses. The emphasis should not be solely on education, but also on attitude transformation. It is equally critical to develop and disseminate clinical practise guidelines. Sexuality in humans is multifaceted and diverse. As is the case with many complex behaviours and personality characteristics, biological and environmental factors contribute to the development of a particular sexual orientation and identity. We must place a premium on people's humanity over their sexual orientation.

## **CHAPTER-3**

### **Socio- legal- psychological barriers in the acceptance of homosexuality**

#### **3.0. Introduction**

Homophobia and transphobia are widespread in Indian society. Homosexuality and transgenderism (Abelove et al., 1993), however, are not new in the nation. Indeed, India's oldest and earliest penal code, Manu smriti, referred to gay activities but did not classify them as crimes. However, the Code deemed homosexual activities to be something that required regulation. While it is apparent from ancient writings that homosexuality has been a component of sexual behaviour from time immemorial, its legitimacy in Indian society remains contentious. Homosexuality was never warmly welcomed, rather, there were standards imposing penalties for gay conduct. The same is true for transgendered people, who are likewise not accepted by society and are labelled as gender deviants or violators of established gender standards. Despite decades of scientific development, homosexual's persons continue to be mostly viewed as cases of mental disease or some other type of mental or physical problem. Dr Indira Sharma, a former president of the Indian Psychiatric Society, has described homosexuality as "unnatural," escalating the debate around sexual minorities. Additionally, she stated that the way homosexuals discuss their rights and sex in public is offensive and unnatural, whereas the straight community does not discuss sex in public, preferring to make it a private affair. Following this comment, concerned members of sexual minorities brought the subject to the Indian Psychiatric Society, which disavowed Dr. Indira Sharma's prior statement. Indeed, the President and General Secretary of the Indian Psychiatric Society stated that there is no scientific evidence to support the classification of homosexuality as a sickness or disease. Section 377 of the Indian Penal Code, established in 1860, prohibits and punishes same-sex sexual activities and behaviour. Indeed, it is reported that the legislation criminalising homosexuality has frequently been utilised to harass, intimidate, and arrest people of sexual minorities arbitrarily (Pickett, 2020).

The expansion of non-heterosexual rights in Western liberal democracies over the last decade or two has been wide and rapid (Read & Marsh, 1998). While legislation establishing the legality of homosexuality has been established in civil law for some time, a large number of recent enactments address the prohibition of discrimination against people based on their sexual orientation. Numerous such nations now recognise civil unions between same-sex couples and provide for their child adoption and parental rights. However, extending these rights has not always been simple. Certain issues have generated significant political opposition in certain Western nations, including the lowering of the consent age (Waites, 1997), the desirability or otherwise of civil unions (Graupner, 2005; Madhill, 2008); contentious debates over adoption and fostering (Rayside and Boweler, 1988); sexual relationship privacy (Hickey, 2002); and the teaching of non-heterosexual orientation (Rienzo et al., 2006).

While many general publics in Western nations increasingly favour non-heterosexual rights (Tucker and Potocky-Tripodi, 2006), they appear to get less support than gender and ethnicity rights (Heinze, 2009) and by older age cohorts compared to younger cohorts (Anderson, 2008). The evidence shows that resistance to these rights is likewise more prevalent among right-wing and conservative persons, including those who oppose on moral grounds (Hancock, 2008). Indeed, data shows that those who live in countries where more people believe religion is essential in their daily life are more likely to express opposition than those who live in countries where less people think religion is important (Pelham, 2009). There is, however, no direct link between religious belief and resistance to non-heterosexual rights, and the underlying problems severely split several religious communities (Crockett and Voas, 2003). Even yet, while religion is sometimes cited as a significant predictor of views, particularly toward homosexuality, these sentiments are frequently unclear (Hodge, 2005).

### **3.1 Social Stigma of Homosexuality**

People suffer negative effects when they have a stigmatised identity, such as stigma associated with their ethnicity (“Goffman, Erving(1963) Stigma,” 1993), body weight, mental illness, or sexual orientation. Goffman (1963) defined social stigma as a "mark" that denotes an

individual's participation in a specific group or collection of assumed qualities that is socially despised. Crocker, Major, and Steele (1998) (Srivastava et al., 2015) emphasise the fact that it is situational and context dependent. While several stigmas occur in virtually every culture and civilization, there are numerous stigmas that are context and culturally specific. Stangor and Crandall (2003) also discussed the social construction of stigma and demonstrated the importance of cultural context, stating that "what is stigmatising differs between and within cultures, as well as through time within a society (Srivastava et al., 2015)." Herek (1991) discovered a significant significance for existing preconceptions and cultural beliefs in generating anti-homosexual stigma in the United States. Lin and Lin (1981) sought to make a connection between homosexuality and family and social values. Sexual minorities are stigmatised for a variety of reasons in various civilizations. As an example, homosexuality can be stigmatised if it is perceived as a bad decision or a danger to a specific religion or social standard. Numerous authors in literature have associated Indian culture with a favourable view on homosexuality. However, there are few research examining the factors that contribute to stigma towards sexual minorities in contemporary India. The purpose of this study is to establish a framework for understanding the psychosocial foundations of stigma towards sexual minorities in Indian culture. While homosexuality has been legalised in a few countries, stigma and unfavourable attitudes toward sexual minorities have persisted.

### **3.2 Negative Attitude Towards Homosexuality**

According to studies, attitudes about homosexuality and sexual minorities are unfavourable, and in reality (Ali, 1996), homosexuals are stigmatised in the majority of nations. This unfavourable attitude may be affected by religious and cultural standards that saw homosexuality as a prohibited behaviour. Previously, it was categorised as a disease/disorder under the DSM and ICD categorization systems. Herek (1988) examined the variables that contribute to unfavourable attitudes against homosexuals. Religious affiliation was revealed to be a significant factor in the development of unfavourable attitudes toward sexual minorities. Additionally, studies have demonstrated that heterosexuals exhibit contempt and hostility

against sexual minorities. Additionally, studies have discovered associations between masculinity and an unfavourable attitude toward homosexuals. These studies have illuminated some of the causes for and reactions to sexual minorities, but the attitude toward sexual minorities in India has received less attention (Tinoco-Giraldo et al., 2021). The studies compiled by non-governmental organisations and newspapers clearly demonstrate India's unfavourable stance toward sexual minorities (Mohan, 2021). Due to recent legislative changes (the abolition of IPC 377) and increased media attention, public conversations regarding these problems have begun to occur. The recent event in India involving the use of "corrective rape treatment" exemplifies homosexuals' current bad standing in the country. Considering these facts, it is critical to study the variables that contribute to the development of heterosexuals' attitudes about the gay community.

### **3.3 Repercussions of Living with The Stigma of Homosexuality**

In the west, research (Sanjaya, 2022) has revealed that homosexuals are perpetual targets of victimisation. Individuals who identify as homosexual face bullying, verbal, and physical harassment, and hate crimes. Bullying occurs often at the high school and college levels in most parts of the world because of LGBT people's sexual orientation. As a result, they are either murdered or commit suicide. Additionally, it contributes to school dropout, low attendance, low academic performance, and a high rate of mental health problems among LGBT kids. On the other side, it increases their stress levels and makes them more susceptible to mental health problems. This negative reaction from society has a detrimental effect on not only their health but also on their self-perception, resulting in poor self-esteem. Numerous research indicate that sexual minorities face a variety of harmful outcomes (Bracy, 1976). There is a particular need to research stigma experiences and their influence on the lives of sexual minorities in India, given the Indian legal system's continual development and the growing exposure of sexual minorities in many regions of the country through pride parades.

### **3.4 Barriers to Homosexuality: -**

### **3.4.1 Unnatural Offences Under Natural Law Theory**

The word "unnatural offence" has aroused much controversy in recent years(Deswal, 2019). The legislation criminalising homosexuality, as well as the language used to describe consenting gay activities as ' crimes against nature' or' unnatural actions, has its origins in natural law philosophy. The primary argument for the rejection of consenting homosexual activities and their punishment is Natural law theory, which holds that consensual same-sex behaviour violates nature's order and is hence immoral. Additionally, there are supporters of Natural law theory in the modern day who not only justify continued discrimination against gays but also offer arguments against homosexual marriage.

In India, criminal legislation criminalising homosexuality was established during the colonial era, and such behaviour has since been condemned not only in Indian culture, but also in the other former British colonies. In India, the legislation criminalising consensual homosexuality, i.e., the Indian penal code based on British criminal law, originated directly from Natural law philosophy. The rationale for this is that according to natural law theory, law is divinely inspired, and homosexuality is deemed sinful in the Bible. Additionally, based on biblical concepts, the same was regarded as a criminal offence, required by old English law and applied in the majority of States. Although the United Kingdom's legal system has changed over time to decriminalise homosexuality, the different commonwealth nations and ancient British colonies continue to operate under outdated rules that were originally influenced by English law. Given the ongoing battle in many areas of the globe for the legalisation of consenting homosexual activities, it is necessary to critically evaluate the reasons advanced by natural law theorists for the designation of the same as an 'unnatural conduct.(j. Angelo & Bocci, 2021)'

### **3.4.2 Natural Law Based on Reason or Abstract Notion**

Since the early age of Greek culture, natural law theory has been widespread in practically all fields. Indeed, it has evolved into a critical tool for justifying and explaining many current political and legal systems in the modern era(Freeman & Lloyd of Hampstead, 2008). Although Natural law theory was marginalised in the nineteenth century due to the popularity of

Positivism, it was resurrected in the twentieth century and remains a significant weapon in contemporary ideologies. In essence, natural law theory maintains that law originates from God and may be discovered via reason. Throughout history, law was inextricably linked to the divine element. The words 'natural law' and 'eternal law' were used interchangeably. Hesiod also noted in his works that Zeus, the king of the Olympian gods, bestowed law onto mankind as his greatest gift. Natural law theory and its link with religion persisted until the mediaeval ages, when St. Augustine and St. Thomas Aquinas advanced the theological origin idea of law. Throughout the Middle Ages, the church was seen as the defender of the divinely ordained law (Mcnabb, 1963). The first premises of natural law thought tended to connect reason with certain theological concepts. St. Thomas Aquinas defined law as an authoritative mandate of reason promulgated by a person charged with the responsibility of the ideal society. Because God is in control of the ideal community, the law is the authoritative rule of activity emanating from him. Thus, natural law is to be regarded not just as a theological concept, but also as the foundation for leading a sensible life for the greater good of the community. Natural law just denotes a theoretical distinction between right and bad actions. In basic terms, it discusses morality, or 'what ought to be.' To break Natural law, for example, by murdering someone or physically assaulting another, is to perform acts that are not just unethical but also unreasonable. Likewise, consenting same-sex behaviours were deemed to be immoral and illogical. As a result, similar activities were likewise criminalised in the majority of countries. Consensual same-sex activities were criminalised on the basis of religious standards set in the Bible and other types of *lex Divina*. (*UNITED STATES COMMISSION on INTERNATIONAL RELIGIOUS FREEDOM SHARI'A AND LGBTI PERSONS*, 2021) Although the rise of the gay liberation movement in the West altered the perception of a sizable portion of the global population regarding homosexuality and other sexual minorities, the criminalization of consensual homosexual acts remains a central point of contention for various legal and political structures. In light of the changing social order, it is critical to investigate the religious standards upon which natural law theorists base their justification for criminalising consensual homosexuality (McLeod, 2005). The word 'homosexuality' arose in the nineteenth century, far

beyond the Bible's period. Karoly Maria Benkert, a German psychologist (*LGBTI Law: Queer Theory*, 2018), invented the term. As a result, the Bible and other holy texts avoid using the term 'homosexuality' directly but condemn comparable sexual behaviour. Nonetheless, substantiating criminalization of homosexuality based on Middle Ages natural law theory, which suggests that the law is divine in origin, is problematic in and of itself. Indeed, several individuals contributed to the Bible's composition. And other religious books that condemn homosexuality owe their existence to human people as well. Human works are not without defects, and there is a possibility that these Holy Scriptures will contain mistakes as well. Thus, criminalising homosexuality based on old sacred scriptures is akin to blindly following a rule without questioning its rationale. Additionally, while the term 'homosexuality' is not expressly stated in any of the Sacred Scriptures, it is argued that references to same-sex behaviour in the Bible and other holy writings allude to acts of aggression, idolatry, and exploitation based on same-sex behaviour. Thus, what is condemned is not consensual homosexuality, but non-consensual homosexual activities, fetishism, and sexual abuse motivated by gay behaviour (Peter Swanson, 2015). Sharia law, or Islamic law, is one of the world's oldest significant legal systems, having affected western criminal law as well. Additionally, it opposes homosexuality as a morally reprehensible conduct. The legislation prescribes death by stoning, limb mutilation, and flogging, all of which are not acceptable by many civilised nations. Additionally, Sharia law is drawn from the Quran and Hadith, both of which have been influenced by human involvement throughout their existence. Nonetheless, current natural law thought places a premium on practical reasoning, as opposed to speculative understanding of nature. Numerous legal theorists also argue that natural law theory is founded on practical reason. For example, Kant's moral philosophy is founded on practical reason. According to the rationalistic interpretation of current natural law theory, law is the mandate of practical reasons. Hugo Grotius, who established the secular and rationalistic form of contemporary Natural law, argued that natural law would persist even in the absence of God (Beiner & Booth, 1993).

### **3.4.3 Homosexuality: Natural Phenomenon v. Unnatural Offence**

The term 'unnatural' refers to something that is not usual or anticipated, or to anything that is widely regarded as correct. Additionally, it refers to phenomena that are out of step with the natural order, aberrant or non-existent in nature. This implies that the term 'unnatural crimes' as defined in Section 377 of the Indian Penal Code, which was falling under the category of sexual offences, refers to sexual behaviours that are opposed to nature. The article of legislation defines 'unnatural offences' as consensual carnal contact with a man, woman, or animal that is "outside the natural order." The above-mentioned description of the same-sex sexual act has sparked several controversies in modern times. It raises a concern about the standards used to determine whether consenting same-sex sexual behaviour and actions violate the natural order. The present debate over decriminalising consenting same-sex interactions has also highlighted the question of whether consensual homosexuality is a natural or unnatural behaviour.

The phrase 'natural' (*Natural Definition & Meaning*, 2023) refers to items that are found in or are derived from nature. In many States that criminalise homosexuality, it is nevertheless assumed that consenting gay activities are not 'natural' since they are not derived from nature, and this is stated in a variety of legal systems, including India. Section 377 of the Indian Penal Code, 1860, which criminalises consenting homosexuality, is a legacy of British colonial-era law founded on biblical concepts. Consensual homosexuality is no longer regarded against the natural order under English law in the aftermath of *Dudgeon v. United Kingdom* (Debnath, 2017). Indeed, in 2016, the country has more than 30 LGBT members of Parliament (Debnath, 2017), a record unmatched by any other parliament in the world's history (Poushter & Kent, 2020). However, several nations, continue to criminalise same-sex sexual activities, believing them to be against nature's order. Natural law philosophers of the old school saw 'consensual gay activities' as unnatural acts due to the absence of offspring as a result of such sexual acts. Natural law theorists stressed procreation as the only purpose of marriage and sexuality, and sexual activities had to be generative in nature in order to be deemed morally acceptable. This suggests that infertile couples' sexual actions and marriage also come under the category of 'immoral acts' or 'unnatural acts' because of non-generative sex, which is not the case. Sexual actions between infertile spouses are regarded ethically acceptable. Thus, using the 'non-

generative sex' argument to justify treating consenting same-sex behaviour as an unnatural act is self-contradictory. Sexuality and marriage are not just for the sake of reproduction. Additionally, sexual actions are motivated by pleasure and biological impulses(Bose et al., 2021). According to Vatsyayana's ancient Hindu scripture 'Kamasutra,' there are four significant purposes of human life. These are the objectives of Dharma, Artha, Kama, and Moksha. Dharma denotes moral behaviour, Artha denotes monetary success; Kama denotes sensual cravings of life; and Moksha denotes liberation(Chakraborty & Thakurata, 2013). This also implies that, in addition to procreation, sensual desire or pleasure is a possible object of sexual activities. The designation of a 'natural' event as 'unnatural' is what has harmed sexual minorities for centuries. This labelling not only results in stigma, but also in sexual discrimination. Additionally, it implies that homosexual behaviour is not accepted in society, as is the individual engaging in such same-sex activities and behaviours, as they are 'unnatural'. Even though it has been scientifically established and reiterated in reports by various organisations that 'homosexuality is natural' and is something that people are born with, rather than a disease, the old draconian law criminalising homosexuality and labelling it as unnatural remains in force in many parts of the world, including India. The law violates natural justice and equality principles and is also discriminatory toward homosexual and transgendered persons. Thus, the legislation criminalising consenting same-sex behaviours and activities between adults violates the norms of international human rights law, which prohibit discrimination based on sexual orientation.

### **3.5 Hinduism and Homosexuality**

The expansion of non-heterosexual rights has had a negative influence on various religion communities worldwide, drawing them into the political arena. Typically, many express a strong opposition to the legalisation of homosexuality and non-heterosexual rights, citing the right to conscience and expression to oppose them. Within these societies, debates frequently centre on the nature of heterosexuality: whether it is a "natural inclination," a lifestyle choice, or even disease. To a degree, contestations have polarised along traditionalist-modernist lines

and have been fuelled in part by lesbian, homosexual, bisexual, and transgender (LGBT) caucuses within religious organisations that continue to be excluded and often persecuted minority. The instance of Hindi India demonstrates such changes, despite the fact that the sheer nature of religion and its place in the nation's culture complicated a number of critical discussions and concerns(Cohan, 2002).

Nonetheless, the natural law argument against homosexuality is without foundation, as such sexual behaviour occurs naturally, and forbidding it on the basis of natural law is a misunderstanding of the Natural law principle. Indeed, on the basis of Natural law philosophy, one may discover reasons in favour of decriminalising consensual same-sex activities between adults.

Natural law theory holds that the law may be discovered via natural causes, and that legalisation of consenting gay actions is justified by natural grounds. Contrasting sexual orientations exist in nature, and punishing someone for what they are born with is a flagrant breach of natural justice and equality. The legislation must be revised and altered to reflect the changing social order, in which members of sexual minorities have achieved significant exposure and cannot be disregarded. It is past time for gays to be recognised by law and protected from continued prejudice.

### **3.6 Reform of Section 377**

In 1860, during the British colonial period, a rule banning homosexual behaviour was enacted in India. Section 377 of the Indian Penal Code, colloquially referred to as the "Anti-sodomy Law," made same sex sexual behaviour unlawful regardless of age or permission. The Indian Law Commission had long advocated for the preservation of the clause. Nonetheless, the LCI advocated repeal in its 172nd report, published in 2000. On July 2, 2009, the Delhi High Court delivered a contentious judgement declaring that gay intercourse between consenting adult males is no longer a criminal offence punishable by up to ten years in jail. Although the repeal was limited to the area of the nation's capital city, it had significant ramifications.

Above all, it compelled India's government to either appeal the verdict to the Supreme Court or repeal the Act, which appeared improbable considering the underlying pressures mentioned. However, to some extent, the legislation had already become obsolete. While convictions for gay intercourse have always been uncommon, there were no prosecutions for homosexual intercourse in the two decades preceding 2009.

In many respects, the judgement brought to a head opposing perspectives on the validity and legality of non-heterosexuality and as previously noted, appeared to reflect the ongoing conflict in India between "progressive" and "traditionalist" groups, including conservative religious forces. To a large degree, India, and Indian diasporic groups' interest with the topic stems from the global expansion of non-heterosexual rights and its ratification in different international treaties. Their acceptance is primarily a result of Western liberal democratic influence, which is fuelled by underlying governmental policies of social inclusiveness that are influenced by vocal lesbian, homosexual, bisexual, and transgender (LGBT) advocacy groups.

There is a shifting cultural factor to observe in India, and there is certainly some validity to the idea that the LGBT rights "revolution" has primarily benefited middle-class Indian city dwellers and has had minimal impact on less wealthy rural populations. On June 30, 2008, Indian labour minister Oscar Fernandes backed calls for the decriminalisation of consensual gay sex, while Prime Minister Manmohan Singh urged more tolerance for gays.

This call came in the aftermath of gay pride parades in Delhi, Bangalore, Kolkata, and Puducherry — urban towns that are emerging as epicentres of Indian homosexual culture. On July 4th, 2008, the Delhi High Court decided that having a homosexual protest anywhere else in the globe was not uncommon. On July 23, Bombay High Court Judge Bilal Nazki argued for a revision of India's "unnatural sex" statute.

In India, the repeal of Section 377, which could pave the way for additional LGBT rights such as civil unions, was and continues to be opposed by several influential conservative Hindu cadres and rightist political parties claiming to represent the views of the dominant religious majority (over 80% of the population is Hindu) and already alarmed by liberalising tendencies

around the world. This argument that conservative Hindus and right-wing parties have used parts of "traditional Hindu religion as a "resource" in their anti-homosexual rights position, which may be characterised as homophobic. It will become clear that the employment of religious motivations is mostly selective, open to interpretation, and decorated with actual or imagined cultural trappings in order to further the cause of undoing non-heterosexual rights. To begin, the article summarises how and why homosexual rights have been expanded in India, as well as why they have become so contentious and politicised. Thus, this brief outline will explain conservative groups' mobilisation against non-heterosexuality in general and sexual rights in particular. Section 377 was repealed in response to intense pressure applied to the Indian government by human rights organisations, which had long claimed that the legislation was discriminatory and violated fundamental rights. The Delhi High Court held that the article, which defined homosexual acts as "carnal intercourse against the natural order," violated the Indian constitution's rights to equality before the law (Article 14); freedom from discrimination and the right to life (Article 15); and personal liberty (Article 16). (Article 21). Earlier in the years, organisations such as the National Human Rights Commission and the Indian Planning Commission pushed for decriminalising homosexuality and promoting more tolerance. The People's Union for Civil Liberties issued two studies in 2003 detailing rights abuses suffered by Indian sexual minorities, particularly transsexuals (hijras and kothis). The law's ultimate repeal also reflected the growing public awareness of the predicament of non-heterosexual persons. In September 2006, Nobel Laureate Amartya Sen and famous writer Vikram Seth joined forces with a slew of other eminent Indians to promote the cause of non-heterosexual people's legal status. Their open letter said that "this harsh and discriminatory law should be repealed in the name of humanity and our Constitution." Additionally, numerous same-sex married couples have made appearances on television in recent years, including renowned celebrity designer Wendell Rodricks and his French partner Jerome Marrel (married in Goa under French law). Prince Manvendra Singh Gohil, a Gujarat native, publicly "came out" in 2005. He was portrayed as the world's first openly homosexual king by Indian and international media, appearing on worldwide television programmes. The issue of non-heterosexuality was

previously raised in 1987, when the national press reported on the storey of two policewomen who married each other in central India using Hindu rituals. There were subsequently several stories of the problems faced by people in same-sex marriages, the majority of which were between lower middle-class young ladies in small towns and rural regions across the nation who were not affiliated with any LGBT lobbying organisation. Disapproving families, communal recrimination, violent persecution, and even police harassment were all responses to these marriages. Persecution resulted in several high-profile elopements and even joint suicides by same-sex couples, the majority of whom were female. However, stories of police harassment of homosexuals and demonstrations appear to have decreased in the early years of the twenty-first century, as Indian courts progressively recognised the freedom of gay and lesbian people to live together as consenting adults. Gay and lesbian Hindu groups began to emerge in India's main cities in the 1990s. They assisted in bringing the issue of non-heterosexual rights to the forefront by being inspired by rights and equality legislation established in Western democracies, notably those relating to same-sex marriage. Despite conservative worries of a backlash, there were other, more encouraging signals for the non-heterosexual movement. The famed "Bollywood" film industry, which historically stressed traditional family and sexual values (Brosius and Yazgi, 2007; Uberoi, 1998), began portraying homosexual and transgender characters. Although they were frequently portrayed as objects of scorn and insult, more affirmative portrayals began to emerge, most notably in India's fringe cinema industry, with films such as *My Brother Nikhil*, *Honeymoon Travels Pvt Ltd*, *Dostana*, *Fashion*, *Men Not Allowed*, and, most controversially, the film *Fire* (Gopinath, 2000). However, the growth of numerous Internet blogs highlighting tales and concerns unique to the disenfranchised non heterosexual minority had a more subtle influence. Additionally, the Internet spawned a thriving Indian homosexual cyber culture, with dating websites serving as an alternate method of meeting same-sex persons. With India growing increasingly accepting of homosexuality's validity, numerous commercial enterprises began marketing India as a destination for gay visitors from across the world, a development that was unsurprisingly mourned by more traditional Indians.

### **3.7 Endorsing Non-Heterosexual Rights**

As one might expect, the repeal of Section 377 was enthusiastically embraced not just by LGBT groups in India, but also by its enclaves in the Hindu diaspora. This was the case for the Indian homosexual community in the United States of America, while the repeal was viewed as part of the ongoing push toward complete equality for non-heterosexual individuals. Numerous wider Hindu representative groups also responded positively. Navya Shastra, an international Hindu reform organisation based in Michigan, issued a press release in support of the Delhi High Court ruling and condemned reactionary religious elements for opposing it, stating: Navya Shastra urges the Government of India not to challenge the ruling or to be swayed by religious chauvinists of any persuasion who would deny equality to all citizens on the basis of ancient texts.(Hunt, 2015)

Diasporic Indian groups have demonstrated a less predictable attitude toward non-heterosexuality and associated human rights problems. While some evidence suggests that these communities emphasise traditional family and sexual values in order to express conservative attitudes, and thus tend to reinforce boundaries with other communities by clinging to their cultural origins, those raised in Western cultural environments may develop more liberal views. It's unsurprising, therefore, that such communities have varied reactions to recent developments surrounding same-sex weddings in general, and specifically to India's 2009 judgement on homosexuality.

However, the relevance of religious allusions in supporting advances is obvious. For example, in the United Kingdom, the Hindu Council UK applauded the Delhi High Court's decision and declared that Hinduism does not condemn homosexuality. Anil Bhanot, the HC's General Secretary, stated, "It is indeed good news that people are not discriminated against because of God's natural laws." He continued by arguing that Hindu scriptures describe homosexuality as a biological condition and, while several instruct parents on how to avoid procreating a homosexual child, they do not condemn the child as unnatural. This tipped the balance against Section 377's contention that homosexuality was "against the natural order." In a similar vein,

the director of Fire, Deepa Mehta, defended his picture by espousing the "natural genesis of homosexuality" in a Hindu religion-philosophical perspective.(Carling, 2016)

*“Traditional Hindu morality rests on the fulfilment of one's Dharma, among other things. The mention of homosexual sex in the Kama Sutra is the proof that homosexuality is one of the countless variations of Dharma, as the Kama Sutra is a sacred book.... Homosexuality is part of the 'Third Nature', the neuter gender which does not engage in procreation and that corresponds to Brahma. Therefore, a person born homosexual that does not fulfil his/her 'third sex' function sins against his/her Dharma*

As a general observation, advocates for non-heterosexuality in India have not only endorsed secular human and civil rights discourse, but have also referred to Hindu literature, mythology, and philosophy, as well as aspects of cultural heritage, although the allusions have frequently been devoid of context or conventional interpretation. In summary, the eclectic nature of Hindu historical views toward non-heterosexuality – which place a premium on context and interpretation – provides abundant resources for current support for non-heterosexuality, maybe more than any other major religious religion. However, as shown below, this cuts both ways, since religious motivations can serve as a source of support for the opposing position, and there is sufficient evidence that this is the case(Hunt, 2011).

### **Conservative reaction to non-heterosexual rights**

In 2009, Swami "Baba Ramdev," famous for his international yoga camps visited and seen on television by over 85 million people worldwide, establishing him as one of India's most revered personalities, criticised the high court's judgement on Section 377. Ramdev, who founded an independent political party, Bharat Swabhimani, with the goal of purifying India's political system of some of its "immoral" aspects, compared homosexuals to "other anti-social groups" and argued that legalisation would have a "negative effect on the younger generation, while increasing HIV/AIDS prevalence. Ramdev argued that:

*“These are unnatural (homosexual) acts not designed for human beings. The decision of the High Court, if allowed to sustain will have catastrophic effects on the moral fabric of society*

*and will jeopardise the institution of marriage itself. This offends the structure of Indian value system, Indian culture and traditions, as derived from religious scriptures....The verdict will encourage criminality and sick mentality. This kind of thing is shameful and insulting. We are blindly following the West in everything. This is breaking the family system in India. Homosexuals are sick people, they should be sent to hospitals for treatment”.*

*Elsewhere In May 2009, a Tamil priest who performed South Africa's first known same-sex Hindu wedding was forced into hiding, fearful of the implications of community leaders' criticism of the lavish wedding of two young men. Claiming to be "true Hindus," they sent invites adorned with Hindu iconography and dressed in traditional Hindu garb (one of the guys adorned his girlfriend with a necklace with the pendant of the deity Ganesha). In response, Ashwin Trikamjee, head of South Africa's Hindu Mahasabha, stated that "the Hindu wedding ritual is between a male and a female - that is what the scripture states." Mickey Chetty, head of the South African Tamil Federation, echoed such thoughts by stating, "We do not support such a union or the conduct of the priest who sanctified it."*

This remark emphasises a critical component of contemporary Hinduism's discussions about homosexuality: the Ashrama's age-based system, which defines a highly regulated conventional life cycle. Hindus are not permitted to seek sexual pleasure in the strict context of heterosexual marriage until they reach the "householder stage" (Grihastya), which is viewed as fulfilling three vital requirements: dharma (responsibility), rati (companionship as friends and mutual heterosexual pleasure), and prajaa – procreation of progeny for the continuation of the ancestral line. These roles are detailed in the Dharma Shastras (Sacred Law), which deal with ethical principles, civil and criminal law, retribution and penitence, but are not regarded religiously obligatory in Hinduism. As proponents of non-heterosexual rights frequently assert, the Dharma Shastras' issues about homosexuality are not largely based on moral judgments or religious prohibitions, but rather on cultural and legal rules concerning offspring and succession of ancestral property. The notion that homosexuality is incompatible with the traditional Hindu life cycle is a central theme of contemporary worldwide web-site bloggers

engaged in the discussion, usually augmented by the statement that it is not natural but has an environmental and/or psychological basis.

*“According to all scriptural evidence, homosexuality is condemned as being a sinful activity. There is no argument to defy that point. If you are really serious about giving gays a solution in spiritual life, then why not take a look at the factors that lead to homosexuality? More and more evidence is showing that homosexuality is not something that is a genealogical defect. Rather, it is something that develops in early childhood... In effect you would have to, by your endorsement, give them asrama facilities independent of other asramas and any other requirement they may need”*(*What Does the Bible Say about Homosexuality? For Starters, Jesus Wasn't a Homophobe*, 2023).

Additionally, those opposed to non-heterosexual rights frequently reference the Manava-Dharmasastra (the Laws of Manu), which is one of the earliest examples of Hindu textual theory and serves as the foundation for nearly all Hindu systems of law (Dharma). According to the reports, if a married lady is discovered to be a lesbian, she should have her head shaved, two of her fingers cut off, and be forced to ride a donkey through her village (M.S 8: 370). As proponents of non-heterosexual rights are quick to point out, these clauses, when taken out of context, appear homophobic, but they are actually concerned with the loss of virginity that left a young lady incapable of marriage (Vanita and Kidwai 2001, 25).

According to the same source, lesbian relations between non-virgin women are subject to a very small sine, whereas homosexual intercourse between men is subject to a prescription of a fully dressed bath and atonement through "eating the five products of the cow and keeping a one-night fast" – the penance being a replacement for the traditional concept of homosexual intercourse, resulting in a loss of cassation. Other texts are contested in their interpretation. For instance, in the Srimad Bhagavatam, one of the most significant Hindu scriptures, Brahma creates a group of male demons who get obsessed with sex and demand sex from him, but he becomes fearful and flees. Given the traditional scriptural evidence or certain interpretations of it, one might expect Hindu leaders in India, particularly when confirming the views of the

more rural Hindu populace regarding traditional kinship, to endorse a highly critical view of Section 377 reform and the broader trend toward non-heterosexuality(Haarsma, 2018).

However, the picture continues to be complicated. Hindu leaders' views are mostly irrelevant in the context of Indian media and the larger Hindu community, which lacks a single religious authority, and especially in comparison to the voices of Islamic leaders in India. This was possibly reflected in the fact that nearly every major daily in India published an editorial in favour of repealing the legislation at the time of repeal. While the pronouncements of Hindu leaders (including the Kanchi Acharya, Puttaparthi Sai Baba, Sri Sri Ravi Shankar, Baba Ramdev, Sundara Chaitanyananda, and Mata Amritanandamayi) unambiguously establish authority for the Hindu populace, many are regarded as politically neutral, and the majority prefer to maintain this stance. Rajiv Malik's 2004 poll of a number of swamis revealed a kaleidoscope of opinions on homosexuality, ranging from favourable to negative. The majority expressed opposition to the idea of a Hindu-sanctified gay marriage. Nonetheless, they felt free to disagree. According to Mahant Ram Puri of the Juna Akhara sect, "Hinduism does not have a rule book." There are about a hundred million authorities in the United States. Given the majority of Hindu religious leaders' mostly neutral attitude, the door has been left open for conservative parties to seek to seize the "religious ground," and they have done so earnestly(*Rajasthan Could Witness 2004 Scenario after Coming LS Polls: Sachin Pilot* , 2019).

### **3.8. Non-Heterosexuality and The Political Right Parties**

In the mid-1990s, Hindu nationalist organisations coalesced around a very visible non-heterosexual problem. *Fire*, directed by Deepa Mehta, was released in 1997 and played to packed cinema crowds around India. The film featured two Hindu sisters-in-law who, dissatisfied with their arranged marriages, had a passionate lesbian relationship with one another. It sparked debate, if not outright controversy, about non-heterosexuality. The film was informally banned for suspected "religious insensitivity" after Hindu extremist's assaulted theatres screening it, alleging that it denigrated Indian culture by defending homosexuality.

However, India's ruling Bharatiya Janata Party (Hindu Nationalist Party) declined to ban it at the time. Similar demonstrations happened in 2004 against the lesbian-themed film *Girlfriend*, despite the film's notably unfavourable portrayal of lesbianism.

According to International News in December 1998, the Hindu Shiv Sena party was the grouping (which included a large number of women) that was particularly active in the violence against *Fire* (A *Timeline: 50 Years of Shiv Sena*, 2016).

Shiv Sena, a far-right political party formed in 1966, gained a considerable following among the Marathi population on the grounds that Maharashtra belonged to the Marathi community and should be given precedence over immigration from other Indian states. Although the party's major base of support remains in Maharashtra, it has sought to broaden its popularity by joining the National Democratic Alliance government that controlled the country from 1998 to 2004. Shiv Sena protests have been known to include acts of violence in the name of defending what it considers to be traditional Hinduism against what it perceives to be polluting Western influences (Banerjee, 2000). The party was outraged about *Fire*, claiming that it offended the Hindu culture and was unethical for Hindus to watch. According to International News, a female activist stated, "Women seeking fulfilment with other women is alien to Indian society, our ladies are poisoned by the movies. It piques their interest in something unethical. There were more blatant assaults against Section 377 repeal that were obviously political in nature. In reaction, on July 5th, 2009, a group of Hindu and Sikh activists organised a demonstration in Delhi. Members of the National Akali Dal (a federation of Sikh political parties centred mostly in Punjab), as well as members of the Hindu group Santan Dharam Sabha, organised the demonstration and pleaded with government officials to intervene in the law's passage. These events primarily represented conservative cadres' reaction to more politicised "progressive" inclinations in Indian society. Anti-homosexuality and anti-gay rights responses are frequently the domain of conservative forces in India, particularly nationalist groups opposed to legalising homosexuality (sometimes alleging that it was unknown in ancient Hinduism), while others opt to keep silent. Navya Shastra has been particularly critical of the

Vishwa Hindu Parishad (World Hindu Council) and the Bharatiya Janata Party (BJP) for opposing Section 377 repeal.

Both groups assert that they represent Hindus in India and, in the case of the VHP, Hindus worldwide. In 2008, Navin Sinha, a BJP leader, was reported as saying, "(The gay rights movement) is an awful, ridiculous thing....For 1,000 years, these two phenomena – I hesitate to use the words (homosexuality and lesbianism) – have simply not existed(*Yashwant Sinha: A Virulent Critic of the Modi Government* , 2022)."

The VHP was formed in 1964 in India and is dedicated to promoting its own kind of cultural nationalism. Its strapline, "Dharmo rakati rakita," represents a distinct position in Hindu politics that is not represented by any single political party. The movement's stated goals and objectives include the following: to consolidate and strengthen Hindu society; to safeguard, promote, and propagate Hindu life, ethical, and spiritual values in contemporary times; and to maintain contact with all Hindus living abroad while preserving their Hindu identity (Hindutva). Its laws are based on the idea that no one must be discriminated against on the basis of religion, sex, caste, ethnicity, or colour, a right that plainly does not apply to non-heterosexuals. This appears to be somewhat justified on the basis that homosexual sex causes bodily damage. A representative of the reform movement Navya Shastra also detected further reasons for the VHP's stance: "*Unable to develop a sufficient theological basis for opposing homosexuality in Hinduism, the VHP relied on the traditional canard that the choice would jeopardise the family system. This is an unscientific view of homosexuality, which is not a lifestyle choice but an innate human condition....*"

The VHP and other conservative political parties in India have a history of downplaying the dangers posed by HIV, and when the virus has been acknowledged, its spread has been blamed on marginalised and stigmatised social groups, particularly homosexuals and drug users, while the alleged dangers of both have frequently been attributed to undesirable Western influences. Typically, Sanjay Nirupam, a prominent Shiv Sena member, purportedly remarked, "One always hears about AIDS and how huge an issue it is - I believe it is all hype(Hunt, 2011)."

### **3.9. Homosexuality Is a Westernised, Upper-Class Phenomenon**

It is not difficult to establish that sexual and emotional homosexual behaviour exists in all civilizations. Ford and Beach discovered more than two decades ago in their seminal book "Patterns of Sexual Behavior" that 64% (49 of 76) of the civilizations they examined saw homosexuality as a natural sexual adaptation. The 49 civilizations vary significantly in terms of the types of homosexual behaviour sanctioned and the extent to which they are legally institutionalised, passively condoned, or aggressively regulated.

Without a doubt, the current ideas of gay identity (as distinct from "homosexuality") and gay liberation (gay people's quest for recognition and equal rights) have their historical roots in the modern Western world. However, some of the anti-homosexual fears that have been incorporated into our medical theories, criminal law, and bourgeois morals also apply. Furthermore, simply being "Western" does not make something bad.

Consider the following examples of "foreign" concepts that opponents of homosexuality are less quick to condemn parliamentary democracy, trade unionism, modern medicine, women's problems, Pepsi Cola, IMF loans, Union Carbide, and big dams.

Additionally, there is no proof that homosexuality does not exist in the lowest classes. Of sure, there can be upper-class lives centred on homosexuality. Gays do not form a self-contained, readily recognisable group. Neither are women, for that matter. Women's experiences do not always transfer into clear political identities; there are methods to address women's concerns that are not exclusive to the upper class. However, this does not imply that women or women's experiences are inherently superior. The necessity of developing strategies to connect sexuality to other issues should not be mistaken with upper class concerns about sexuality.

Not everyone who engages in same-sex sexual behaviour inevitably becomes, or even desires, a political revolutionary. However, the question is whether homosexual behaviour, given its antagonism to the State's regulatory machinery, can serve as the basis for a political

perspective. Rather than inventing deceptive excuses for ignoring the subject of homosexuality, shouldn't there at least be a public discourse on the subject?(Lerch & Servedio, 2020)

### **3.10. Homosexuality Is Caused by Traumatic Childhood Experience**

What are the "causes" Homosexuality becoming a significant issue only when gay individuals are viewed as strange or aberrant. There is no one cause of homosexuality; its occurrence and development are the result of a complex interaction of environmental, societal, and individual variables. Most non-gay people would find it absurd and insulting to be asked, "What causes heterosexuality?" Nonetheless, the "causes" that support heterosexuality as the norm and see homosexuality as aberrant need examination.

Surely, what passes for normal behaviour in some men—pinch women, set fire to spouses, make sexist jokes, raps—must have a "cause"? Could it be that socialisation into heterosexuality is a painful event throughout childhood? Surely, what must be questioned is the norm of aggressive heterosexuality, not individual deviations from it.

The Kinsey Institute's 1981 research on the development of sexual preference in men and women concludes: "No one aspect of family life can be singled out as particularly important for either homosexual or heterosexual development on the basis of our findings..." According to some sociologists, homosexuality is the result of "blocked possibilities," with people becoming gay because heterosexual relationships are unavailable. However, if heterosexuality is so firmly established, how is it that it can be so easily destroyed by such social circumstances? The finding imply that homosexuality is as profoundly entrenched as heterosexuality, and that the variations in pre-homosexual boys' and girls' behaviours and social experiences reflect or represent, rather than create, their future gay inclinations. Additionally, some persons become gay in maturity without any prior history of homosexual feelings or behaviours. In short, theories that attribute homosexuality to a unique social experience cannot be expected to adequately account for such a fundamental aspect of one's existence as sexual desire appears to be.... Thus, you may provide footballs for your sons and dolls for your daughters, but no one can promise that they will like them. We appear to have

found a pattern of thoughts and behaviours in the kid that cannot be attributed to a single social or psychological cause; fact, homosexuality may have a biological origin (like left-handedness and allergies do), which parents cannot regulate. In fact, we cannot propose anything to worried parents other than the care, compassion, and dedication that good parents presumably bestow on all their children(Van Den Aardweg, 2011).

### **3.11. If Homosexuality is Openly Embraced, The Population Will Die Out**

This fallacious argument claims that if given half a chance, all people would turn gay, and exclusively so. However, there is no evidence to support this assertion. Without social restrictions, overt gay behaviour may rise, but so will investigation and acceptance of bisexuality. Furthermore, it cannot be assumed that gay desire results in a person's inability to reproduce. It is well established that heterosexual and gay behaviour are very compatible. Second, there is less evidence that sexual desire is a necessary condition for successful reproduction. Individuals who enjoy same-sex sexual encounters, on the other hand, are not required to be unproductive, though they, like anybody else, may choose to be. Likewise, being non-gay does not ensure that populations will not perish. A visit to orphanages reveals that most adults who leave infants are heterosexual in orientation. If celibacy can be justified as a desirable practise without instilling fear of population extinction, why couldn't homosexuality? Indeed, 65,000 women and 18,000 men in India's Catholic population are probably celibate due to their positions in the priesthood. Nonetheless, the Christian population has been growing in recent years. "At times, I believe that the family system is a mistake, and that everyone would be lot better if heterosexuals confined themselves to childbearing and gays raised kids," one gay writer observes(Charalampos, 2017)

#### **3.11.1 Homosexuals Are Child Molesters**

The overwhelming majority of child molesters in the Western world have been identified as heterosexual men. Adult males are frequently known in India to marry underage girls, while young girls are occasionally coerced into prostitution. Gay males and lesbians are no more

predisposed to molest youngsters than anybody else. The majority of LGBT individuals criticise partnerships that are not mature and consenting.

Furthermore, rape and molestation appear to be associated with someone's dominant position of authority over another. There may be a tiny percentage of homosexual men who fit into this group, but it is not due to their sexual orientation. Rather than labelling all homosexual males as child molesters, those who like guys to the point of murdering girls, even in the womb, should be criminalised.

### **3.11.2 Lack of Scientific Evidence**

The late twentieth century saw a change in the view of homosexuality away from sin, criminality, and disease and toward a natural variety of human sexuality. The American Psychiatric Association and the World Health Organization both recognised it as a normal variation in 1973 and 1992, respectively. Since then, several nations have decriminalised gay activity, and some have recognised same-sex civil unions and marriage. The new perspective is based on research demonstrating a high prevalence of same-sex feelings and behaviours in men and women, across cultures, and in nearly all non-human primate species. Psychological tests were unable to discriminate between heterosexual and gay orientations. Additionally, research revealed that individuals with gay orientation did not exhibit objective psychological disorder or deficits in judgement, stability, or occupational skills. Homosexuality is increasingly considered a normal variety of human sexuality by psychiatric, psychoanalytic, medical, and mental health experts. Sexuality in humans is complicated. Accepting the difference between desire, behaviour, and identity recognises sexuality's multifaceted character. The fact that these aspects are not always consistent in people demonstrates the issue's complexity. Bisexuality, both sequential and concurrent, and disjunction between biological sex and gender roles and identities exacerbate the problem. While medicine and psychiatry utilise terminology such as homosexuality, heterosexuality, bisexuality, and transsexuality to refer to all associated issues, current societal use favours the phrase lesbian, gay, bisexual, and transgender (LGBT), which emphasises identities. The prevalence of

homosexuality is difficult to assess for a variety of reasons, including the shame and societal repression associated with it, the small sample sizes used, and the inability to separate desire, conduct, and identity. Figures vary according to age group, area, and culture. Medical and scientific communities continue to dispute the relative importance of nature and nurture, biological and psychological variables, in sexuality. Essentialist conceptions defend biology and discount the emotional and social significance of sexual desire and relationships. On the other hand, constructivists advocate for the importance of culture and history. While essentialism and constructionism appear to be incompatible on the surface, they may function as mediators of orientation and identity, respectively. Anthropologists have recorded substantial differences in the organisation and meaning of same-sex behaviours between cultures, as well as changes through time within specific communities. The universality of same-sex expression coexists with cultural differences in its meaning and practise. Cross-cultural research demonstrates the limitations of any one explanation for homosexuality within a given community. Adult sexual orientation, according to classical theories of psychological development, has its origins in childhood experiences. Recent study, however, indicates that psychological and interpersonal events throughout one's life account for sexual orientation. Adult homosexuality is unlikely to be explained by a single collection of traits or a single pathway. The notion that homosexuality is a stable phenomenon is based on the persistence of same-sex desire, the failure of attempts to change, and the lack of effectiveness with orientation-altering therapies. There is a growing recognition that homosexuality is not a single phenomenon and that it may contain numerous phenomena.

Once considered the norm, anti-homosexual sentiments have evolved through time in a variety of social and institutional settings throughout the western world. However, hetero sexism is also prevalent, as it idealises heterosexuality, regards it as the standard, and denigrates and stigmatises any non-heterosexual types of behaviour, identity, relationships, and communities. Apart from the difficulties inherent in living in a largely heterosexual environment, the variety within persons of gay inclination leads in a plethora of concerns. Sex, gender, age, ethnic origin, and religion all contribute to the complexity of the issues at hand. The stages of life (childhood,

adolescent, middle age, and old age), as well as family and relationships, provide a variety of issues. In most cases, the mental difficulties confronting gay, lesbian, and bisexual persons are comparable to those confronting the overall population. The intricacies of these identities, on the other hand, necessitate tolerance, respect, and a sophisticated knowledge of sexual affairs. Clinical examinations should be comprehensive and go beyond conventional labelling to address a variety of concerns with lifestyle choices, identity, relationships, and social support. It is necessary to assist people in understanding their sexuality and to aid with functioning in a primarily heterosexual environment. Individuals who identify as gay encounter several obstacles, including disputes about admitting their homosexual emotions, the meaning of disclosure, and difficulties in coming out. Gay-affirmative psychotherapies have been created to assist individuals in coping with their knowledge of being same-sex attracted and societal stigma. There is no proof that sexual conversion treatments are successful. These therapies also pose ethical concerns. Indeed, there is evidence that such attempts may have a detrimental effect on the patient, including the induction of melancholy and sexual dysfunction. However, faith-based organisations and counsellors pursue such conversion attempts using yardsticks that do not fulfil scientific criteria.

The Supreme Court's historic decision declaring that Section 377 of the Indian Penal Code violates the constitution's basic rights was consistent with worldwide, human rights, secular, and legal developments. However, many religious and communal leaders' anti-homosexual sentiments reflect widespread prejudice in India. Prejudice against alternative lifestyles is ingrained in many cultures, incorporated into most faiths, and is a cause of contention in Indian society. In the psychiatric literature, there are a few minor case series describing homosexuality in males and its treatment using aversion therapy. There is evidence of heterosexism and anti-homosexual sentiments among psychiatrists and mental health practitioners. The international classification of diseases-10 category (F66) for ego dystonic sexuality appears to be used in clinical practise only for homosexuality, implying ongoing pathologizing. It focuses the blame on the individual without properly evaluating the stigmatising and repressive social milieu. Sexual medicalization and the political ramifications of labelling and its function in social

control are frequently overlooked. Rarely is the pervasive use of illness models to study mental problems questioned. There is a paucity of comprehensive research on homosexuality in Indian psychiatric literature. There is a dearth of data on prevalence, emotional difficulties encountered, and available support groups and therapeutic treatments. These studies are critical for expanding our understanding of the local and regional contexts of sexual behaviour, orientation, and identity in India. Even though medicine and psychiatry argue that gay inclination is a natural variety of human sexuality, the mental health community and the Indian government have yet to take a clear stance on the problems necessary to change widespread prejudice in society.

Sexuality is an integral component of our existence and plays a significant role in our daily lives. To paraphrase John Bancroft (1994), 'there are few persons for whom sex has not been significant in their life, and many for whom it has played a dominant role'. It's challenging to define because it involves so many facets of our life. Our sexuality can manifest itself in a variety of ways. While certain sexual behaviours are obvious, many are as subtle as the way we move, talk, dress, or cope with life in general (Crooks and Baur, 1996). Not just the physical component of sex is emphasised, but also the biological, psychological, and social dimensions of human existence. Numerous assumptions about sexuality are made based on one's attitudes, which are generally quite conservative or liberal. There are several myths, fallacies, exaggerations, secrets, and value-laden judgments in the subject matter. In such a situation, research is the only way to get correct knowledge and a more thorough understanding of sexuality. Research enables us to conduct systematic tests of assumptions in order to substantiate or reject claims. As with other sciences, academics that study human sexuality seek to comprehend, anticipate, control, or influence the occurrences that are the focus of their various professions. While the first two points are self-evident, there have always been debates and problems surrounding the control of human behaviour (Crooks and Baur, 1996). In comparison to many other fields of study, sexuality as we know it today is still an 'infant' science, having developed mostly during the last century. Though we Indians can proudly claim its origins in the works of Vatsayana (Kamasutra) as early as 400 B.C., our Vedas, puranas,

and culture historically contain the whole range of wisdom (Pande. A & Dane. L, 2000). However, when we consider modern research procedures, Alfred Kinsey's pioneering study, which included an enormous general survey of American sexual behaviours, occurred only in the late 1940's and early 1950's. Even though a sizable body of knowledge is collecting, numerous questions remain unresolved. Sexual health is widely acknowledged as a critical component of overall health. It is both the cause and outcome of a wide variety of behavioural and physical abnormalities. Despite this, Indian researchers have shown only a passing interest in sexuality studies. Physicians either demonstrate a lack of interest in or disregard patients' psychosexual concerns (Avasthi & Nehra, 2000). We lack reliable assessments and estimates of sexual disorders (Kulhara & Avasthi, 1995), specialised clinics (Rao. TSS, 2000), special groups (Rao. TSS, 1989), training facilities (Singh et al, 1987), and concerned practitioners to a large extent (Avasthi et al, 1994). Our culture is rife with myths, misconceptions, and prejudices about sex (Mishra, 1963), and so-called 'sex specialists' and 'quacks' have contributed to the self-perpetuating, iatrogenic diseases. Wig (1960) pioneered and expanded pioneering work in this field, coining the term 'Dhat syndrome' for a distinct culture-specific clinical disease. Our old medical systems, which continue to place a premium on 'semen conservation,' are blamed for the difficulty in treating these persons and patients' refusal to accept or continue treatment adequately (Singh, 1985, Chadda & Ahuja, 1990). Though numerous researchers have sought to comprehend the phenomenon and have succeeded in including it as an entity in ICD-10, more work remains to be done to characterise its 'phenomenology, course, and consequence' (Avasthi, 2000). Avasthi, (2000) provides an exhaustive evaluation of the research conducted in our country on guilt connected with masturbation, sexual activity, sexual dysfunction in males and females, sexual elements of family planning, and other sexual illnesses. However, it pales in comparison to the study and literature being generated in the topic of sexuality in western countries, particularly North America and Europe. The sheer size of the population and the diversity of sexual disorders should have sparked significant interest and investigation in and of themselves. TSS (2003) made a passionate plea for the establishment of a specialised section on "sexualities" within the Indian Psychiatric Society to

stimulate interest, concern, and study in this area. It was emphasised that Psychiatrists and Psychologists who have received adequate training in behaviour and relationship issues, compassion, empathy, and an understanding of the various nuances of the mind and instincts are better equipped than other medical specialists to deal with sexualities to educate the public, dispel misconceptions, and treat problems.

### **3.12. Impact of Criminalization of Private Homosexual Acts**

Attacks against homosexual individuals in metropolitan public spaces are quite prevalent. Most gay men and lesbians do not report crimes against them. The causes appear to be that violence and other human rights abuses directed against them frequently result in severe emotions of shame, as if they were somehow responsible for the assault. While this sense of self-blame is not unique to homosexual victims of crime, it is worsened by the fact that many gay men and lesbians have not accepted their sexuality, and frequently have been assaulted in locations associated with sex—illicit or not. Additionally, there is a concern of being labelled gay while recounting attacks. These sentiments usually discourage LGBT people from seeking redress and help from the police, civil rights groups, or even close friends and family members.

Without the possibility of open, socially legal relationships, many homosexual men turn to "cruising" in parks, on certain streets, and even in public restrooms in pursuit of sexual partners. This may be the quest for an ideal mate, or more honestly, for one among many, or a "safer" choice for a guy who does not feel capable of risking the degree of emotional commitment or the danger of social embarrassment that a more "stable" relationship may entail. Lesbian women in India typically avoid public cruising. This might be because men, regardless of their sexual orientation, enjoy a far better level of protection in public settings than unaccompanied women. It might also be because lesbian women (and many homosexual men as well) regard cruising, or a "hunt" for sex, to be an unappealing or edifying activity.

All homosexual people, however, are extremely vulnerable since their sexuality is concealed at job, school, their place of residence, their family home, and among friends, making them ideal targets for blackmail, extortion, verbal and physical assault, and police harassment.

ABVA discovered several cases of this type in literature and through first-hand interviews. A selection of them is listed below.

We want to highlight that the real frequency of such crimes is at least a hundredfold greater than any non-gay citizen could anticipate.

### **3.13. Homosexual Children**

In India, gay and transgendered youngsters are largely suppressed at home. In Indian society, discussing sexual orientation or sexuality is still taboo. Thus, the majority of youngsters who identify as sexual minorities remain silent about their sexual orientation or gender identity in public since they have experienced firsthand how being a gay or transgendered person is despised and deemed against morality. Additionally, if they disclose their sexual orientation or gender identity, they risk discrimination and physical harm from others.

In countries such as India, where consenting private homosexual actions and behaviours are criminalised, the issue is exacerbated for gay and transgendered youngsters who are already grappling with their sexuality and transgenderism. These children are more likely to face violence or other forms of discrimination in their family and community, since they are viewed as deviants who do not adhere to traditional standards about sexuality and gender. Additionally, criminalising homosexuality may exacerbate stigma and fear of familial rejection among young homosexual transgendered people.

Due to fear of rejection and shame from society, individuals of sexual minorities, especially children, frequently conceal their true sexual orientation and gender identity from family and community. This hiding of their true identities has a severe effect on the physical and mental health of young homosexual and transgender persons who are already battling with their sexuality and gender identities.

These young people also frequently flee their homes, exposing them to a variety of dangers such as homelessness, physical or sexual abuse, and drug misuse, as covered in earlier chapters. This propensity to conceal one's true sexual orientation and gender identity is why such

instances of discrimination against teenagers on the basis of sexual orientation and gender identity fail to garner public and legal attention. Indeed, when parents learn of their children's homosexuality or transgenderism, they frequently respond with wrath, anxiety, disgust, or dejection. This parental reaction is mostly motivated by their concern of their children being rejected and discriminated against in society due to their sexual orientation and gender identity. To safeguard their children against such expected discriminatory behaviours and anguish, as well as to safeguard the family's reputation, parents typically respond adversely in a homophobic or transphobic atmosphere. A family's unfavourable attitude to homosexual and transgender children may also involve a coercive attempt to alter a child's sexual orientation or gender identity through different therapies.

Numerous research-based studies have found that such attempts to alter an individual's sexual orientation or gender identity are damaging to their general health and well-being. Additionally, the American Academy of Pediatrics reported that treatments for sexual transition or transgenderism may result in sadness, anxiety, and self-condemnation. Additionally, it was shown that when such therapies are used to modify sexual orientation or transgenderism, the likelihood of such transformation is extremely small or non-existent. Additionally, attempting to convert gay or transgendered teenagers is more dangerous than attempting to convert adults. Young gay and transgender children are more likely to experience family rejection and social pressure to convert. Indeed, when compared to the heterosexual or other population that adheres to the society's gender norms, homosexual and transgendered children are more likely to experience depression, suicidal tendencies, and segregation, as well as to be victims of various violent acts, as discussed in previous chapters. Despite the hazards and risks associated with subjecting a gay or transgender adolescent to such therapies, there are no legal restrictions prohibiting minors and other members of sexual minorities from receiving such treatments. Additionally, a sizable percentage of therapists continue to assert that homosexuality or transgenderism is a form of illness that should be corrected.

Numerous parents and adults feel that homosexuality or transgenderism is a treatable mental illness. Indeed, several psychologists have observed that parents of gay and transgendered

children frequently coerce their children into seeing a psychiatrist in the goal of reintegrating them into the heterosexual and gender conforming community. According to Dr. Pulkit Sharma, psychologist (VIMHANS), he was once contacted by an educated family to shock their son in order to make him fit into the heterosexual community. Dr. Samir Parikh, head psychiatrist at Max Healthcare, also stated that the majority of parents who see psychologists to change their children's sexual orientation or gender identity feel that homosexuality or transgenderism is a curable mental illness. Dr. Sandeep Vohra, senior consultant psychiatrist at Apollo Hospital, noted that it is more difficult for upper-middle-class and educated families to accept their homosexual or transgender offspring. Numerous LGBT rights advocates also assert that, in today's homophobic and transphobic society, many physicians attempt to use the parents of homosexual or transgendered children in order to profit from their anguish. Indeed, Ashok Row Kavi, a gay rights activist, revealed that famous psychiatrists make money by administering electric shock treatments to homosexual and transgendered persons, jeopardising their lives.

### **3.14. Homosexual Women**

Lesbians, bisexual women, and transgender (LBT) people in Asia face forced institutionalisation in mental rehabilitation clinics, electroshock treatment as aversion therapy, sexual harassment at school and work, threats of rape to convert them to straightness, school expulsions, landlord eviction, police kidnapping, family violence, and media stigma. Lesbians experience employment discrimination based on their gender and sexual orientation. Women are refused employment and advancement if they appear too masculine. Male employees stalk and sexually harass lesbians, who fear retribution and reprisal if they complain. Transgender/gender variant individuals face discrimination in the workplace and are subjected to extortion, harassment, and sexual abuse by members of the community and those in positions of power, such as police officers. Activists who advocate for the rights of LBT persons face risks to their safety, including harassment, assaults, and even torture and abuse, with authorities either complicit in or failing to intervene in these crimes.

LBT individuals in Asia frequently experience violence in the "private" sphere—from members of their personal and extended families, communities, and religious organisations. This violence manifests itself in the form of beatings, house confinement, ostracism, mental and psychological abuse, verbal abuse, forced marriage, corrective rape, and, in some cases, murder to restore family honour. Fear of family and community violence is frequently heightened by police participation, when officers work alongside family members to break up lesbian relationships through arrests, detentions, and intimidation. In certain instances, one of the spouses faces allegations of kidnapping, human trafficking, or child abuse. Lesbians are also charged under sodomy statutes, even if the legislation does not expressly mention lesbianism. Complicating matters is the state's failure to exercise due care in implementing existing laws criminalising domestic and sexual abuse to affected LBT individuals, denying them access to complaint processes and avenues for remedy. Victims do not seek protection under these laws because they live double lives, and disclosing the abuse brings scorn, rejection, discrimination, and additional violence. As a result of this vicious loop, violence goes unreported, unacknowledged, and uncontrolled. While the media occasionally reports on suicide pacts or failed same-sex marriages, the coverage rarely refers to the events as abuse or repression of rights. Rather than that, media coverage perpetuates the stigma associated with LBT individuals and makes them the target of mockery and humiliation.

Numerous humanitarian organisations and women's rights NGOs are unaware of the magnitude of sexual orientation and gender identity-based violence and discrimination. Government reports to treaty monitoring bodies, as well as shadow/alternative reports by women's rights NGOs, frequently make no mention of violence against LBT groups and individuals. This is because sexual rights for women, apart from reproductive rights, are rarely a priority for the women's human rights movement, and the demand for women's sexual autonomy is treated as incidental or a lesser priority. Simultaneously, when LBT activists petition governments, treaty bodies such as CEDAW, or national human rights agencies, they frequently lack the data and evidence necessary to substantiate their allegations of violence and discrimination, contributing to the problem's under-recognition. Throughout 2007 and 2008, the International Gay and Lesbian

Human Rights Commission (IGLHRC) met with grassroots and national LGBT organisations in Asia to ascertain their most pressing concerns and needs. IGLHRC heard from women's groups that homophobic and transphobic violence against women was their top concern — even though some of the groups had the competence and resources to make it so. To increase awareness of the issue, several organisations performed small-scale studies in their service areas, but these were restricted in scope. There has been no regional data collection on violence against lesbians, bisexual women, and transgender (LBT) persons in Asia. In response to what we heard, IGLHRC held a Strategy Workshop in Quezon City, Philippines, from May 27-30, 2009, to kick-start a cross-country discussion with activists from Asia. Their reports show that homophobic and transphobic violence against non-heteronormative women is under-reported and under-documented in the region, and hence overshadowed by other regional problems. This data deficiency greatly leads to a lack of financing for programmes and lawmaker attention. Few government initiatives to combat violence against women engage LBT communities. LBT persons frequently lack the rights and remedies against violence that other people, especially heterosexual women, enjoy under anti-discrimination, domestic violence, and rape laws. In nations with little or inadequate official responses to violence against women, LBT persons are further ostracised since their pain is concealed by double or triple danger. The benefits gained by women's rights movements are frequently not extended to LBT persons, despite the fact that many are members of these groups in their home countries. Despite these discrepancies, LBT activists are attempting to raise awareness of state- and non-state-level violence in a number of Asian countries. The following nation summaries are based on the IGLHRC's May 2009 cross-country exchange. They serve as a precursor to the two-year in-depth qualitative and collaborative research and documentation project that IGLHRC and LBT partners in Asia will begin in June 2010 and will culminate in local advocacy initiatives to end violence against women based on their sexual orientation, gender identity, or gender expression. Several of these activities will be connected to ongoing national, regional, and/or international public awareness and violence prevention campaigns, such as the 16 Days of Activism to End Violence Against Women, the UN Secretary General's Campaign to End

Violence Against Women, the International Day Against Homophobia, International Women's Day, and the Campaign to Just Say No to Violence and Impunity.

In India, heterosexual women face similar violence to LBT persons, particularly in the family and marriage, with the primary distinction being that violence is aimed at LBT sexual identities and behaviours as well. According to Sahayatrika, an LBT organisation headquartered in the southern Indian state of Kerala, the impact of violence is different since lesbian identities, relationships, and altered gender are not socially recognised, and in most of India, same sex is criminalised. Forced marriage and punishment by family members for exercising sexual choice are examples of forms of violence. Home detention, family expulsion, deprivation of economic and material resources, coerced mental treatment, and coerced education are all forms of punishment. Lesbians are also at risk of eviction by landlords and police brutality, which is frequently carried out in collaboration with family violators. Continuing to live in a violent household frequently results in limited physical mobility for spouses and family members, as well as social isolation. Sahayatrika provides peer support to LBT victims of abuse, legal representation from sympathetic attorneys, financial help, and relocation to an out-of-state refuge. They receive limited support from other women's organisations and point out that the prevailing climate of sex phobia, moral policing, lack of legal recourse, denial of women's right to sexual choice, lack of social acceptance for unmarried women leaving their families, community harassment and threats against single women living alone or women living in couples, and rejection of women transgressing gender norms. Additionally intimidating are the linguistic and cultural differences in India, especially within states, which can offer frightening obstacles for individuals already dealing with safety concerns. The Domestic Violence Act in India does not provide protection for same-sex couples. A legislation forbidding forced marriage may be an option for LBT individuals, but they run the danger of having to disclose their sexual orientation or gender identity outside the family, as well as the loss of material resources and community connections when uprooted from family.

In China, where there is currently no law prohibiting domestic violence, the LBT group Common Language conducted a two-year study on domestic violence with funding from the

Anti Domestic Violence Network of the China Law Society, a government-supported organisation with the country's largest network of domestic violence programmes. Common Language discovered that 50% of lesbians experience familial abuse and 90% of lesbians over the age of 25 are compelled to marry. Lesbians experience the same types of violence as heterosexual women in China: physical, psychological, verbal, economic, and sexual. Additionally, lesbians are subjected to retaliatory rape by partners and spouses when their sexual orientation is discovered or exposed. Both lesbians' heterosexual spouses and lesbians' parents justify the use of physical abuse to "restore lesbians to normalcy." Husbands and boyfriends utilise malicious public disclosure of sexual orientation to inflict public shame and prejudice on lesbians and bisexual women. This strategy is successful in China's culturally conservative society. According to Common Language, women who are subjected to family and spouse abuse are fearful of divorce for fear of losing custody of their children. They are also hesitant to invoke the legislation against forced marriage as a means of self-protection, particularly against parents. Typically, surviving assault entails seeking assistance from lesbian friendship networks. According to Common Language, there are insufficient resources and capacity for LBT victims to call or seek assistance because LBT groups lack the resources and capacity to deal with domestic violence and government funding for services designed exclusively for LBT women experiencing domestic violence is limited. Numerous mental health professionals are unaware that homosexuality has been declassified as a disease, thus impeding effective therapy for LBT individuals seeking assistance.

As an LBT youth organisation in Indonesia writes, "Violence against women is marginalised in general, violence against LBT is more stigmatised, and violence against young LBT is invisible." As a result, young women's subjugation and marginalisation continue unabated. Forced marriage, forced hospitalisation in mental or religious institutes, and physical assault are all examples of violence. According to advocates for LBT in Indonesia, abusers are mostly parents or members of religious communities. Additionally, young LBT persons face verbal abuse and bullying at school from peers and instructors, street harassment, and police harassment and intimidation. Additionally, corrective rape happens when women are

"compelled to have intercourse with a male in order to be cured" of their non-conforming sexuality or gender identity. Victims discover ways to survive by seeking assistance from other young lesbians who are members of secret E-lists via Internet chat rooms and telephone SMS. Violence intervention and prevention are challenging, much more so for young LBT individuals, who are imprisoned by their age, economic dependency, lack of agency, and lack of mobility. Seeking governmental protection is improbable, given numerous laws prohibit homosexuality, including the pornography legislation, the anti-prostitution statute, the vagrancy law, and the public order law.

In several areas, homosexuality is punishable under syariah (Islamic) law. Women who identify as LBT (including female to male) risk being targeted by religious groups that instigate communal violence against anybody who violates religious standards for acceptable sexuality and gender expression. The media's and popular culture's negative depictions of lesbians, particularly the notion that they should be murdered, exacerbate anxiety. In some regions of Indonesia, widespread societal and cultural rejection contributes to underreporting of violence against young lesbians and female to male transgender people. Internalized views of lesbianism as wicked and immoral further isolates LBT individuals who are victims of abuse and prevents them from seeking treatment. Within the broader gay men's and waria (male to female) groups, LBT (female to male) youth suffer from a lack of visibility, limiting them access to public areas and chances to congregate freely and openly. They fight for their voices to be heard.

Domestic abuse is commonly regarded as the "most recognised type of violence against women" in Japan, however it is limited to heterosexual women. LBT people face the same types of physical, psychological, verbal, and sexual abuse as heterosexual women and men, but their violators come from a broader range of backgrounds—husbands, boyfriends, same-sex partners, immediate and extended family members, homophobic friends, teachers, and public officials. According to local activists, silences around sexuality in general, and homosexuality in particular, impede the revelation of violence for fear of disclosing the motivations for the assault. Additionally, LBT individuals lack awareness about the violence they face, which contributes to their lack of empowerment. Fear of mistreatment by police or service groups,

particularly women's organisations, exacerbates isolation. The majority of shelters for women who have experienced domestic abuse will not accept LBT individuals. Japan's Ministry of Health, Labor, and Welfare funded a hotline programme for sexual abuse victims in October 2009. The National Women's Shelter Network established the hotline, which is accessible once a week to LGBT victims.

Domestic Assault Act in Malaysia provides women with recourse and protection from violence exclusively inside heterosexual marriage. For LBT individuals, there is an additional risk of criminal punishment against members of the same sex. According to Knowledge & Rights For Youth for Safe Spaces (KRYSS), family members are the primary perpetrators of violence against LBT persons. Religious authorities and members of religious groups also perpetrate or order violence, "particularly against transsexuals who have undergone gender reassignment surgery, where the state's legislation of Islamic beliefs via syariah serves as justification for violence and discrimination." LBT migrant workers in Malaysia face violence motivated by racism and anti-immigrant sentiment from the c Data on this type of violence are limited, owing to people's fear of reporting. One issue expressed by Malaysian LBT activists is that the general climate in Malaysia (even within women's rights and human rights organisations) is unfriendly to open sexuality discourse. LGBT organisations are not authorised to register, which precludes them from receiving public money accessible to other organisations and limits their advocacy on sexuality rights, which adds to the absence of a cohesive strategy and approach to sexuality rights.

In Nepal, the Supreme Court directed the legislature to establish laws protecting LGBT persons from state-sanctioned violence and discrimination. However, the national domestic violence legislation does not include safeguards for lesbian, gay, bisexual, and transgender persons. According to Blue Diamond Society (BDS) lesbian activists, violence against LBT persons includes verbal humiliation and agony, physical assault, forced marriage, forced reparative therapy to "fix" sexual orientation and gender presentation, murder, and rape, including corrective rape. Typically, perpetrators are husbands or direct or extended family members.

LBT adolescents face "derogatory name calling by school authorities due to their failure to conform to social standards."

Police brutality is a significant issue for metis (feminine men, cross-dressing males) and third gender individuals, especially transgender men. Lesbians and female to male transgender service members are particularly vulnerable to violence and discrimination at the hands of peers and those in positions of power, including kidnapping, imprisonment, psychological harassment, verbal humiliation, threats, and intimidation. While LGBT organisations give immediate aid in the form of family violence interventions and emotional support to victims, their personnel lacks expertise in dealing with domestic abuse and is thus restricted in their assistance. Additionally, they lack training in documenting violence, advocating for police, and media activism. There is a dearth of training and information available to police personnel who can aid LBT victims of assault.

In Pakistan, advocates for LBT persons say that national laws do not acknowledge the forms or causes of violence experienced by LBT individuals. Family members conduct the majority of violence against sexually and gender nonconforming women. According to the Organization for the Protection and Propagation of the Rights of Sexual Minorities (OPPRSM), family-based violence frequently involves forced home confinement, mental and psychological abuse that results in shame and self-hatred, pressure to marry, exclusion from family events, family silence, and childhood sexual abuse. In certain situations, family members commit honour murders. Lesbians in heterosexual relationships also face violence from their male partners, which may involve physical and verbal abuse, as well as public disclosure of their sexual or gender orientation, increasing their vulnerability to communal abuse. Psychiatrists commit violence when they coerce LBT individuals into undergoing mental therapy, including hormone testing. According to one group of LBT activists, "there is no gay movement, and the women's rights movement is not openly supportive and frequently cautious," limiting possibilities for relief and protection against assault. According to preliminary data conducted by one organisation, violence against LBT persons is rarely apparent or reported in Pakistan in comparison to violence against homosexual males.

Rainbow Rights and Lesbian Advocates Philippines (LeAP) claim a "specific form of gender-based violence" in the Philippines, not only because LBT persons are women, but also because they are third sex and violate social norms. The women's movement has contributed to broad recognition that violence against women is connected to women's low place in society and patriarchy." However, lesbians are viewed as women who "deserve to be more than what they are," which includes physical battering, sexual abuse, psychological and emotional abuse, verbal abuse, intimidation, and public mockery. Typically, perpetrators are family members. Additionally, church leaders, students, instructors, employers, and coworkers are abusers. Young lesbians also face physical punishment from their parents, corrective rape orchestrated by a family member to "cure" them, coerced psychiatric therapy for mental illness, and religious group "pray-overs" to "convert" them to heterosexuality—which occasionally results in suicides. Transgender persons are refused entrance to public spaces due to their outer appearance and are compelled to dress according to gender-specific dress codes. LBT activists identify several impediments to violence intervention and prevention: homophobic, unsympathetic, or insensitive attitudes and practises of barangay (district) officials, police officers, health professionals, and social workers; improper handling of complaints by barangay officials and police; police corruption; and judicial discrimination by homophobic judges who penalise lesbians for their sexual orientation. In 2004, LeAP published a study on ten lesbians and bisexual women in an attempt to convince the Philippines Congress to enact an anti-discrimination law. "It aimed to demonstrate that lesbians and bisexual women face assault and prejudice in the Philippines." The measure is still in committee.

In Sri Lanka, the Domestic Violence Act targets cohabiting individuals and technically applies to same sex couples, but they may be forced to conceal their connection, according to the Women's Support Group (WSG), because same sex relationships are illegal in Sri Lanka. There is currently no information on who may have invoked the statute in order to seek protection from domestic abuse. The majority of violence directed against LBT individuals happens when close and extended family members learn of the individual's sexual orientation or gender identity. Family expulsion forced home confinement, and prohibition of communication with

non-family members are all possible penalties. Lesbians in heterosexual marriages, as well as lesbians in same-sex partnerships, face abuse from their spouses and in-laws. In certain instances, family members of lovers who oppose the connection falsely accuse LBT individuals of abduction. Outside the house, violence against LBT individuals takes the form of property destruction, harassment, financial and sexual extortion, blackmail, and threats of physical assault and rape, including public incitement to rape lesbians. Perpetrators are frequently neighbours, acquaintances, co-workers, employers, and members of the police and military. Certain medical and legal professionals extort LBT patients or clients using sensitive information about them. Intragroup disagreements frequently result in the forcible expulsion of other group members. Certain lesbians engage in relationships with males in order to conceal their identities from family members and escape severe family opposition. For others, heterosexual marriage is a means of evading familial hostility while maintaining (clandestine) same-sex relationships. Lesbian moms who are subjected to domestic abuse in heterosexual relationships keep silent out of fear of losing custody of their children in the event of divorce.

While some lesbians flee violent homes and seek peer support, the marginalisation of lesbians and transgender (female to male) people, even by organisations dedicated to domestic and sexual violence, sends a strong message, just as the threat of criminal sanctions discourages LBT people from reporting to the police. Moral policing, fuelled by rising anti-Western sentiment, as well as nationalism and religious fanaticism, create further impediments to involvement by violence. A significant problem that LBT persons in Sri Lanka must struggle with is the war and ethnic strife, which obscures non-conflict-related human rights activities, therefore reducing public (and non-governmental organisation) discussion of sexual and women's rights. For fear of being charged with terrorism, the Prevention of Terrorism Act prohibits all women from reporting custodial rape.

Despite widespread recognition that women are the major targets of patriarchal culture-based violence in Taiwan, there is also uncertainty and a lack of information regarding how to define violence aimed at persons based on their sexual orientation or gender identity. According to the Gender/Sexuality Rights Association (GSRAT), lesbians and transgender (masculine)

teenagers face violence not just as women, but as sexual and gender variant persons as well. They are compelled to attend re-education programmes to alter their sexual orientation and gender expression, are physically abused at home by their parents, or are ejected from the family and denied family resources. Transgender (female to male) individuals face severe and degrading treatment from authorities and are refused entrance to public restrooms if their appearance does not conform. Sexual assault is a threat to butch lesbians. To flee familial abuse, LBT adolescents seek assistance from gay-friendly instructors, professors, and school counselling facilities, as well as from LGBT organisations and hotlines. Fear of leaving the family is a significant obstacle to safety, as it results in the loss of educational possibilities and material resources. At the state level, mechanisms for preventing violence are harmed by insufficient implementation of human rights legislation, political lip service to the LGBT community, a lack of corrective action by politicians, a lack of government funding to promote LGBT human rights, and a lack of legal recognition for gender change. Despite Taiwan's international reputation for tolerance of homosexuality and gender variation, LBT individuals are openly mocked and vilified in Taiwan by politicians, employers, lawmakers, and the media. According to GSRAT, the LGBT movement is too fragmented, lacks alliances with other human rights movements, and fails to educate the public about sexual rights—all of which undermine civil society's ability to hold the government accountable for its promises of equality and tolerance for LGBT people.

### **3.15 Problems Faced by Homosexuals as Social Stigma**

Lesbian, gay, bisexual, and transgender (LGBT) persons confront enormous challenges growing up in a society that frequently presents heterosexuality as the only acceptable orientation and homosexuality as aberrant. They continue to endure prejudice and marginalisation in many aspects of life around the world. Homophobic violence and assault against LGBT persons are a daily occurrence. In most of the EU Member States, same-sex couples lack the same rights and protections as opposite-sex couples, and so face discrimination and disadvantage when it comes to accessing social security programmes like as health care

and pensions. Most LGBT persons continue to conceal their sexual orientation or experience harassment in the workplace out of fear of losing their job. Young LGBT individuals are particularly susceptible because they face separation from family and friendship networks, harassment at school, and invisibility, which can result in academic underachievement, school drop-out, mental illness, and homelessness in certain circumstances. Not only does this discrimination deny LGBT people equitable access to critical social commodities such as work, health care, education, and housing, but it also marginalises them in society, making them one of the most vulnerable groups at danger of social exclusion. I'm going to highlight some of the key issues confronting LGBT people worldwide.

### **3.16. Fear Of Being Marginalized And Social Exclusion**

At the individual, interpersonal, and societal levels, marginalisation is at the heart of exclusion from fulfilling and full social lives. Individuals who are marginalised have very limited influence over their life and accessible resources; they may become stigmatised and frequently face negative public opinions. Their possibilities to contribute to society may be restricted, and they may acquire poor self-esteem and self-confidence, leading to isolation. Social laws and practises may limit their access to critical social resources such as education and health care, housing, income, leisure activities, and job. The effects of marginalisation on social exclusion are similar regardless of their origins and processes, regardless of whether they are rooted in social attitudes (such as those toward impairment, sexuality, or ethnicity) or social circumstances (such as job closures, a lack of affordable housing, and so on). LGBT people may face numerous types of marginalisation – such as racism, sexism, poverty, or other issues – in addition to homophobia or transphobia, all of which have a detrimental effect on their mental health. The stigma associated with sexual orientation and gender identity or expression that deviates from the accepted heterosexual, non-transgender norm keeps many LGBT individuals on the periphery of society. This marginalisation frequently removes LGBT individuals from a variety of support systems, including their own families, resulting in limited access to resources that many others take for granted, such as medical care, justice and legal

services, and education. Marginalization and bigotry against LGBT individuals frequently hinder them from obtaining basic public services such as health care and housing, and lead to major health disparities. Marginalization of LGBT persons frequently begins with their birth family. According to one research, around 30% of LGBT adolescents worldwide have experienced physical abuse at the hands of family members due to their sexual orientation, gender identity, or expression, and LGBT youth are believed to account for up to 40% of the world's homeless juvenile population. The family marginalisation of LGBT kids impedes initial prevention and education efforts, increases risk-taking behaviour that might result in HIV infection, and creates barriers in the way of LGBT adolescents living with HIV/AIDS obtaining adequate medical care and psychosocial support. Additionally, in the absence of alternative forms of assistance, many LGBT adolescents are compelled to engage in criminalised activities such as sex work to live, pushing them farther into the edges of society and exposing them to a much-increased risk of HIV.

### **3.17. Lack of Understanding Among Family Members**

Historically, relatively few teenagers came out to their families or confided in others about their sexual orientation. Most lesbians, gay men, and bisexuals (LGB) did not discuss their LGB identification with others until they were adults. Many LGB adults were afraid of rejection and severe negative reactions because of discussing their life publicly. Until the 1990s (Ryan et al., 2009), LGBT adolescents had little resources. Gay and transgender teenagers lacked resources for learning about their identities and seeking assistance. Recently, the Internet, school diversity clubs, and LGBT youth organisations have all aided homosexual and transgender adolescents in obtaining correct information, counsel, and support. With increased access to services, more LGBT adolescents are coming out throughout adolescence (disclosing their homosexual or transgender status to friends, family, and other adults). Until recently, little was known about how families react when an LGBT adolescent discloses their sexual orientation. And much less was understood about how family attitudes influence the physical and mental health of an LGBT youth. Families and caregivers have a significant effect

on the risk and well-being of their LGBT children. It is demonstrated by new study from the Family Acceptance Project (FAP)(*Lack of Research & Knowledge on the Critical Role of Families*, 2009). The FAP researchers found over 100 actions that families and caregivers use to express their feelings about their LGBT children's status. Approximately half of these behaviours are accepting, whereas the other half are rejective. The FAP researchers quantified each of these behaviours to demonstrate how family reactions impact the risk and well-being of an LGBT adolescent. According to the FAP researchers, families that are torn about their children's LGBT identity think that the greatest approach to assist their children in surviving and thriving in the world is to assist them in fitting in with their straight classmates. As a result, when these families restrict their child's access to homosexual friends or LGBT services, they are acting out of concern and care. They feel their activities will contribute to their homosexual or transgender child's happiness. However, teenagers who believe their parents wish for them to change believe their parents do not love or even despise them. Parent-child conflict is exacerbated by a lack of communication and misunderstanding between parents and their LGBT children. These communication breakdowns and misunderstandings regarding sexual orientation and gender identity can result in family conflict and disruption, which may result in an LGBT teenager being removed from or pushed out of the home. Many LGBT kids are placed in foster care or wind up in juvenile prison or on the streets because of family strife about their sexual orientation. These characteristics contribute to their susceptibility to abuse and to significant physical and mental health issues. According to FAP research, family rejection has a negative influence on the health and mental health of LGBT young people. LGBT youth who have been rejected by their family due to their identity have much poorer self-esteem and less resources available to them. Additionally, they are more isolated and lack support than individuals who have been welcomed by their families. LGBT adolescents who face severe rejection from their parents and caregivers have an extremely high chance of developing physical and mental health problems as young adults. They have lower health than non-rejected LGBT youth. They have a greater difficulty with substance abuse. They have a greater sense of hopelessness and are far less inclined to protect themselves against HIV or

sexually transmitted illnesses (STDs). And this conduct places them at an increased risk of contracting HIV and AIDS.

### **3.18. Homophobia**

Lesbian, homosexual, bisexual, and transgender persons are more likely than heterosexuals to face intolerance, discrimination, harassment, and the threat of violence because of their sexual orientation. This is because of homophobia. On a wider scale, among of the elements that may perpetuate homophobia are a dominant group's moral, religious, and political views. Living in a homophobic atmosphere compels many LGBT individuals to conceal their sexual orientation out of fear of negative reactions and repercussions of coming out. Indeed, there is no one definition for the term homophobic, as it encompasses a broad variety of diverse attitudes and perspectives. Homophobia is a term that is frequently used to refer to hatred toward or fear of gay individuals, but it can also relate to stigma associated with social ideas regarding homosexuality. Negative sentiments or attitudes against non-heterosexual conduct, identity, relationships, and community can result in homophobic behaviour, which is at the foundation of many lesbians, gay, bisexual, and transgender (LGBT) people's experiences of discrimination. Homophobia shows itself in a variety of ways, including homophobic jokes, violent attacks, job discrimination, and poor media depiction. For those raised to believe homosexuality is bad, discovering they may be gay can result in emotions of shame and self-loathing, resulting in low self-esteem. Suppressing homosexuality entails rejecting an essential component of a person's identity, which may have a profound effect on their life and relationships. Additionally, the question of whether to come out can create significant personal suffering. LGBT individuals who choose to publicly announce their sexual orientation may suffer prejudice and discrimination from family, friends, and the broader community. Homophobia has the potential to inflict significant harm and disruption in people's lives. For instance, many LGBT individuals have been homeless because of family rejection following disclosure of their sexual orientation. Homophobic persons are quite efficient at interfering with the lives of LGBT people. They are powerless to hide their sentiments of hatred and their

inability to tolerate LGBT persons. As a result, they verbally or physically abuse LGBT persons and expose them to harm. LGBT persons are exposed to stress, unhappiness with their living environment, bodily discomfort, loneliness, and ostracism because of these views.

### **3.19. Problems of Homelessness**

Numerous issues confront LGBT persons who are homeless, including a shortage of housing and assistance tailored to their unique needs. For instance: Around 40% to 50% of homeless teenagers living on the streets self-identify as LGBT. They are staying there because they were evicted from their houses due to their sexual orientation or fled an abusive environment. Family lodging is not available in the shelter system across the country for homeless same-sex couples. Transgender individuals are not permitted to pick whatever gender they choose when living in the shelter system. The shelter system is rife with abuse and harassment of LGBT homeless individuals (*Out For Change: Racial and Economic Justice Issues in LGBT Communities*, 2005). Most domestic abuse shelters are closed to homosexual men and transgender persons. Additionally, there has been a dearth of comprehensive plans for long-term housing for persons living with HIV. Without economic assistance, homeless LGBT kids frequently engage in substance abuse and hazardous sexual activities, and frequently develop mental health issues. LGBT adolescents who are homeless are deprived of schooling and social support during key formative years—more than half of homeless LGBT youth report encountering peer prejudice.

### **3.20. Psychological Distress**

LGBT individuals endure significant levels of stigma, discrimination, and harassment daily. Most LGBT individuals adapt to this, particularly when they have family and friends' support and are involved in LGBT organisations and social networks. However, a sizable number of LGBT individuals, particularly younger LGBT people, have faced stigma, discrimination, and harassment in the absence of support. Numerous individuals also suffered additional stress because of experiences such as extremely high levels of homophobic bullying in schools, as well as physical and verbal assaults. This had a detrimental effect on their mental health, resulting in elevated levels of psychological distress, self-harm, and suicide ideation. LGBT

adolescents might feel especially alone, as many will be exploring their sexual orientation or gender identity on their own. They can be particularly sensitive during this age of navigating their way to maturity, a vital period of social and emotional growth. Rural regions can make it more difficult for LGBT persons to be out. Cities are more receptive to enabling LGBT individuals to choose whatever aspects of their lives they desire to be out in and with whom they wish to be out, for example, at employment, with friends, family, and neighbours, and with medical and social services. This is particularly challenging in rural regions, because being out in one domain, for example, at work, increases the likelihood that one's community, family, and friends are aware of one's LGBT status. Rural LGBT persons may be more prone than the overall population to leave their place of birth/adolescence. Gay and bisexual men and women are more prone than heterosexuals to suffer from depression and anxiety. These emotions may include profound grief, worry, loneliness, social awkwardness, and a sense of being overwhelmed. This is not only due to their gender identification! This is because being gender diverse causes a great deal of pain in a patriarchal culture. Indeed, there is so much anguish that it can be classified as a mental illness. Numerous reasons may lead to this, ranging from living in an often-homophobic environment to experiencing familial rejection to being closed off from part or all elements of life. Mental illnesses are not indicators of sexual orientation, but of prejudice and fear of discrimination. The LGBT community, most likely as a result of violence, social rejection, and isolation, has greater rates of anxiety, mood and drug use disorders, and suicide ideation than the general population between the ages of 15 and 54(Subhrajit, 2014). Bisexual women have been reported to have considerably worse mental health than lesbians or heterosexual women, possibly because of rejection from both gay and straight groups. Mayock et al. (2009) indicates in a large-scale Irish study that adolescent LGBT persons are more susceptible to psychological discomfort as a group. According to them, more than 60% of respondents explicitly link their stress and despair to their non-heterosexual identification. There is a substantial body of data indicating that poor mental health can be a result of homophobic views and heterosexist in society, resulting in diminished self-esteem and confidence and increased stress, particularly among young homosexual women.

### **3.21. Barriers to Care**

Lesbian, gay, bisexual, and transgender (LGBT) individuals confront unique barriers, difficulties, and problems that frequently make it difficult for them to access and receive competent and affirming healthcare. Heterosexist beliefs can impair the quality of therapy, and many LGBT individuals avoid getting help of fear of a poor experience. Individual organisations and therapists are not always LGBT-friendly, and some therapists may be unaware of their own heterosexist. Staff members may be judgemental of LGBT sexuality or be in the dark about LGBT services. In one of the research, over 40% of lesbians reported receiving negative/mixed responses from mental health professionals when they discussed their sexuality openly (including instances of overt homophobia, prejudice, and a perceived lack of empathy)(Warner et al., 2003).

### **3.22. Victims Of Hate Crimes**

Lesbian, Gay, Bisexual, and Transgender individuals, as well as those believed to be LGBT, are often targets of hate crimes and violence. LGBT individuals face stigma and prejudice throughout their lives and are frequently the victims of sexual and physical assault, harassment, and hate crimes.

Additional factors that may influence LGBT people's mental health and well-being include the process of coming out (disclosing their LGBTQ identity to others), gender transition, internalised oppression, isolation and alienation, loss of family or social support, and the impact of HIV and AIDS. However, the experiences of LGBT persons with violence and prejudice vary according to a variety of characteristics such as colour, gender, income, immigrant status, and language challenges. LGBT immigrants are more likely to experience violence because of their race and ethnic origin, as well as their sexual orientation and gender identity.

### **3.23. Conclusion**

Indian sensuality, which is constantly referenced around the world through references to Tantric lifestyles, Kamasutras, and sexual arts, will reshape the world in the next decades as Indian people rediscover themselves. A cross-section of Indian people who have adapted to less dogmatic and prosperous Western societies, as well as their behaviour patterns and views, demonstrate that a healthier sexual approach to our lives is ultimately healthier for our well-being, overall progress, and, of course, a personal awakening. India's younger generations and Indian people globally have been attempting to define sexual and sensual terminology independently, rather than being affected by external and international influences. Indeed, it is a healthier way, and when Indian people in India reach a point when they are all officially educated and socially liberated and have considerably more space and time at their disposal, they will discover that an open conversation about sex topics is natural and appropriate. We should begin discussing topics and shining a light on dark regions that contribute to illiteracy, bad health, and a variety of societal ills such as failed marriages, rapes, divorces, contempt for women, child abuse, and an overall unhappy population.

The fraternity must recognise the need of conducting research on the context-specific challenges confronting LGBT individuals in India. Sexuality education for medical and mental health professionals must be sensitive to the difficulties experienced by individuals with diverse sexual orientations and identities. Clinical services for individuals with such difficulties and concerns must be comprehensive in nature. A constructive and non-judgmental attitude will go a long way toward alleviating discomfort. Professional associations must raise awareness of these problems, facilitate the transfer of information and skills, and create opportunities for mental health practitioners to build their confidence and competence in assisting persons with diverse sexual orientations and identities. Psychiatrists and other mental health practitioners must be taught about human rights concerns and potential abuses. The emphasis should not be just on education, but also on attitude modification. Additionally, the creation and distribution of clinical practise recommendations is critical. Sexuality in humans

is varied and diverse. As is the case with many complex behaviours and personality characteristics, biological and environmental factors contribute to the development of a specific sexual orientation and identity. We must place a premium on people's humanity above their sexual orientation.

## **CHAPTER -4**

### **Judicial fight for social acceptance: Impact of Decriminalization**

#### **4.0. Introduction**

A huge number of nations across the world had legalised homosexuality, and India had just lately seen a series of legal moves aimed at bringing the country up to speed with other countries about homosexuality decriminalisation. This chapter aims to summarise the legal events that led to the Indian Supreme Court's historic decision in 2018 to read down section 377 of the Indian Penal Code (IPC), decriminalising homosexual intercourse between consenting adults in private: this decision will not only have positive consequences for the lives of queer people in India, but will also help to reduce homophobia in the country. The Indian Penal Code was created in 1860, while India was under British administration, and it is the country's official criminal legislation. Lord Macaulay established Section 377 of the IPC to govern crimes classified as "unnatural offences," which includes sodomy(Sharma, 2008).

It is stated in Section 377.

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

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Several academics have pointed out that the statute's language permitted courts to interpret the "unnatural crime" under consideration in a variety of ways. To begin with, the definition of sodomy has been broadened to encompass a variety of non-procreative sexual activities. Nonetheless, this legislation has been utilised to especially attack queer sexualities for one major reason: they are not "natural(Sumit Baudh, 2006)," and they do not conform to a culture

built on hetero-patriarchal values. As a result, gay sexual actions, whether consenting or non-consensual, were constantly monitored and regulated by the state. In addition, Section 375(*Reformation in the Laws Relating to Sexual Offences in India*, 2019) of the IPC governs nonconsensual heterosexual sexual activities, with rape being defined as only being committed by a man against a woman. Although it is true that s. 377(Joshi, 2010) has never been used to prosecute heterosexual intercourse and that there are few court cases filed against homosexuals under S. 377, it is also undeniable that the current legislation has had a significant impact on the lives of queer people in India: they are subjected to harassment, blackmailing, and other forms of extortion by private citizens(Remien et al., 2019).

Queer individuals endure prejudice in the workplace, are mistreated by health-care providers, and have difficulty obtaining health-care facilities. Given the present atmosphere of violence and prejudice against gay people in India, it should come as no surprise that LGBTQ+ organisations have been working hard to change things. The first challenge to S. 377 came in 1994, when a Delhi-based NGO named ABVA filed a public interest litigation (PIL) lawsuit challenging the constitutional legitimacy of the statute, claiming that it infringed on the right to privacy. This court case did not result in the desired result, and India will have to wait until 2001 to see a new NGO initiative. The Naz Foundation Trust, an AIDS NGO located in New Delhi, spearheaded the second attempt by filing a PIL case with the Delhi High Court to have S. 377 “read down.” The Naz Foundation claimed that Section 377 is illegal because it infringes on privacy, dignity, health, equality, and freedom of speech(Constitution of India, 1950,) Left-wing sympathisers and LGBTQ+ groups backed the petitioners in court, with "Voices Against 377" playing a key role. The petition was, however, rejected by the High Court on the grounds that Section 377 was primarily utilised in the context of child sexual abuse and that its repeal would be harmful. The Naz Foundation petitioned the High Court for a review in 2004, but it was denied. Following that, a Special Leave to Appeal against the High Court's ruling was filed in the Supreme Court of India, which was asked to review the case. On July 2nd, 2009, a two-judge bench of the Delhi High Court finally accepted the petition and read down S. 377, declaring that the IPC violates Articles 21, 14, and 15 of the Constitution insofar as it

criminalises consensual sexual acts of adults in private, effectively decriminalising homosexuality((PDF) *“No Going Back”*: *The Legal Battles around Section 377 of the IPC An Essay on Social Marginality in Contemporary India*, 2020). The queer jubilee was short-lived, however, as the Supreme Court reinstated S. 377 in the *Suresh Kumar Koushal v. Naz Foundation* case (Dixit, 2019) in 2013, saying that the legislation in question did neither compel nor condone the persecution of LGBTIQ+ persons. This judgement has been extensively condemned by Indians as well as foreign LGBTIQ+ and human rights organisations, and a fresh writ petition contesting the Koushal case's outcomes was submitted in the Supreme Court in 2016. On September 6th, 2018, a five-judge panel in *Navtej Singh Johar v. Union of India* unanimously found S. 377 illegal in regard to consenting sexual acts between adults of the same sex: the legislation has been described as "damaging to an individual's dignity and identity(*Section 377 and Beyond A New Era for Transgender Equality?*, 2019.)." India is now one of the Commonwealth countries that has decriminalised homosexuality because of this momentous decision. Such a slew of appeals, petitions, and counter-petitions reflects the reality that S. 377 isn't just a legal problem; it's part of the Hindu Right's larger nation-building agenda, which includes, among other things, counter-normative genders, and sexualities. When one considers the conservative arguments made in court against the repeal of S. 377, one gets the impression that Indian culture does not accept homosexuality. Indeed, one of the Government's arguments against the repeal is based on majoritarian morality: "The law does not function independently from society." It merely reflects the society's perspective The general population has showed tolerance for a new sexual behaviour or sexual inclination, but it is not generally accepted (Joshi, 2010). Clearly, the conservative attitude and discourses on s. 377 are motivated by a desire to construct a Hindu state with “traditional” ideas of gender and sexuality at its core, where the term of “tradition” is linked with the concept of “natural.” The situation is made more complex by the fact that mainstream ideology is based not just on heteronormative practises and beliefs, but also on nationalistic language that views homosexuality, and more broadly, queer existences, as alien to Indian culture and tradition. One of the Hindu Right's primary arguments is that India must be protected from "Western"

influences, and homosexuality is portrayed as a product of colonialism as well as current globalising movements and forces.

The homophobic instance of the rhetoric appears to be the “real” western import: the “authentic Indian morality” that S. 377 is accused of opposing appears to be a continuation of Christian moral norms brought with colonisation. According to academics, Indian authoritative literature contains numerous references to homoeroticism and third genders. Furthermore, the idea of a heterosexual and mainly India, which is at the heart of nationalistic instances' "true Hindu identity," appears to be a reaction to the colonial enterprise's disparaging depiction of the "effeminate other" who indulges in the sin of sodomy. As a result, national identity and citizenship are associated with heteronormativity within the nationalistic goal of establishing a "Hindu" India: as a result, the political and legal turbulence surrounding attempts to abolish s. 377 of the IPC should not come as a surprise. And, while the Supreme Court's historic judgement marks the beginning of a conceptual shift, gay people in India still have a long way to go before they can be fully integrated into society (Hsu, 2007).

## **4.1 Long Journey of Struggle**

### **4.1.1 Roots of homosexuality in the British empire codification and the Indian penal code**

The IPC, as well as Section 377, was enacted by the Legislative Council and signed by the Governor General on October 6, 1860. Less well known is the fact that homosexual offences were first codified in 1825, when the historian Lord Thomas Babington Macaulay was tasked with drafting legislation for the Indian colony. Macaulay led India's first Law Commission and was the primary drafter of the Indian Penal Code, the British Empire's first comprehensive draught of codified criminal law. In an 1837 address, Macaulay introduced a draft and went over the provisions in detail. However, when he got to his version of the anti-sodomy provision, he expressed displeasure that the drafters had been forced to consider such heinous topics (Friedland, 2010). The 'injunction to silence' against anti-sodomy legislation, popularised by jurists like as Macaulay, resulted in a "weird condition of affairs." We have yet to see the term "sodomy" used in any anti-sodomy legislation in any of the former British territories. Because

of the stigma and humiliation associated with the word, as well as the risk of infection, euphemisms arose around it, allowing for future revision and refinement of the offence under the pretence of explanations. Instead of using the traditional British offence of 'buggery,' which, given the 'injunction to quiet' and Macaulay's personal aversion to debate or discussion on the subject, could have been the best option, he drafted a new one. The most precise' legislative legislation turned out to be the most ambiguous law against sodomy. The following are the two proposed provisions related to 'Unnatural Offences,' which are characterised by the element of consent:

Cl. 361: 'Whoever, with the intent to gratify unnatural lust, touches any person or animal for that purpose, or is by his own consent touched any person for that purpose, shall be punished with imprisonment of either description for a term that may extend to fourteen years and must not be less than two years, and shall also be liable to fine.'

Cl. 362: 'Whoever, with the intent to gratify an unnatural desire, touches any person without that person's free and intelligent consent for that purpose shall be punished by imprisonment of either description for a term that may extend to life and must not be less than seven years, and shall also be liable to fine.'

Cl. 361 and Cl. 362 vary in that nonconsensual punishment is more severe, while consensual punishment is less severe, implying that different standards of 'damage' exist. The term 'touch', on the other hand, was never defined. The concept of 'gratifying unnatural lust' was dropped before the final text because it was too imprecise and confusing. The final draft(*Refworld / Iran: Update to Responses to Information Requests IRN24789.E of 22 August 1996 and IRN21549.E of 2 October 1995 on the Situation of Homosexuals, and on Whether Legal Penalties Are Applied in Practice*, 1998.) of the Indian Penal Code, which was delayed due to the Indian revolt in 1857, included a modified definition under the heading of Unnatural Offences, which established a thumb rule for defining the offence of "sodomy" in subsequent colonial Criminal/Penal Codes. Section 377 of the Indian Penal Code, the dreaded source of homophobia throughout the former British Colonies, read as follows:

Section 377: Unnatural offences—Whoever voluntarily engages in carnal intercourse against the order of nature with any man, woman, or animal shall be punished with life imprisonment, or with imprisonment of either description for a term which may extend to ten years.

Explanation: Carnal intercourse is not required for the offence specified in this section. Penetration is sufficient.

The meanings of the terms 'carnal intercourse' and 'the order of nature' were not explained. It likened the offence to bestiality and applied it to both heterosexuals and homosexuals, making penetration the sole criterion. It also makes no distinction between consenting and non-consensual sex, unlike Macaulay's initial draught, and so is harsher. It carries a penalty of up to 10 years in prison for both consenting and non-consensual sodomy. The reasons for the shift are unknown due to a lack of access to and availability of other legislative documents, diaries, and paperwork. On the surface, however, it appears that there was a conscious attempt to: equate sensuous sodomy with non-consensual sodomy, therefore not treating consensual sex separately and, maybe, leniently raise the Punishment; confine the offence from mere "touching" to actions including "penetration."

Acts that come under the purview of Section 377 have been reclassified as non-procreative(*DESCRIPTION OF MODULE*, ), imitative of sexual intercourse(*Lohana Vasantlal Devchand And ... vs The State on 24 July, 1967*), and sexual perversity(*Fazal Rab Choudhary vs State Of Bihar on 13 September, 1982*).s

## **4.2 Journey from Norshirwan To Naz**

A young man named Ratansi was apprehended and subsequently freed in an early twentieth-century Indian case(*Section 377 and the Dignity of Indian Homosexuals | Economic and Political Weekly*, 2006) for attempting to have anal intercourse with Noshirwan. Ratansi's refusal to deny his gay love/sex interest in court enraged the judge, who dubbed him a "despicable" specimen of mankind for being addicted to the "vice of a catamite(*Section 377 and the Dignity of Indian Homosexuals | Economic and Political Weekly*, 2006)," as he

admitted in court. Ratansi and Noshirwan were arrested before they could complete the act—actual penetration—and the judge was unable to condemn them. But, as in Khairati, the judge, while bound by the law in convicting the 'sodomite'/'catamite,' did not hold back in expressing his disdain and moral outrage at the sexual conduct. The act's association with the person—a catamite—becomes more essential than the deed itself.

### **Sodom to Gomorrah**

Why is it that an act rooted in the Chinese tradition of "playing the flute" is deemed a crime?(West & Green, 2002)

Through legislation like Section 377, the shifting judicial imagination of gay sex played a major part in re-drawing the sexual map of 'immorality.' The term "carnal intercourse against nature's order" was never defined(*Economic and Political Weekly Section 377 and the Dignity of Indian Homosexuals*, 2006). Unnatural offence was limited to 'anal sex' in one of the first documented Indian instances because "the act must be in that portion where sodomy is generally done."(*Gay Rights in India | Economic and Political Weekly*, 2006) In *Khanu v. Emperor*(*What Does Section 377 of IPC Criminalize? | India News - Times of India*, 2018), an important judgement on Indian anti-sodomy legislation, the meaning of Section 377 was revised. The case featured a coerced oral sex act between an adult male and a juvenile, according to the facts. The fact that the sexual conduct was non-consensual and coercive had no bearing on the decision. The Court's main concern was whether oral sex constituted an unnatural carnal crime under Section 377 of the IPC(*What Does Section 377 of IPC Criminalize? | India News - Times of India*, 2018).

Khanu ruled that Section 377's reach is not confined to "coitus per annum" (anal sex) but can also include "coitus per os" (oral sex). Sodomy, along with the potential of other sexual activities, became a part of Section 377. The process of deciding what these additional actions may be was not straightforward; it required a complex understanding of carnal intercourse, penetration, and natural order(*What Does Section 377 of IPC Criminalize? | India News - Times of India*, 2018) . The first line of argument was clinical, defining the order of nature as "the

potential of human conception." As a result, any type of oral or anal intercourse is illegal because it does not result in procreation, and it is much worse than bestiality. However, no consideration was or has been given to the fact that other types of penetrative intercourse, such as peno-vaginal sex with contraception, fit neatly under the same reasoning, and therefore condom distribution should be a crime as well. The last stage was to define carnal intercourse as "a brief visitation to one organism by a member of another organisation for specific clearly defined and limited purposes." The major goal of the visiting organisation is to induce bliss by causing a nerve detachment as a result of the sexual crisis. However, there is no intercourse unless the visiting member is at least partially engulfed by the visited organism, because intercourse implies reciprocity' (circa). It qualifies as carnal intercourse as long as there is an opening (in this case, the mouth) that may engulf the 'penis' and give sexual climax. It becomes a 'unnatural crime' because it does not lead to procreation.

Apart from criminalising oral sex, the Khanu case cleared the way for a broader interpretation of Section 377. In a 1961 case from East Pakistan (now Bangladesh), Khanu was used to expand the reach of the similar Section 377 of the Pakistan Penal Code to include 'thigh sex.' The Pakistani court applied Khanu's penetration-specific definition, ruling that "the insertion of the accused's male organ into the artificial hollow between Giasuddin's thighs would constitute penetration and carnal intercourse." In the Indian case of Lohana Vasantlal, the ruling in Khanu was followed and amended.

On the facts, it featured three males who forced a fourth underage kid to have anal and oral intercourse with them, similar to Khanu. However, the decision is so preoccupied with include oral sex under 377 in a broader definition of "sexual perversity" than Khanu that it entirely overlooks and minimises the actual pain and harm caused to the kid who was compelled to do the sexual act. The use of force and coercion are not discussed. The defendants in this case were penalised not for forcing a youngster into oral sex, but for having the act of oral sex itself. Despite the fact that Lohana Vasantlal regarded sex for procreation to be an outmoded notion, she nevertheless considered oral sex to be a criminal offence due to the act's simple inappropriateness. It went even farther, sparking a debate on whether 'oral sex' may be used as

a precursor to natural vaginal intercourse as long as it doesn't become a substitute. The 'imitative test' was developed in this way by the Lohana court; for example, oral sex was imitative of anal sex in terms of penetration, orifice, enclosure, and sexual enjoyment, making it comparable to anal sex and hence punishable under Section 377. Khanu was a judgement written by British justices representing and nominated by the colonial administration during the British rule of India. Lohana's case was heard in Indian courts two decades after India's independence in 1947. The transition to an independent, democratic India, on the other hand, had no effect on the dictatorial colonial mindset that Section 377 was construed with in 1967.

In *Calvin Francis v. Orissa (Calvin Francis vs State Of Orissa on 7 February, 1992)*, the Orissa High Court described a case in which a man inserted his genital organ into the mouth of a 6-year-old girl, stating (Zaman et al., 2016), "In order to attract culpability under Section 377, IPC, it must be established that (i) the accused had carnal intercourse with man, woman, or animal, (ii) such intercourse was against the order of nature, (iii) the act by the accused was against the essence of the Section 377 offence is carnal intercourse against the natural order. Thus, the legacy of colonial judicial homophobia persisted, and in the case of *Brother John Antony v. State in 1992 (CASE COMMENT ON BROTHER JOHN ANTONY v. STATE, 1992.)*, we moved from oral and thigh sex to mutual masturbation. 'An assault (perhaps violent) has occurred is of secondary relevance in this case,' says the judge. The court goes into great detail about what it means to be sexually perverse and concludes that mutual masturbation falls under 377 because "the petitioner's male organ is said to be held tight by the victims' hands, creating an orifice like thing for manipulation and movement of the penis by way of insertion and withdrawal." In the classic Singaporean judgement of *PP v. Kwan Kwong Weng* (Davis, 2016), the side allusions to the notion of precursor versus substitution in Lohana were eventually concretized into law. In this instance, the complainant was a 19-year-old lady who was duped by the accused into performing oral sex on him. '...fellatio between a man and a woman, whether the lady agreed or not, which was absolutely immaterial,' Kwan Kwong Wang continued his fixation with the act's unnaturalness and disregarded the value of consent (Davis, 2016): This has a significant impact on the idea (or lack thereof) of consent in situations of

377, because judgments dealing with non-consenting sexual activities by weakening "victim creation" also render "victim non-existence" in cases of consensual sexual activities meaningless. The Singapore Court established a clear distinction between two types of oral sex: 'prelude'(Davis, 2016) to vaginal intercourse, which is permitted, and 'substitute' oral sex, which is not. The 'procreation' rationale is dismissed by both Lohana and Kwan Kweng. They acknowledge and accept that individuals have sex for pleasure, which is a significant step forward and a significant judicial acknowledgement. Approval of pleasure, on the other hand, does not imply acceptance of 'oral sex.' Thus, heterosexuals have the right to sexual autonomy and practise for various consensual sexual behaviours such as oral sex. This hetero-normative focus on sexual activity is an attempt to impose a moral sexual order, rather than merely prohibiting a single sexual act. In a same spirit, it has been claimed that the Supreme Court of the United States established a discursive moment when it decriminalised consensual gay relations between adults but also authorising a new system of heightened control of homosexuality in *Lawrence V. Texas*(*Lawrence v. Texas* :: 539 U.S. 558 (2003) :: *Justia US Supreme Court Center*, 2003). Prior to *Lawrence*, courts could readily dismiss homosexuals' claims by referencing the criminalised and immoral character of sodomy. *Lawrence*, on the other hand, has thrown down sodomy laws and immoral character. However, since *Lawrence* struck down sodomy statutes, and morality as a basis for legislation has been rejected, courts will be forced to conduct more detailed assessments of homosexuals' lives, judges will be required to hear homosexuality discussed more frequently, and homosexuality(Hunter, 2004) will be forced to speak.

The right to privacy argument made by Naz Judgment was founded in part on a 1994 case named *Rajgopal v. State of Tamil Nadu* (1994), in which the court established a citizen's "right to be left alone." Indeed, a 1984 Delhi High Court decision, subsequently affirmed by the Supreme Court, said that "neither...the right to life nor...the right to equality has any place in the privacy of the home and marital life."*(Brink v Kitshoff NO Case CCT 15/95 Explanatory Note*, 1996) In this context, Naz argued, citing the *Rajgopal* decision, that "a person has a right to protect his own privacy, his family's privacy, marriage, procreation...and education among

other things." In this context, Naz has advocated for a legal non-intervention realm to at least safeguard a new class of sexual citizens who are becoming more respectable.

The provision of the Sexual Offences Act that criminalises sodomy was found to be constitutionally unlawful by the constitutional court in the case of National Coalition for Gay and Lesbian Equality (the sodomy case). The constitutional court creates a paradigm of legally permissible sexual interactions in this instance. In contrast to prostitution/criminal sex, constitutionally sanctioned, or 'civil sex,' as Nicole Fritz defines it, is 'private and intimate' for the purpose of 'nurturing relationships or making life affirming decisions about 'birth, marriage, or family,' and facilitates 'deep attachments and commitments to the necessary few other individuals with whom one shares not only a body but also a mind. By losing its sexual charge and ability to undermine hetero-patriarchal norms, homoerotic desire is de-eroticized and becomes domestic, familiar, family, and knowable.

### **Sodomy in Matrimony**

Consensual sodomy between married spouses is not illegal under common law. Sodomy between husband and wife was prohibited by the Nigerian Criminal Code of 1916. The court in Grace Jeyaramani ruled that "if the woman was not a consenting participant, the husband might be guilty of sodomy." Grace demonstrates that anti-sodomy laws are intended to prevent same-sex sodomy rather than opposite-sex sodomy. Sodomy laws are intended to prohibit, among other things, what we now refer to as consensual homosexuality, as well as to impose a moral order that frowns on any sex outside of the married union. As a result, the "order of nature's" rationale or meaning has shifted away from "procreation" and toward heterosexual marriage. The 'majority of heterosexual relationships are in reality arranged outside the marital realm,' thus this is still a restricting notion. As a result, the married household becomes the new natural order, allowing oral sex, cunnilingus, and even sodomy. However, both secular and religious legislation have agreed that heterosexual marriage is the only requirement for sex, pleasure, and exploration.

### **Consent Irrelevant in Sodomy**

Sexual practises are built on a complex relationship between consent to self-harm and self-injury. In anti-sodomy legislation, consent is immaterial. The emphasis on the 'act' alone, *actus reus*, regardless of permission, has resulted in the criminalization of non-consensual sodomy victims (typically the complainant).

In a judgement issued by the House of Lords in 1993, which was supported by the European Court of Human Rights, sadomasochism was effectively declared illegal (1997). Consent to injuries inflicted during a homosexual sadomasochistic encounter was not an adequate defence to charges of bodily harm and injury, according to the decision, because "public policy required that society be protected by criminal sanctions against a cult of violence that contained the danger of proselytization and corruption of young men, as well as the potential for serious injury." The Indian state frequently cites the ruling in arguing that consent is immaterial and that the anti-sodomy statute, Section 377, should not be repealed because it would jeopardise public interest, morals, and public health.

In another case involving consent in Sodomy, *R v. Brown*(*Regina v. Brown [1994], House of Lords, 1994.*), a group of four men were involved who had been in homosexual sadomasochistic relationships with each other for a period of ten years, beginning in 1978, involving genital tortures and various methods of generating and receiving pain during sex. The decision, handed down in the House of Lords in 1993, was primarily based on private videotapes of the men's sexual acts. They were charged with assault causing actual bodily harm in violation of section 47(a) of the Offences Against Persons Act, 1861, and illegal wounding in violation of section 20 (B) of same act. It was determined that the intercourse was done in a consenting manner without any form of compulsion. The accused argued that activities performed in secret and with permission could not be regarded illegal and so could not be prosecuted, but this argument was denied.

The court concluded in *R. v. Brown*(*Regina v. Brown [1994], House of Lords, 1994*) that such sodomistic activities cause severe harm and must be assessed on policy and public interest grounds. The case goes on to say that while there are legal public actions requiring physical

invasion, such as "hazardous sports/ stunts," "medical operations," or even "risk exhibitions/ stunts," a private sexual act that seems to cause public disturbance is prohibited. This last category of "dangerous exhibition" is particularly interesting in the Indian context, where the state cannot outlaw a variety of religious and communal practices/rituals in the name of bodily harm because they fall into a realm where the state cannot fully intervene without undermining its own authority.

MK filed a complaint against his employee for performing sodomy on him in a case from Papua New Guinea (Stewart, 2014), and the court judged him guilty as an accomplice. The Papua New Guinea Penal Code was developed from the Queensland Penal Code, and its anti-sodomy clause also punishes the offender's passive sexual partner. The primary issue before the court was whether MK, the passive sexual partner, should also be penalised for sodomy, even though he did not agree to it. MK was found guilty of allowing or allowing his employer to penetrate him, and he was sentenced to prison. Sodomy is simply concerned with the act, which had been accomplished in this case, regardless of the passive partner's permission (or lack thereof). In a separate concurring opinion, Justice Prentice noted that the term "permit" does not indicate "consent," but rather "allow, suffer, not prevent."

Prentice J. also remarked, in a crucial acknowledgment regarding the true aim of anti-sodomy legislation, that they are engaged in the goal of establishing a moral order, rather than being concerned with individual sexual actions.

*Buggery is one of the offences of sexual indecency which modern text writers see as not designed so much for private protection as for the enforcement of officially received opinions on aspects of sexual morality.*

*The crimes of unnatural sex- coercive sodomy, buggery and bestiality are still punishable under section 377, are seen as the crimes of men. Based on the criteria of penetration and their own limited understanding of sex between women, the courts here excluded 'lesbian' sexual activities from the scope. The exclusion was caused solely by the inability of the courts to define lesbian sexual activity within the terms of penetration and carnal intercourse. It is here that*

*the role of the 'gross indecency' provision becomes relevant for criminalising sex between women.*

The reasoning that portrays male/men as sexually active, if violent creatures is compatible with notions of potentially illegal male sexual behaviour. While sections 377 and 375 are hardly the best locations to search for codification of female/sexual woman's wants, they continually support conceptions of women's heterosexuality and women as subjects to be safeguarded from male inclinations toward sexual violence, unless they are spouses. Even when aggressive toward women, heterosexual sex is viewed as normal in comparison to sex that is defined in opposition to it.

### **4.3 The Commencement of Advocacy for LGBT Rights In India**

In 2001, Lawyers Collective filed a case in the Delhi High Court on behalf of Naz Foundation, contesting Section 377. The petition questioned the constitutionality of Section 377 and argued that it should not be used to criminalise same-sex conduct between consenting adults in private. In formal words, the petition requests that Section 377 be 'read down' to exclude the criminalization of same-sex actions between consenting adults in private, limiting the applicability of the legislation to situations of child sexual abuse.

Even though the petition was initiated by a single NGO, it quickly came to represent the whole community. Lawyers Collective and the Naz Foundation began the process of making a "public interest litigation" "public" by organising a series of meetings at various phases of the petition. This practise of constant interaction with the community over the following seven years contributed to Section 377 becoming a more politicised topic. The Union of India's (Home Ministry) affidavit, which stated that the government would uphold the law, the National AIDS Control Organization's (NACO) affidavit, which stated that Section 377 impedes HIV/AIDS efforts, and the intervention of Joint Action Kannur (JACK, an organisation that denies that HIV causes AIDS), were all key stages in the petition. As each step of the petition unleashed a torrent of emotions, this process of discussion flowed back into the community, fueling sentiments of outrage and indignation, hope and despair, fury and terror. The regular meetings

were therefore a method of keeping the activist community informed of events and allowing them to adapt to the changing situation. The participation of B. P. Singhal in the petition tipped the scales significantly. The balances had suddenly tipped, with Naz becoming increasingly isolated among the chorus of voices opposing the petition. A coalition of forces appeared to be forming to defend what the community viewed as a manifestly unfair law. It was suggested in a conference organised by Lawyers Collective to address this development that other gay groups should also join the petition to support the petitioner. With the emergence of this concept, Voices Against 377 (a Delhi-based coalition of child rights, women's rights, and LGBT organisations) decided to enlist the help of the petitioner. Voices' main focus was on LGBT rights, but Naz, as an HIV/AIDS organisation, would continue to stress how Section 377 hampered HIV/AIDS interventions and therefore LGBT people's access to health.

When the case was first rejected by the Delhi High Court, appealed to the Supreme Court, and eventually sent back to the Delhi High Court, there were significant delays covering a total of seven years. The Delhi High Court first dismissed the case just as it was gaining traction, claiming that the petitioner, the Naz Foundation, was not impacted by Section 377 and so had 'locus standi' to challenge it. When the dismissal was contested in court, the Supreme Court remanded the matter to the Delhi High Court to be heard as soon as possible. Since the petition was first submitted by the Naz Foundation in 2001, it has gained more public support, both in terms of public opinion and in the judiciary. After a protracted wait, the issue was eventually scheduled for final arguments before a Delhi High Court Bench comprised of Chief Justice Shah and Justice Muralidhar in September 2008.

#### **4.3.1 The Delhi High Court's Final Arguments: Empathy, Dignity, and Group Sex**

The significant difference by the time the case was scheduled for final arguments in September 2008, seven years after the petition was submitted, was that it had become much more embedded in the concerns that characterised contemporary India. There was a lot of excitement around the last hearings, both because of the media coverage and because of the anxious expectation. During the sessions, community people packed the courtroom, intently watching

each twist in the arguments and the judges' responses. The proceedings were heavily covered by the media as they unfolded, and the community was also kept informed by daily minutes of the hearings that were posted on community web forums. The petitioner's main point was the right to health and how Section 377 hampered HIV/AIDS interventions. Case studies, notably from Lucknow (2001), where Section 377 was utilised to focus an HIV/AIDS intervention at the men having sex with men (MSM) group, backed up the claims. So, far from being supported by a compelling state interest, Section 377 actually served as a barrier to the realisation of a particularly vulnerable population's right to health. The central argument of Voices Against 377 was that "Section 377 is a legislation that infringes on an individual's dignity, not in a vague sense, but by altering the essence of a person's identity."

LGBT people's sexual orientation and gender identity are at the heart of their identities. This is something you can't take away from me.' Furthermore, in a scenario like this, where you are criminalising a category and impacting a person in all areas of their existence, from the moment they wake up to the time they sleep, morality is inadequate justification to keep the legislation. Surprisingly, the Government of India's main argument was that if Section 377 was amended to exclude consenting sex activities between adults in private, it would jeopardise society's right to health. Mr P. P. Malhotra, the Additional Solicitor General, was the counsel for the Union of India. He mentioned a number of studies to prove that homosexuality was linked to a number of significant health issues. He stated, citing one study:

*The sexual activity enjoyed by homosexual results in bacterial infections, and even cancer. There are activities like golden showers, and insertion of objects into the rectum which cause oral and anal cancer.*

Referring to notions of decency and morality, the ASG noted:

*In our country it is immoral on the face of it. Society has a fundamental right to save itself from AIDS. This right is far greater than any right of the less than 1% who are in this programme. The health of society should be considered and it is the greatest health hazard for this country.*

*If permitted it is bound to have enormous impact on society as young people will then say that the High Court has permitted it.*

B. P. Singhal argued that Section 377 was morally repugnant to Indian values. Homosexuality was a perverse type of sex in the words of his guidance, and young people would fall into the trap of gay addiction in the name of excitement, satisfaction, and fun. The unfortunate element of this is that gay behaviour is naturally accompanied by drink, drugs, and illness. He said that he was focusing on morals and the joint family structure, and that "we must not import sins from the West." We have historic ideals to which we must adhere. It would have an impact on the institution of marriage, and if women had doubts about their husbands' actions, there would be a rush of divorce cases.

JACK's counsel argued that there is "no scientific evidence" that HIV causes AIDS, that "any intentional spreading of an infectious disease would be an offence under Sections 269 and 277 of the IPC anyway," and that "any intentional spreading of an infectious disease would be an offence under Sections 269 and 277 of the IPC anyway." The opposing counsel then claimed that Naz had not come to court with clean hands and was a member of an international network utilising HIV/AIDS to advance a political goal (*Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India* | HRW, 2002).

#### **4.3.2 Listening to LGBT Voices in the Courtroom**

*It was with a great deal of concern that queer activists awaited the hearing. How would the judges indeed understand complex issues of sexuality and rights? How indeed would we be able to persuade them that this was an issue of rights? Should we not have learnt from the experience of Public Interest Litigation in the 90s and stayed away from the court as any guarantor of rights? These were some of the thoughts circulating like a nervous eddy through the queer community.*

In general, the court reaction has been scrutinised in terms of the reasoned reasoning and the determined case. In contrast, the variety of answers that judges have daily in courts has received less attention.

Another indicator of reactions, which may fairly be described as standing in for the quality of judicial empathy, arose almost as a total surprise in this secret library of what Liang appropriately defines. The judges' questions and remarks revealed a great feeling of empathy for the suffering of LGBT people, rather than a desire to humiliate them.

We all know what kind of sneers and mocking this problem receives in society, C. J. Shah said, and he took judicial note of the social discourse of homophobia by stating, "We all know what kind of sneers and mockery this matter receives in society." To prove his argument, he told the touching story of a youngster who was exposed to jibes and sneers because of his sexuality and was unable to sit his test as a result. He was only permitted to take his test without intimidation after a judicial intervention, and, in the words of C. J. Shah, 'he happily passed.' The first crucial point in the courtroom proceedings, which spanned 11 days, was when Naz's attorney, Mr. Anand Grover, read Albie Sachs' decision in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (*National Coalition for Gay and Lesbian Equality v. Minister of Justice | Women And Justice | US Law | LII / Legal Information Institute, 1998*). The South African Constitutional Court found that the crime of sodomy violated the right to equality and dignity and so had to be abolished. J. Sachs put it succinctly:

*In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, and that impinges on the dignity and self-worth of a group* (*National Coalition for Gay and Lesbian Equality v. Minister of Justice | Women And Justice | US Law | LII / Legal Information Institute, 1998*).

Sachs' conclusion obviously affected the judges, who consulted among themselves. C. J. Shah wished the Additional Solicitor General (ASG) had been present in court to hear J. Sachs' side of the story. The burden of proof has moved from the lawyers to the judges, almost unconsciously. When they drafted their decision, they had to deal with the weight of J. Sachs'

presence as well as the weight of history. In case there were any doubts, Voices against 377 submitted an outline of submissions arguing: This case ranks with other major constitutional challenges that have liberated people who have been condemned to live lives as second-class citizens because of their race or gender, such as *Mabo v. Queensland* (Research, 1993)(where the High Court of Australia declared that Australia's aboriginal peoples had title to the land). *Brown v. Board of Education*(*Brown v. Board of Education* | Case, 1954, Definition, Decision, Facts, & Impact | Britannica, 1954), (where the United States Supreme Court held that segregated schools in the several states are unconstitutional in violation of the 14th Amendment) and *Loving v. Virginia*(*Loving v. Virginia* :: 388 U.S. 1 (1967) :: Justia US Supreme Court Center, 1967), (where the United States Supreme Court held that laws that prohibit marriage between blacks and whites were unconstitutional).

The judges' focus on what they viewed as the main reason for preserving Section 377, public morality, was the second key point. They wanted to know how the lawyers for Voices Against 377 would react to the public morality rationale for keeping Section 377 in place. Mr. Shyam Divan, speaking for 'Voices against 377,' said:

*Any law or statutory provision that denies a person's dignity and criminalises his or her core identity violates Article 21 of the Constitution. Section 377 operates to criminalise, stigmatize, and treat as 'unapprehended felons' homosexual males. The provision targets individuals whose orientation may have formed before they attained majority. It criminalises individuals upon attaining majority, for no fault of the person and only because he is being himself. Article 21 absolutely proscribes any law that denies an individual the core of his identity and it is submitted that no justification, not-even an argument of 'compelling State interest' can sanction a statute that destroys the dignity of an estimated 25 lakh individuals. This argument that the state cannot plead 'compelling state interest' when the core value of dignity is at stake, seemed to resonate deeply with the judges with them repeatedly asking the ASG to respond to what they characterised as 'a very strong argument on dignity.'*

The sequence of discussions between the judges and the ASG, as well as the lawyers for B. P. Singhal and JACK, was the third significant event. In contrast to the evident empathy with which the judges heard both Naz and Voices against 377, the ASG, as well as the counsels for JACK and BP Singhal, were asked questions that revealed judicial impatience with the nature of the arguments and hinted at the deep structure of their judicial sympathies. Mr. Sharma, counsel for B. P. Singhal, made a particularly amusing reference to *R. V. Brown* (Giles, 1994), a House of Lords decision in which they ruled that consensual sadomasochistic practises between adults were not entitled to protection on grounds of privacy, to make the point that 'homosexuals enjoy group sex and even enjoy committing violence.' This is sexual perversity, and criminal actions warranting punishment were done in the midst of such perversity when they were consenting adults.' He described the inclination of gays to engage in group sex as "disconcerting." Sodomy was not a crime in the United Kingdom when the *R.v. Brown (Issue of Consent in R v Brown, 2021)* decision was handed down, according to Chief Justice Shah.

So, even if Section 377 is repealed and gay activities between consenting adults are no longer considered crimes, it would still be a crime if the passive partner is subjected to serious harm, even if the partner has agreed.

The significance of the decision was subsequently questioned by Chief Justice Shah. Mr. Sharma answered that the 'anus is not meant for any intercourse by nature, and if the penis penetrates the rectum, the sufferer is determined to be injured.' The action itself is harmful to one's health.

Chief Justice Shah wondered if the argument that this conduct causes harm because it is unnatural or likely to produce injury had been made previously; if anybody had claimed that the act caused injury in any culture, western or eastern, in numerous nations where the prohibition had been repealed, or in WHO reports. Could Brown be driven to the logical conclusion that sex between two guys is a source of damage in and of itself? Why had this case never been brought before a court until now?

Mr. Sharma proceeded to distance himself from Brown, claiming that "alcohol and narcotics are used to get consent and boost excitement; there is genital torture on the anus, testis, bloodletting, penis burning...'

Mr. Anand Grover interjected to explain that Brown involved violence and dealt with a reality scenario not envisaged by Wolfenden, which was acknowledged by the judgement itself.

What the three extracts above illustrate is that the judges were sensitive not just to incidents of violent violence but also to the more subtle language of prejudice during the hearings, which transformed the courtroom into a magical realm for the duration of the hearings. LGBT people who had grown accustomed to society's sneers and jeers now felt not just heard, but also appreciated. The judges simply restored dignity to a sector of society whom the government seemed set on treating with contempt and derision via the art of sympathetic listening. Judges spoke about sex without sneering and, for the first time in Indian judicial history, managed to really talk about homosexual sex in the context of tenderness and love. Love and affection, closeness and yearning became part of the judicial register, displacing the persistent focus on the bare-bones gay act as a danger to civilization's basic foundations. The style of judicial inquiry addressed the connection of homosexuality with excess through an emphasis on group sex, and the discourse about homosexuality was connected to settings of emotion and feeling.

#### **4.4 A New Morality Language—A Paradigm Shift From Popular To Constitutional Morality**

The issue of morality has been at the heart of the Section 377 debate, and it was addressed by many parties in the Naz Foundation case. The Union of India, as well as intervenors like B. P. Singhal and JACK, insisted on arguing that reading down the provision would undermine society's morality. The judges, too, were concerned by the issue of morality, and they tried repeatedly to persuade the parties to react to it as a reason for keeping Section 377.

The court addressed the issue of morality by establishing the word "constitutional morality," which became the concept on which the remainder of the decision was based.

The concept of morality that evolved from a Judeo-Christian sensibility lies at the heart of the law's origins. It dates back to a time when there was no distinction between law and morality, and law was intended to reflect religious morality. Thus, the crime of sodomy, which carried a death sentence at the time, was a part of Canon law, which then became a component of English law, and eventually a part of the Indian Penal Code. The Wolfenden Committee report, established in 1957 to investigate the prosecution of homosexuality, was the first to question this concept of law and morality as an integrated system. The Report presented a compelling case for the decriminalisation of consensual same-sex activities between adults in private in its recommendations. According to the legendary Wolfenden Committee:

*“It is not, in our view, the function of the law to intervene in the private lives of citizens... Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality, which is, in brief and in crude terms, not the law's business” (Wolfenden Report, 1957, Conclusion | The British Library, 1957).*

The Wolfenden Committee Report's recommendations were then the topic of one of the most famous legal arguments in history, between Lord Devlin and Prof. H. L. A. Hart, which has been a staple of legal education across the world since it was first held. Lord Patrick Devlin made the basic argument for why homosexuality should be treated as a crime. Devlin claimed that homosexuality constituted an attack on a 'society's fundamental morality,' thus it should continue to be penalised even if it was a private immorality. In his opinion, a society's survival is contingent on the preservation of common political and moral ideals. It was critical to sustain such ideals, and indeed to guarantee society existence, that even private immorality like homosexuality remained a criminal offence. Prof. H. L. A. Hart presented the classic defence of the Wolfenden Committee Recommendations in response to Devlin's comments. Following Mill's defence of liberty, Hart claimed that the foundation of criminal law is the prevention of damage to others. In Hart's theory, the law has no foundation for intervening to legislate on public morals. Hart claimed that there is no factual evidence that society would collapse if the law did not promote public morality. If this is the case, we should believe that there can be no

change in societal morality since every change in societal morality is associated with societal morality collapsing. In fact, Hart argued vehemently for the Wolfenden Committee's basic suggestion that "there must be a domain of private morality, which is, in plain and vulgar terms, not the law's business".

The significance of Hart's ideas in India cannot be overstated. Every law and jurisprudence student has had to deal with his way of thinking. Hart's work is still revered in legal academic circles, particularly among jurisprudence teachers, as the pinnacle of positivist jurisprudence. Hart has also been referenced by academically inclined justices in Indian High Court and Supreme Court decisions. In short, in a challenging terrain of utter lack of exposure to the rhetoric of homosexual rights, H. L. A. Hart's (Dworkin, 1957) work gives an incredibly beneficial beginning point for communicating to judges, attorneys, and legal scholars in a language that they not only understand, but have been trained to revere.

Given this, the Naz decision might have been perfectly justified in making the case for homosexuality's decriminalisation, based on Hart's stance that the government had no business regulating a zone of private morality. Such an understanding would have sufficed to get the consequence of Section 377 being interpreted down to exclude consensual sex between adults from criminalization. The judges, on the other hand, picked a more ambitious approach.

The justices began by quoting Dr. B. R. Ambedkar, who said in the Constituent Assembly, *"Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.*

They went on to state:

*"Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality".*

*They added that `moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view*

By defining the concept of constitutional morality, the justices changed the parameters in which the judiciary had hitherto viewed gay expression. From the first tentative steps, when Hart and Wolfenden created legal space for 'private immorality,' homosexual expression was now to be seen as something that needed to be protected, not just tolerated, because protecting the expression of homosexuality is at the heart of the meaning of the freedoms guaranteed under the Indian Constitution. It became 'moral' to preserve LGBT rights and 'immoral' to criminalise individuals based on their sexuality, in an inversion of the debate's parameters. It became critical to guarantee that LGBT speech was permitted in order to safeguard what Devlin may have termed "society's constitutive morality" and the judges dubbed "constitutional morality."

*Constitutional morality in the judges' reading requires that LGBT persons are treated as equal citizens of India, that they cannot be 'discriminated against on grounds of their sexual orientation and that their right to express themselves through their intimate choices of who their partner is be fully respected. It's only when the dignity of LGBT persons is respected that the Indian Constitution lives up to its foundational promise. Taken one step further, constitutional morality also requires the court to play the role of a counter majoritarian institution which takes upon itself the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe.*

If there is one constitutional concept that may be the underlying theme of the Indian Constitution, it is that of 'inclusiveness,' as the justices put it. This Court finds that the Indian Constitution represents a deeply established principle in Indian culture that has been passed down through centuries. The inclusivity that Indian culture has always exhibited, literally in every facet of life, is seen in the recognition of a role for everyone in society. Those deemed 'deviants' or 'different' by the majority are not rejected or shunned on this basis.

The basic idea of article 15 and homosexuality is Swaraj's recognition in "Naz."

*“Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him...will it restore him to a control over his own life and destiny? In other words, will it lead to swaraj for the hungry and spiritually starving millions(Desai, 1956)”*

The liberation movement against colonial authority was motivated by Swaraj, or autonomy, which is a basic pillar of our constitution. ‘Personal autonomy is a picture of people directing, to some extent, their own destiny, shaping it via consecutive decisions made throughout their life.’(Review, 2019) The Delhi high court acknowledged the significance of this principle in our constitutional framework in the Naz foundation case, holding that "personal autonomy is inherent in the grounds stated in Article 15." The court was just following the precedent set in Anuj Garg, in which the Supreme Court determined that the right to autonomy and self-determination supports Article 15's prohibition on sex discrimination. Article 15 includes a closed list of five stated grounds: religion, race, caste, sex, and place of birth, if we examine attentively. Other factors, such as HIV status, pregnancy, gender identity, language, sexual orientation, handicap, and so on, are virtually unchangeable or need a fundamental decision. Until date, discrimination on the basis of these vague comparable grounds has been successfully challenged under Article 14. Because of the Naz decision, those reasons "that are not listed in Article 15" of the constitution will be afforded a heightened level of "strict scrutiny" protection under article 15. As a result, while disability and pregnancy are not specifically mentioned in Article 15, they are now protected. It's worth noting that the high court has found that "sex" is a "specified ground" that includes "sexual orientation," and that discrimination based on sexual orientation is "rooted in stereotyped judgements and generalisations about the behaviour of either sex".(*Naz Foundation vs Government Of Nct Of Delhi And ... on 2 July, 2009*) As a result, section 377 discriminates based on gender. Another constitutional novelty brought about by the Naz decision under article 15 is the high court's declaration that it protects against discrimination perpetrated not only by the state (vertical impact), but also by private entities. (The impact is horizontal). The concept of horizontal application of rights is included in Article 15 (2). In other words, discrimination against one

citizen by another in terms of access to public areas is prohibited. Discrimination on the basis of sexual orientation is, in our opinion, illegal, even when the right established in article 15 is applied horizontally(*Naz Foundation vs Government Of Nct Of Delhi And ... on 2 July, 2009*).

Article 15 (2) itself, which reads: “*No citizen shall, on the ground only of religion, race, caste, sex or place of birth or any of them, be subject to any disability, liability, restriction, or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing Ghats, roads, and places of public resort maintained wholly or partly by state funds or dedicated to the use of the general public.*”

The horizontal impact of article 15 was earlier recognised by the Supreme Court in *Vishaka v. State of Rajasthan*(*Vishaka & Ors vs State Of Rajasthan & Ors on 13 August, 1997.*), even if the Naz court did not expressly mention it.

The fact that the rule was rarely implemented against gays was a major aspect of the extra solicitor general's defence of section 377. On this point, the bench of the Learned High Court ruled that

“*In fact, admitted case of the union of India that section 377 of the IPC had generally been used in cases of sexual abuse or child abuse, and conversely that it had hardly been in cases of consenting adults, shows that criminalization of adult same sex conduct does not serve any purpose*(Africa & America, 2013)”

As a result, the topic of "constitutional morality" causes a paradigm change in the way the law views LGBT people. Protecting the rights of LGBT people is about more than just ensuring a marginalised group their constitutional rights; it also speaks to our shared vision of the sort of nation we want to live in and what that implies for the majority. In many ways, the Naz foundation decision finding the Indian penal code clause that criminalises same-sex relationships as "an crime against nature" unlawful is groundbreaking. It finally puts a stop to what has been dubbed the Indian penal code's "Sodo metrics" and so invalidates the incorporation of Victorian sexual morality into Indian society, law, and culture. It pushes the boundaries of human rights and liberties. It underlines the reality that justice's promise is best

realised when it begins to listen to the voices of stigmatised individuals and groups. It emphasises and recognises that the development and continuation of stigma through popular sanctions backed up by legal penalties devastates many a personal life goal and has fatal consequences for communities of persistently prejudiced and disadvantaged individuals. The Hon'ble Justice Ajit Prakash Shah and Justice Murlidhar, stressing dignity, held the following hearings:

*“At least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognizes a person as a free being who develops his or her body and mind as he or she sees fit. At the root of the dignity is the autonomy of the private will and a person’s freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others(Naz Foundation vs Government Of Nct Of Delhi And ... on 2 July, 2009)”*

Article 21 of the constitution, which emphasises the right to dignity and privacy as a component of basic rights, was held.

*. “In the Indian constitution, the right to live with dignity and right to privacy both are recognized as dimensions of article 21. Section 377 IPC denies a person’s dignity and criminalizes his or her core identity solely on account of his or her sexuality and this violates article 21 of the constitution. As it stands, section 377 IPC denies a gay person a right to full personhood which is implicit in notion of life under article 21 of the constitution”.*

The court went on to say that the consequences of keeping Section 377 alive were as follows:

*“The criminalization of homosexuality condemns in perpetuity a sizeable section of society and forces them to live their lives in the shadow of harassment, exploitation, and humiliation, as well as cruel and degrading treatment at the hands of the law enforcement machinery.*

The justices went on to discuss the need of maintaining and preserving morality in India. The justices have bolstered the Naz Judgment's potential for minority rights by stating that popular

morality and majoritarian opinion must be subordinated to constitutional morality and the preservation of basic rights(*Naz Foundation v. Government of NCT of New Delhi and Others*, WP(C) No. 7455/2001 | *ESCR-Net*, 2001). The court correctly stated:

*“Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under article 21. Popular morality, as distinct from constitutional morality derived from constitutional values is based on subjecting notions of rights and wrongs. Constitutional morality stands derived from basic constitutional values and may provide ‘a valid justification for restriction of the fundamental rights under article 21’. Thus, if there is any morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality(Naz Foundation v. Government of NCT of New Delhi and Others, WP(C) No. 7455/2001 | *ESCR-Net*,2001)”*

*Court further held: “In our scheme of things, constitutional morality must outweigh the argument of public morality, even it be the majoritarian view(Naz Foundation v. Government of NCT of New Delhi and Others, WP(C) No. 7455/2001 | *ESCR-Net*, 2001)*

Finally, because the court interpreted "privacy" to include a broad definition of autonomy and personality, section 377 cannot be enforced in public settings, where considerable same-sex contact occurs. In addition, the petitioner argued that section 377 of the IPC violated the Indian Constitution's right to life provision, claiming that "the preamble to the constitution recognises that the rights enshrined within are designed to "assure the dignity of the individual and protect those cherished human values as the means of ensuring the individual's full development and evolution." *private sexual relations, including preference and orientation, are deeply held and matters and a core part of an individual's identity.* Individual rights to individuality, liberty, privacy, equality, conscience, speech, and association are all invoked in this regard by sexual orientation. It is argued that sexual interactions constitute an intrinsic part of the right to life on this premise. Criminal sanctions against homosexual activities have the impact of reinforcing public misunderstanding and prejudice, as well as increasing homosexuals' worry and guilt emotions, which can lead to depression and the catastrophic repercussions that might follow.

In a nutshell, the following is the content of the Naz decision:

The Supreme Court found that the rights to dignity and privacy are protected under Article 21 of the Constitution's Right to Life and Personal Liberty, and that criminalising consenting homosexual intercourse breaches these rights. The court further found that S.377 violates the constitutional principle of equality established in Article 14 since it establishes an arbitrary categorization and singles out homosexuals as a group. In addition, discrimination based on certain traits, such as sex, is prohibited under Article 15. According to the court, the term "sex" encompasses not only biological sex but also sexual orientation, and so discrimination based on sexual orientation is prohibited under Article 15. The court also observed that Article 21 of the Constitution guarantees the right to life, which includes the right to health, and found that S.377 is an obstacle to public health since it obstructs HIV prevention activities. S.377 was not repealed in its entirety by the court. The provision was found illegal in the sense that it criminalises adults engaging in consenting sexual activities in secret. Insofar as it pertains to non-consensual non-vaginal intercourse with children, the rule was upheld by the court. The court went on to say that the ruling would stand until parliament decided to change the law.

LGBT activists, analysts, and organisations such as UNAIDS praised the decision, while some religious leaders and politicians expressed their unhappiness with it. Naz has elicited a harsh response from religious leaders and groups that deem it objectionable, resulting to the filing of a petition with India's Supreme Court. The administration identified no flaws in the decision and did not file an appeal.

However, it was challenged by a number of persons who had no genuine stake in the subject. In early 2012, two Supreme Court judges heard the case. Then, 21 months later, on the morning of one of them's retirement, the verdict was eventually handed down. The Delhi High Court's decision was overturned, Section 377 was fully reinstated, and private, adult, consenting sexual activities other than those considered 'natural' were once again criminalised.

#### **4.5 Arguments in Favor of Homosexuality Punishment**

Queer activists are frequently confronted with two types of arguments in opposition to their demand for the repeal of anti-sodomy legislation. The first is a cultural argument: anti-sodomy legislation in Africa and Asia are culturally reflecting and integral to the autonomous, modern, democratic nation state. The second, less nuanced but no less homophobic argument is based on the law's seeming non-application. "

- Homosexuality in general affects their religious feelings, especially when it's described as an antiquated remnant of Victorian sexual ethics and morality in the section 377 IPC prohibition.
- Homosexuality also calls into doubt the authority of sacred scriptures and practises.
- Encourages members of religion groups to engage in "sinful" behaviour (through the acknowledgment of privacy rights) and disobedience of religious prescriptions and proscriptions. Homosexuality has put the institution of the heterosexual family, as defined by major religious traditions, in jeopardy.
- Individual and social health repercussions and impacts, particularly of HIV/AIDS, remain extremely high, and are not completely within the Indian state's, legal, and social resources to battle.
- Other secondary accusations include cultural degradation, social breakdown, child abuse, foreign infiltration, and the misappropriation of AIDS funds, among others.
- In 1983, India's highest court proudly said that "neither the concepts of a liberal society nor the fact that homosexuality has ceased to be a crime in certain nations has affected our thinking."

Although the Delhi High Court partially decriminalised sec. 377 for the preservation of basic rights, many individuals who were not even initial stakeholders before the Delhi High Court did not accept it. As a result, they filed an SLP in the Supreme Court of India, requesting that section 377 IPC be preserved in its original form.

The Chief Justice of India, while admitting the appeal against the high court's ruling, allegedly stated that no one has been prosecuted for "gay intercourse" under section 377 IPC (*Supreme Court Transfers to Itself All Petitions on Same-Sex Marriage - The Hindu, 2023*).

A bench of Justice GS Singhvi and Justice S J Mukopadhyaya reversed the landmark Delhi high court judgement of 2009, decriminalising consensual private acts of homosexuality by adults, and upheld the constitutional validity of S.377 IPC while hearing the special leave petition in Suresh Kumar Kaushal & others versus Naz foundation of India & Ors. (2013).

The following are the major tenets of the arguments submitted before the Supreme Court of India in support of the retention of section 377 of the Indian Penal Code.

1. That the High Court erred by declaring Section 377 IPC to be in violation of Articles 21, 14 and 15 of the Constitution insofar as it criminalises consensual sexual acts of adults in private, completely ignoring the fact that the writ petition filed by respondent no. 1 lacked the foundational facts required for deciding on the constitutionality of a statutory provision.

2. Shri K. Radhakrishnan, experienced senior counsel standing for intervener in I.A. No.7 – Trust God Missionaries, claimed that the legislature established Section 377 IPC to safeguard societal values and morals. He used Black's Law Dictionary to demonstrate that the term "order of nature" has been defined as "something pure, as opposed to artificial and manufactured." He said that the most basic aspect of nature was the presence of organs, each of which had a specific function. Nature has given each organ in the human body a specific role. The organs are designed to operate together and should not be mistreated. It goes against nature if it is overused. Nature's code is unbreakable. In society, sex and food are controlled. Nature has a responsibility to safeguard what it has predetermined, and man has a responsibility to nature. He used a Sanskrit phrase that meant "you are dust and will return to dust."

3. Mr. Huzefa Ahmadi, another attorney for Suresh Kaushal, said that the freedom to sexual orientation can always be limited on moral and health grounds (*Josh Blackman » Lawrence v. Texas Rejected in Supreme Court of India Decision Upholding Sodomy Statute, 2013.*).

4. Kaushal's counsel also argued that the High Court was unjustified in striking down Section 377 IPC on the flimsy grounds of a violation of Articles 14, 15, and 21 of the Constitution, and that the matter should have been left to Parliament to decide what is moral and what is immoral, as well as whether the section in question should be kept on the statute books.

5. Another Kaushal lawyer, Shri Praveen Aggarwal, contended that all basic rights function within a square of reasonable constraints. When it comes to freedom of speech and expression, there is censorship. The high prevalence of AIDS among homosexuals demonstrates that the act in question, as defined by Section 377 IPC, is a societal evil, and hence its prohibition is justifiable.

6. Another justification for keeping Section 377 IPC is that it does not penalise a specific group of individuals, identity, or orientation. It simply lists specific actions that, if carried out, would constitute a crime. A ban like this governs sexual behaviour regardless of gender identification or orientation.

7. That lesbians, gays, bisexuals, and transgender people make up a tiny fraction of the country's population, and that in the last 150 years, less than 200 people have been prosecuted (as per reported orders) for violating Section 377 IPC, and that this cannot be used as a sound basis for declaring that section ultra vires Articles 14, 15, and 21 of the Constitution.

8. Article 12 of the Universal Declaration of Human Rights (1948), Article 17 of the International Covenant on Civil and Political Rights, and Article 8 of the European Convention on Human Rights all protect the right to privacy. It was incorporated into Article 21 as a result of a broad interpretation of the right to life and liberty. In many situations, the extent of the right as well as the legal restrictions on its exercise have been established(*Kharak Singh vs The State Of U. P. & Others on 18 December, 1962*).

9. Article 21 stipulates that the right to life and liberty is subject to legal action(*A.K. Gopalan vs The State Of Madras.Union Of ... on 19 May, 1950*).

10. The mere potential of a provision of law being abused does not render it unlawful. Unless the reverse is proven, it must be assumed that a law's administration and execution would be done "not with an evil eye and an uneven hand.(A *THANGAL KUNJU MUSALIAR M VENKATACHALAM POTTI AUTHORISED OFFICIAL AND INCOME TAX OFFICER Vs. M VENKATACHALAM POTTI AUTHORISED OFFICIAL AND INCOME TAX OFFICER:A THANGAL KUNJU MUSALIAR*, 1955.) "

11. The Supreme Court also decided that LGBT rights activists had not presented the HC with any substantial evidence that S.377 had been utilised to prosecute gays as a group. There were also no confirmed indications indicating gays were being singled out for discrimination.

12. The Supreme Court further said that the HC was incorrect in claiming that s.377 IPC obstructs homosexuals' personality development or damages their self-esteem.

13. The Supreme Court also declared that anal intercourse between two homosexuals is a high-risk behaviour that puts both gays at danger of contracting HIV/AIDS. It went on to say that homosexual activity has been proven to be one of the most harmful behaviours a person can engage in.

14. Homosexual activities are unnatural and contrary to nature's order. The human body is just not intended to participate in gay behaviours, according to medical research. Every component of the body is designed to serve a certain purpose and must be used only for that reason. On the other hand, the sexual action is ideally created to be done between a man and a woman.

15. If homosexuality is allowed, the number of persons infected with HIV/AIDS will rise, while our country's general health would decline.

16. It is against our religious beliefs to decriminalise consensual sex between people of the same sex, because it would lead to male prostitution.

17. Disobedience to traditional sexual morality breeds societal animosity.

#### **4.6 Decriminalization of Homosexuality in India**



achievement in rationalising the Penal Code in terms of sodomy and gross indecency offences was lost once the Sudanese Government imposed a Shariat-inspired penal code in 1991, which included specific sanctions for Zina. The additional categories of 'rogues and vagabonds' in the colonial Sudanese Penal Code (unlike the IPC, its immediate predecessor) explicitly target effeminate gay males participating in prostitution, offsetting the rationalisation of the sodomy crime. Inadvertently, the homosexual's identity was criminalised as a result of the conduct.

### **Queensland Penal Code and Colonial Bureaucrat**

Sir Samuel Griffith, Chief Justice of Queensland (Australia), wrote the Queensland Penal Code (QPC) in 1899, based on a draught provided by J. F. Stephens in 1878. It was the second most significant Penal Code, notably in British Africa, when it was enacted in 1901. The QPC drafted the "unnatural offence" in the same way as the IPC but added the category of "passive" sexual partner, or one who "permits." As a result, Section 208 of the Queensland Penal Code read:

Anyone who a) has carnal knowledge of any person against the order of nature; b) has carnal knowledge of an animal; or c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a crime and faces a fourteen-year jail sentence. The addition of the allowing catamite was done on purpose to make it clear that both parties in a sodomy act were criminals. Despite the fact that "penetration" was a need for proving a "unnatural offence,"(David Robinson, 2013) QPC created a distinct offence of "attempts to commit unnatural offences." Thus, even in the absence of penetration, which is otherwise a necessary component of "unnatural offences," any undefined "attempt" might lead to a presumption of guilt. The following account of QPC's growth in Africa is critical in debunking current African and Asian leaders' assertions that anti-sodomy legislation represent the ideals of sovereign African states. While the crime of sodomy was constantly improved throughout the application of criminal laws in subsequent colonies, it was not done in a well-organized manner. These rules entered African and Asian history only because of the whims and fancies of the ubiquitous colonial agent—the bureaucrat.

Outside of Australia, the QPC was initially used in the nineteenth century in Papua New Guinea and Northern Nigeria. In 1916, it was used as a basis for the creation of a unified Federal Criminal Code in Nigeria. In the 1950s, the Code was utilised to rewrite the criminal laws of East Africa, replacing the Indian Penal Code.

The introduction of the QPC and IPC across Africa, on the other hand, was not as easy. In terms of codification, the colonial office had no consistent or long-term strategy. The territorial split between Northern and Southern Nigeria, for example, became a battleground for despotically appointed colonial rulers of state and their cunning advisers in Nigeria.

Northern Nigeria's Chief Justice, H. C. Gollan, chose the Queensland Penal Code as the model for the Northern Nigeria Penal Code, which took effect in 1904. Southern Nigeria's High Commissioner and Secretary of State, on the other hand, desired a criminal law modelled after the Indian Penal Code. Shuckburg, John Risely, an adviser to Lord Elgin, the Secretary of State for the South, criticised the Indian Penal Code because it went too far beyond English legal standards. Risely and another adviser, Hugh Bertram Cox, were able to persuade the Secretary, but the process was sidetracked and eventually abandoned. Despite fears that the code would add additional offences and enslave people, a single Criminal Code based on the Northern Code (modelled after the QPC) was enacted in 1916, two years after Nigeria was merged. Even though the Criminal Code of Nigeria's 'unnatural sex' provision remained true to the QPC, it continued the 'furtive' engagement with the offence by exploiting the existing ambiguity in the definition of 'carnal knowledge.' It redefined the term 'carnal knowledge,' excluding intercourse between a husband and wife. As a result of the ambiguity in the terminology, there was room for narrowing and restricting the offence to the true and goal of regulating sex between males, as well as unmarried couples. This produced an inconsistency with the 'order of nature' reasoning, which was based on the concept of non-procreative sex. The concept of 'natural' sex has moved from procreative to married heterosexual intercourse in this context.

However, two more significant modifications to Africa's randomised criminal codification process were still on the way. Following the drafting of Nigeria's Criminal Code, the colonial

government in East Africa sought to eradicate the Indian Penal Code's effect. Another Secretary of State's adviser, Henry Grattan Bushe, who, like Risley, didn't think the Indian Penal Code was 'English' enough, played a key part in this case. The fact that the Indian Code was written by Macaulay, who was unmistakably an Englishman, appears to have been disregarded. Bushe's efforts were effective, and the colonial administration was soon on the side of the Nigerian Criminal Code. Kenya, Uganda, and Tanzania all abandoned the Indian Penal Code in 1930 and followed Nigerian Criminal Code draughts. As a result, they inherited considerably broader rules, which penalised a passive participant in sodomy, sodomy attempts, and gross indecency. Risely (in his early support for the QPC in Nigeria) and Bushe (who fought for the abandoning of the IPC in East Africa) developed the strategy for the adoption of criminal codes where none existed, according to a legal historian.

Northern Nigeria opted to create a distinct Penal Code, independent of the Federal Criminal Code, in 1960, and used the Sudanese Penal Code of 1899 as its foundation, which was paradoxically based on the IPC, and which Northern Nigeria had previously rejected. Despite the injunction to remain silent, a 'furtive' attempt to re-craft sodomy was made once more. The Sudanese Penal Code's failure to criminalise consensual sodomy did not go unnoticed. In Section 377 of the Northern Nigeria Penal Code, the previous consent-neutral IPC definition was reinstated.

It did not, however, do the same with the 'gross indecency' clause, which remained applied exclusively to non-consensual acts to prevent misunderstanding and bafflement. Another oddity, in addition to the Sudanese Penal Code, is the shape that Ghana's anti-sodomy statute has taken. Ghana is one of the few former British colonies in Africa and Asia that treats consensual sodomy as a minor infraction. This is the outcome of ideological disagreements among colonial criminal code drafters.

The British colonial administration commissioned R. S. Wright, a liberal lawyer inspired by John Stuart Mill's notions of personal liberty, to create a criminal code for Jamaica. On the question of law and morals, Wright's Code differed from the Queensland and Indian Penal

Codes. Wright's Code distinguished between consenting and non-consensual buggery, punishing the former with a maximum two-year sentence. Wright's Code never made it to Jamaica, where it was intended, but it was adopted in St. Lucia in the Caribbean and served as the primary basis for the development of Ghana's Penal Code. 'Whoever is guilty of unnatural carnal knowledge-(a) of any person without his consent, or of any animal, is guilty of a misdemeanour; (b) of any person with his consent, or of any animal, is guilty of a misdemeanour,' according to Section 105 of Chapter 6 titled 'Sexual Offences' of the Penal Code of Ghana(*ACTS OF GHANA FIRST REPUBLIC*, 1960).

#### **4.7. Gross Indecency- Justification for Harassment Of Homosexuals**

The famous Labouchere Amendment, which established the offence of 'gross indecency' in England in 1897, was a recognition that two men might engage in many more sexual activities beyond sodomy, and that a broader penal framework was required to criminalise them. The term "gross indecency" is still undefined. It all depends on what an ordinary person, a police officer in a public park, or a judge on the bench thinks to be obscene. Gross indecency is defined as any sexual conduct that "falls short of real intercourse and may include masturbating and obscene behaviour without any physical contact," according to a 1998 modification to the Tanzanian Penal Code. Kissing, holding hands, sleeping together, and/or staring at each other with an intimate purpose without any overt physical contact are examples of non-penetrative sexual behaviours between two males. The captain Marr case from 1946 in Singapore demonstrates the use of the gross indecency provision in capturing gay males. Captain Marr, a naval officer, was charged with gross indecency with Sudin, a young Indian prostitute, even though no one observed the crime. The captain's watch was discovered with Sudin, and Sudin's clothing was located in the captain's chamber, providing compelling proof of 'gross immorality.' This is in stark contrast to a sodomy accusation, which often requires medical testing as proof of sodomy. As a result, the absence of any visible evidence of penetration generates a strong, if debatable, inference that sodomy did not occur. Any 'suspicious behaviour' between two men, on the other hand, might be seen as gross indecency. The offence

of grossly indecent, and its application only to men, as opposed to the sodomy offence, which applies to both homosexuals and heterosexuals, was a clear attempt to target a specific group of men who have sex with each other—as habitual sodomites, perverts, and consenting adult homosexuals.

#### **4.8. Section 377 IPC & Forensic Injustice**

The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and morphology, with an indiscreet anatomy and possibly a mysterious physiology.' Michel Foucault (*The History of Sexuality*, 1978.)

The term 'infundibuliform' literally means 'funnel shaped,' and it has been used to describe two things in particular: floral forms and frequent sodomite anuses. It is the latter that we are concerned with in this case. One of the earliest recorded instances in appeal under Section 377 of the IPC demonstrates the need of anal examination. In the case of *Queen Empress v. Khairati* (*The Third Gender and the Indian Law - a Brief History - IPleaders*, 1884) in 1884, Khairati was found guilty under Section 377 of the Indian Penal Code on the charge that he 'did in the district of Moradabad abet the offence of sodomy, by allowing some unknown person to commit the offence of sodomy on his person, within four months prior to the 15th of June (1883), the exact time being impossible to state, did abet the offence of sodomy, Khairati was revealed as a eunuch when he was seen singing while disguised as a lady among the women of a certain family. '...he is shown to have the characteristic mark of a habitual catamite—the distortion of the orifice of the anus into the shape of a trumpet, as well as to be affected with syphilis in the same region in a manner that distinctly points to unnatural intercourse within the last few months,' the trial court continued. Thus, Khairati was not arrested and sentenced for any specific act of sodomy, but rather based on a suspicion based on his look, which was later confirmed by a medical investigation. 'The three facts established against the accused—his appearance as a woman, the form of the anus, and the venereal disease—irresistibly lead to the conclusion that he has lately exposed himself to unnatural lust,' the lower court said. On appeal,

Justice Straight overturned the conviction since the time, location, and name of the accomplice were unclear. However, he praised the efforts of the police in "checking these despicable activities." Sexual offences provide the state dubious justification to enable forensic intervention into the bodies of victims to confirm the incidence of the crime, distinguish the truth from false accusations, and, in many cases, to identify the exact amount of sexual connection. For example, a rape victim may be evaluated by medical-forensic specialists to document physical injuries and symptoms of rape or penetration. Under the different colonial Contagious Illnesses Acts, these invasive practises of maintaining a sexual record notably generated the notion of the 'common' or chronic prostitute, with repeated convictions under the Act owing to the presence of venereal diseases. The same is true in situations involving sodomy and the formation of a 'habitual sodomite.'

As a result, focusing at the substantive legal offence alone is insufficient to comprehend the full impact of sodomy legislation. The criminal character of the homosexual has been shaped in part by the evidentiary standards and criteria for proving the crime of sodomy. In *Khairati*, forensic evidence was used to prove that sodomy had occurred. He uses "the shaving of the anal hair but not necessarily the pubic hair" as evidence to accuse a passive sodomite of being a chronic sodomite. Forensic writers' hypotheses aren't meant to chronicle particular sexual actions, but rather to deduce life histories and identities. The defendant in the Indian case of *D. P. Minwalla v. Emperor* (Section 377 and the Dignity of Indian Homosexuals, 2006) claims the lack of a marked anus as proof of a noncriminal past. In the back of a vehicle, in a semi-public location, Mr. Minwalla was discovered in the process of anal intercourse with another guy. Mr. Minwalla had a medical test in a frantic attempt to persuade the court that his anal hole was not formed like a "funnel," which is a symptom of a habitual sodomite. Minwalla's conviction was upheld with a reduced sentence, even though he lacked a crucial physical characteristic.

In a case from Pakistan, which acquired the Indian Penal Code and retains Section 377 in its original text, the importance of the anal examination in evoking assumptions about life histories may be demonstrated. However, in the early 1970s, Section 12 of the Hudood Ordinance created the offence of Zina, which punishes sex between males only when it occurs in

conjunction with an act of kidnapping. In Muhammad Din, the two defendants were charged with Zina for forcibly performing sodomy on another young guy at a Lahore Railway Station late at night. 'The Doctor detected no traces of fresh aggression on the anus and rectum of the complaint,' according to the medical examination. Muhammed Aslam's(*State Of U.P. vs Mohammad Din And Ors. on 24 July, 1984.*) anus was determined to be funnel-shaped, and he looked to be a frequent passive agent.

Because there was no other guilty proof, it was almost certain that it had happened before. The involvement of medico forensic writers might be blamed for the 'culpability' of deformed anuses.

This criterion, which is based on the funnel-shaped anus and suggests flexibility in the anal sphincter because of constant anal penetration, becomes the most important instrument for establishing a person's "habitual" gay nature, as well as a tool for abuse, harassment, torture, and entrapment. Another forensic specialist examines the way the sodomite arranges his look in addition to the physical evidence of penetration.

The court dismissed the claim that the 'victim' arrived at the railway station late because he had missed the train based on the medical report. 'It appears that he had gone to the railway station long after the train for Narowal had left, and... for some other reason,' the court said. According to the court, the other reason was presumably connected to the anus' form, since "this opinion got support from the medical evidence that he looked to be a habitual passive actor." The court refused to believe that the complainant had been kidnapped or abducted for the aim of inducing unnatural desire in him. The court dismissed the accusation of Zina and found the defendant guilty of sodomy without the need for permission or compulsion under Section 377.

Following are the arguments advanced for decriminalization of homosexuality in India.

1. In India, Section 377 has had a significant impact on same-sex relationships. Even though female same-sex couples are not technically guilty of this crime, both men and women in same-sex partnerships have been harassed, as the sheer presence of the legislation is frequently

utilised by law enforcement organisations to intimidate persons, they believe to be homosexuals. This is even though the law punishes behaviour rather than position, and there is even a clause in the Indian Penal Code that imposes a particularly harsh sentence on anybody who falsely threatens to prosecute someone under section 377. Because of their sexual orientation, sodomy laws make all gay men and lesbians presumed criminals. As a result, gay individuals are regarded as criminals without any evidence of wrongdoing. This conflating of status and behaviour is both legally and factually incorrect.

2. The history of unnatural offences against the natural order and their enforcement in India throughout the Mogul, British, and post-independence periods reveals that the notion was introduced by the British, and there was no legislation in India criminalising such actions. It is founded on Judeo-Christian moral and ethical principles that view sex as merely utilitarian, i.e. for breeding. The clause stayed on the law books after independence, and it is today considered part of Indian values and morality.

3. Despite appearing to be impartial on the surface, an examination of the decisions reveals that heterosexual couples have been effectively excluded from the section's scope, while gay males have been targeted because of their involvement with the prohibited conduct.

4. The criminalization of Section 377 has a profound impact on homosexual men, limiting their right to dignity, personhood and identity, privacy, equality, and health by criminalising all forms of sexual intercourse that homosexual men can engage in, as their penetrative sexual acts are essentially penile non vaginal. As it is generally homosexual or transgender people who relate to the sexual behaviours prohibited by Section 377, the section ends up criminalising identity rather than simple conduct.

5. Criminalization fosters a culture of silence and intolerance in society, perpetuating homophobia, and prejudice. Homosexuals are hesitant to tell their families about their sexual orientation. Those who have revealed their sexual orientation suffer astonishment, denial, and rejection, and others are even pressured to cure themselves via abuse and marriage. Even though homosexuality is no longer regarded a sickness or a mental condition, but rather an

alternative variety of human sexuality and an unchangeable feature that cannot be altered, they are subjected to conversion therapies such as electro-convulsive therapy.

6. Section 377 thwarts health services by prohibiting the collection of HIV data, obstructing information dissemination, imposing harassment, threats, and closure on organisations that work with MSM, prohibiting the supply of condoms because it is seen as aiding an offence; restricts access to health services, driving the community underground; prevents disclosure of symptoms; and increases sexual violence and harassment.

7. It is evident that Section 377 IPC, whatever its current pragmatic use, was not created with child sexual abuse in mind or to fill a rape legal gap. It was founded on a Victorian-era vision of sexual morality that drew on ideas of carnality and sinfulness. In any case, the statutory goal of safeguarding women and children has no influence on private consenting sexual activities between adults.

8. This statute (section 377 IPC) runs counter to NACO's affidavit's assertions. The NACO has said that the implementation of Section 377 IPC has a negative impact on the infliction by causing hazardous sexual activities to go undetected and untreated. As a result, Section 377 IPC thwarts HIV/AIDS preventive initiatives.

9. The State does not have the constitutional authority to violate the privacy of citizens' lives or to control behaviour that only the citizen is concerned with merely based on public morality. The provision's goal is arbitrary and irrational since it criminalises private sexual encounters between consenting adults without any indication of significant damage. For legislation to be non-arbitrary and proportional toward attaining the state goal, the state interests must be "legitimate and relevant."

10. Even in places where sodomy prohibitions have been eliminated, the idea that public morality of gay conduct may unleash floodgates of criminal behaviour is based on little substantial evidence. Moral outrage, no matter how intense, is insufficient to override people's fundamental rights to dignity and privacy. Constitutional morality must trump the argument of

public morality, even if it is the majority opinion, as held by Learned Judges in the Naz Foundation case.

11. Section 377 IPC breaches Article 21 of the Constitution by denying a person's dignity and criminalising his or her basic identity merely because of his or her sexuality. As it is, Section 377 of the Indian Penal Code denies a gay person the right to full personhood, which is implied in Article 21 of the Constitution's definition of life.

12. Section 377 of the Indian Penal Code treats all homosexual males as criminals. When everything connected with homosexuality is portrayed as twisted, queer, and repulsive, the gay and lesbian community is defined by deviance and perversity, and they face widespread discrimination based on who they are or who they are believed to be, rather than what they do.

13. Section 377 must be interpreted in the context of constitutional principles such as the "right to be left alone." Section 294 of the IPC recognises the distinction between private and public obscene actions.

14. By criminalising a deeply held personal trait like as sexual orientation, Section 377 harms the LGBT population. It is incompatible with the right to equality since it encompasses voluntary sexual actions by individuals in the privacy of their own homes.

15. Sexual intimacy is a crucial element of mental health, psychological well-being, and social adjustment, and it is a basic aspect of human experience. By criminalising homosexual men's sexual actions, they are denied this essential human experience, while heterosexuals are free to have it.

16. Section 377 is quite virus-like. Articles 14, 15, 19(1)(a), and 21 of the Constitution inasmuch as they undermine the LGBT community's dignity and personhood. Human rights include sexual rights and sexuality, which are protected under Article 21. Consensual same-sex activity is not "against the order of nature," according to scientific evidence. LGBT people do not want preferential treatment. They simply want to be treated equally and not be criminalised for who they are. By throwing a shadow of crime over such sexual connections,

our Constitution does not deny any citizen the freedom to completely establish relationships with other people of the same gender. 'When there is uncertainty or question about the construction of any phrase in the chapter on Fundamental Rights, it is our responsibility to determine it in favour of the liberties so gravely underlined,' wrote Justice Vivian Bose in *Krishna v. State of Madras*, 1951 SCR 621. When using the authority of judicial review of legislation, the courts should, in most cases, defer to the wisdom of the legislator. However, it is also widely established that the level of respect due to the legislature varies depending on the topic matter. When concerns of "great constitutional importance," such as constitutionally enshrined human rights, are at stake, the courts are required to accord the legislature far less respect than would normally be the case in discharging their own sovereign power. Every organ of the state, every authority under the Constitution, receives its power or authority from the Constitution, and must act within the limitations of powers, according to our constitutional structure. The judiciary is charged with interpreting the Constitution to its fullest extent. The two constitutional rights used in this case, the 'right to personal liberty' and the 'right to equality,' are fundamental human rights that individuals have simply by virtue of their humanity(*State Of Madras vs V.G. Row.Union Of India & State ... on 31 March, 1952*).

## **EFFECTS**

### **4.9 India Has Legalized Homosexuality-Periodical Effects (2 July 2010- 13 December 2013)**

In 2009, homosexuality and gays were far more visible than in previous years. Gay, bisexual, transgender, and lesbian persons from all walks of life have 'come out' as gay, bisexual, transgender, or lesbian. Homophobia, which thrives on the secrecy surrounding sexuality conversations, is gradually being fought by a growing number of people 'coming out.' The greater political implications of a person's personal decision to come out cannot be overstated. The fact that no single judge knew anyone who was gay or lesbian in 1986, when the US Supreme Court voted to keep the anti-sodomy legislation in *Bower's v. Hardwick*, is the most suitable illustration of the role that coming out plays in changing society perceptions. When

the US Supreme Court overturned the anti-sodomy law in *Lawrence v. Texas* in 2003, every justice knew someone who was homosexual or lesbian. Because of the nature of media coverage and interactions with gay and lesbian judges from other jurisdictions, judges in India were likely to know queer persons by 2009. The decision comes at a time when mainstream society is becoming increasingly queer. Queer themes and openly queer characters are becoming more prevalent in literature, plays, movies, dance performances, and other forms of entertainment. The mainstream Bollywood film industry is likely the clearest example of how queerness has been reflected in popular culture. *Dostana*, a successful film from 2008 that presented a love triangle between two main male Bollywood stars and a female celebrity, was perhaps the first time the word "gay" was used in an almost casual everyday sense in Bollywood cinema. This was in stark contrast to *My Brother Nikhil*, the first official mainstream LGBT film, which was about a gay athlete who died of AIDS and did not use the terms "gay" or "homosexual" even once. *Dostana* brought queerness to the Indian public's attention and sparked sexuality discussions in homes and offices. This was not limited to English-language literature or Hindi-language movies, as evidenced by the work of prominent Marathi playwright Chetan Datar, who frequently dealt with homosexual themes in his performances. A few days after the judgments, Naz Foundation stakeholders were called to talk on crucial issues related to homosexuality at various forums including schools, colleges, media organisations, and non-governmental organisations (NGOs). The ruling has also given you more clout when dealing with the cops. A increasing attitude of entitlement in the queer community accompanied this shift in public society. Prior to 2009, there was a clear air of anxiety in the community, particularly when it came to publishing gay newsletters, with those engaged worried about what the printer would say and whether the publication itself would be labelled obscene, potentially leading to arrests. A lot has changed since then. The community was far more visible and vocal than before. The feeling of a lurking, subterranean anxiety had dissipated, and a hesitant new confidence had taken its place. This might be described as a process in which LGBT people begin to believe that they have rights. Between 2009 and 2013, print media reported a slew of articles of gay people "coming out," and a slew of Bollywood

celebs openly supported the LGBT community. A small number of psychologists and counsellors have begun writing columns about homosexuality. A few stories of social acceptance and a couple of social rejection were also published, highlighting the community's prominence in our traditionally homophobic country. While the court's decision was legally limited to decriminalising homosexuality, debates on equality and the justices' interpretations of gender and sexuality have imply a much broader impact. Even those who were contesting the case were surprised when the Hindustan Times and Times of India reported homosexual couples across India suddenly marrying and claiming the ruling as proof.

Naz's decision had the potential to be powerful. The Naz Foundation's landmark decision has provided unprecedented constitutional protection (although for only four years) and represents a new beginning for all minorities. This minority group (minority because the official number of gays in India is 25 lakhs, a tiny fraction of the country's total population) is a vulnerable one, as it faces prejudice and discrimination simply for being a member of this group. Aside from numerical strength, there are additional aspects to consider.

Political vulnerability (indicated by the degree of social prejudice and negative stereotypes prevalent against a group), social vulnerability (indicated by the degree of social prejudice and negative stereotypes prevalent against a group), and economic vulnerability (inferred from wealth, income, land and house ownership, occupation, education, and other material indicators) are all examples of vulnerability.

#### **4.10 Re-Criminalization Of Homosexuality In India (12 December 2013-February 2015) Periodical Effects**

Hundreds of people protested Section 377 at Barakhamba Road in Delhi for the inaugural Queer Pride Parade following the depressing Supreme Court decision on November 30, 2014. Supporters included Tagore International School Delhi students and teachers, members of the LGBT community, lawyers, and representatives from the US and Canadian embassies. “The fact that such a large and colourful crowd showed up demonstrates that we haven't lost. We will triumph in the fight for the LGBT community. And we will not be silent about it.” Anand

Grover, the founder of Lawyers Collective and a petitioner counsel in the Naz Foundation case, said as much.

Following the Supreme Court's decision to recriminalize gay sex, the LGBT community has vowed to continue fighting. FACEBOOK, the popular social networking site, has offered new gender options in addition to the usual male/female binary. The LGBT community applauds this initiative. This can be viewed as a democratic step to recognise different genders, in line with the global acceptance of the LGBT population. "This decision would send a subtle psychological message that other genders are also normal," one LGBT member stated on the condition of anonymity. People will gradually grow more accepting of us." Many supporters of homosexual rights, including Bollywood celebrities, were astonished, and expressed their disappointment on social media and in the press, calling the Apex Court decision a disappointment. The decision sparked outrage across the country, with social media leading the charge. Supporters and celebrities reacted angrily on social media, calling the move retrograde. In a good step, the Indian Supreme Court acknowledged transgender people as a "third gender" in March 2014, and included them as a class component of OBC, allowing them to claim reservation in various jobs against a 27 percent quota.

LGBT community members staged an event in New Delhi on December 11, 2014 (a year after the apex court verdict) in which experience sharing, community performances, and lectures by community leaders discussed ideas to overcome the situation involving persons belonging to the LGBT community. They concentrated on topics such as health-care access and enhanced efforts to protect human rights and respond quickly to crises. "Human rights of the LGBT community require protection, and they should not be classified as criminals," K G Balakrishnan, head of the National Human Rights Commission of India and former chief justice, stated at the event. Tim Crook, for example, is one of the few world-famous entertainers to come out as gay and publicly acknowledge his sexuality. "So let me be clear," he wrote to Bloomberg Businessweek. I am proud to be gay, and I consider it to be one of God's greatest gifts to me. Tim Cook, the CEO of the world-famous APPLE Company, has been a strong supporter of workplace equality laws in Congress, as well as marriage equality in California

and opposition to an Arizona state bill that targeted gays. On the 19th of October 2014, Aamir hosted a popular TV show called "Satyamev Jayate" on the Star Plus channel, which aired on "alternative Sexuality." This episode dealt extensively with the real difficulties confronting the LGBT community. A writer, an LGBT activist, a psychologist, a social worker, and a representative from the Naz Foundation, which won a landmark battle for LGBT rights in 2009, were on hand to speak about the numerous facets and struggles that member of this group experience on a regular basis. There was lively debate about general attitudes toward homosexuals, sex change, raising the standard of living in society, LGBT rights, and so forth. This episode has once again advocated for the rights of India's LGBT community. On the contrary, the Goa government announced in early 2015 that it had launched a programme to rid LGBT persons of their homosexuality. Mr. Ramesh Tavedkar, Goa's sports minister, has indicated that the state will soon open a specific centre for LGBT persons, where they can receive proper treatment and be able to live a normal life.

#### **4.11. Experiencing Opposition To Legalizing Homosexuality In India**

The first point raised here is that if Sec. 377 is repealed, crimes such as sodomy, bestiality, and other forms of uncivilization may go unpunished, resulting in complete uncivilization. I'd want to underline that the right that is being promoted is the right to "basic human rights," which includes the right not to be discriminated against<sup>400</sup>, the right to private, and the right to life and personal liberty. Sodomy acts committed with force, or sodomy acts committed against children, must continue to be punished. Similarly, actions of bestiality are not supported because they are not acts between human beings and cannot be brought within the ambit of constitutional protection under any interpretation of the law. We're arguing for only private homosexual acts between consenting adults in this case.

The second reason against homosexuality is that removing the section will unleash a flood of delinquent activity, which may be misinterpreted as giving them unrestricted liberty. As a result, gay activities will proliferate in society, and male prostitution will rise. This is also a misnomer because, as several studies have shown, it is a natural orientation rather than an

adopted behaviour. People will not respect the law simply because it grants them a licence till they are of a certain sexual orientation. Second, even though male prostitution is on the rise, it is on the decline, since legalisation will reduce prejudice, exploitation, and torture, as well as providing a more suitable work atmosphere and greater job prospects for LGBT individuals. Because of the societal marginalisation that the LGBT community is experiencing, many members of the community are turning to male prostitution. Nobody wants to hire a gay because their identity has been criminalised, making them a target for ridicule, hostility, and prejudice. The community will benefit from 'social inclusion,' and they will be able to explore other opportunities for earning a living.

The final argument, that homosexuality may have a significant impact on the Indian social order and conventional institution of marriage, does not hold up against prosecution. If homosexuality must continue to be punished for the sake of Indian culture or the marriage system, what does this mean for young people in live-in relationships and sexual actions prior to marriage? It is important to stress that the law's role is to control and protect "constitutional morality," as opposed to "public morality," which is based on changing subjective views of society.

The fourth argument against legalisation, that the Indian political system will be impacted because LGBT persons will be able to openly participate in politics and fight for special or favoured rights or employment reservations for their community, does not require an immediate response. In March 2014, the Indian Supreme Court declared transgender people to be a "third gender" and listed them as a class component of the OBC, allowing them to claim reservation in various jobs against a 27 percent quota.

The final argument against homosexuality is that lethal diseases such as AIDS, Hepatitis B, Syphilis (veneral disease), and genital herpes will become more common. This argument holds true if homosexuals engage in an unprotected sexual act. This is true for both heterosexual and homosexual sexual acts.

#### **4.12 Positive Consequences of Legalizing Homosexuality in India**

1. Less exploitation and discrimination: Making private homosexual acts between consenting adults legal will significantly reduce exploitation, violence, and discrimination against the LGBT community. Under section 377 of the Indian Penal Code, LGBT individuals have been a target of violence, mostly by police and government officials. They are booked under it even when they are cruising in public parks, meeting, and gathering in which they do not intend to perform an act described by section 377 IPC. It is one of the most overused laws in India, and it is frequently used to blackmail and coerce homosexuals. All forms of exploitation, prejudice, blackmail, and extortion will be eliminated once marijuana is legalised.

2. The LGBT community will get incentive and confidence to come out of the closet: The LGBT community will benefit first and foremost from the legalisation of homosexuality in India. People will feel more confident and driven to come out of the closet if they are in this situation. Because a closet is dark and encloses a person with many worries and inhibitions, 'coming out of the closet' is incredibly significant. They will get the confidence to confront homophobic reactions from others, as well as a boost in their self-esteem. "I believe you are either born homosexual or you are not," standup comedian Vidhur Kapoor said. I was born as a gay man. Guys began to refer to me as homo. My self-esteem was eroding with each passing day. I was forced to take tests to ensure that I was a healthy boy. I can't kill myself because of the way I was born, the counsellor remarked. I eventually told my mother that I was dating someone and that I wasn't going to lie to her. My parents have come a long way, and many others, hopefully, will as well."

3. Families of LGBT individuals will no longer be ashamed or stigmatised because of their ward's sexual orientation: Families of LGBT people will feel more integrated with the rest of society. The acceptance of this minority community into the mainstream will gradually remove the stigma and humiliation that their family members have experienced. Mockery among LGBT people exists in society because we have allowed it to flourish. Funny, non-serious, and loose depictions of gays on television and in the media have not only tarnished the LGBT community's image but have also shattered their families' confidence in dealing with society and relatives. If the law and society treat LGBT people with respect, defend and secure their

rights, the family's morale will improve, and they will no longer be ashamed or stigmatised because of their child's sexual orientation.

4. More work opportunities: Once homosexuality is legalised, firms will adopt rules in their human resource policies that are accepting of LGBT people. Because of society's discomfort with this minority group, even businesses, organisations, and institutions are hesitant to hire LGBT employees. Legalization will aid in ensuring that this population has equitable access to work opportunities.

5. Decriminalization has few (if any) negative implications, with studies indicating a decrease in STDs (sexually transmitted diseases) and improved psychological adjustment in nations where homosexuality is legal. Not to mention, only voluntary gay actions between adults in private are being pushed for legalisation. Forced sexual actions, as well as sexual acts between children, are not tolerated. LGBT persons will be welcomed into the mainstream, with equal rights and opportunities in all aspects of life: Legalization will promote LGBT individuals having equal rights and opportunities in all aspects of life. The legislation is insufficient to change people's beliefs, but it is unquestionably helpful in getting the ball rolling. The criminality of one's identity renders one a criminal in the eyes of society, resulting in a lot of hatred, prejudice, and exploitation for members of the LGBT Community.

6. They are not offered jobs, and they face discrimination at school, at home, and at work, which undermines their self-esteem. They lack equal rights and opportunities because the constitutional law, which is the custodian and protector of everyone's fundamental rights, has chosen to deny them. If homosexuality is allowed, society will have to embrace it sooner or later, and community members will feel more confident and accepted. They will no longer be treated with prejudice and will be welcomed into society with equal rights and opportunities.

7. Finally, because gay actions do not result in procreation, population control can be maintained without any measures: Because homosexual actions do not result in children, they will benefit Indian society in two ways. Because gay activities do not result in procreation, the unwanted birth of children because of unprotected sex can be controlled.

Couples who are unable to have children through natural means will be compelled to adopt orphans. According to a survey, over 20 million children in India are orphans, accounting for about 4% of the population and more than the population of Delhi. These children live in poverty and are a vulnerable class in and of itself. These impoverished youngsters are more likely to commit crimes, both as victims and perpetrators. Due to resource scarcity and lack of access, even the government is unable to adequately provide better education and life for everybody(*SACHS J Reported as National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*, 1998.).

#### **4.13 CONCLUSION**

The building up of a case against laws that prohibit, criminalise, and penalise same-sex activities, it's necessary to conjure up the picture of the wounded homosexual, who is injured not only physically but also psychologically by the law's symbols. Fundamental rights must be understood broadly and purposefully to elevate the individual's dignity and value as a human being. Articles 14, 19, and 21 must all be read in conjunction. Article 14's right to equality and Article 21's right to dignity and privacy are intertwined and must be achieved for other rights to be fully realised. The Constitution is a living text that should be able to adapt to new issues and difficulties as they arise.

## **CHAPTER-5**

### **Comparative analysis of countries recognizing same sex marriage with**

#### **India Scenario**

##### **5.0. Introduction**

Everyone has sexual sensations, attitudes, and beliefs, yet each person's sexual experience is distinct because it is filtered through an incredibly personal lens. This viewpoint is based on both personal and professional experience, as well as public and societal sources.

From ancient times to the present, sexuality has captivated individuals from all areas of life. In art and literature, sexual themes have been prevalent. Historically, religious, philosophical, and legal systems have attempted to define sexual values and taboos. It's helpful to start with the past to gain a better understanding of the present. Although the word homosexual was not coined until the late nineteenth century, it is derived from the Greek root homo, which means "same." People who are sexually attracted to other people of the same sex are known as homosexuals. Instead of homosexuals, the terms 'gays' or 'gay people' are sometimes used.

Regardless of their age or origin, gay people existed in all classes, social groupings, races, and countries. Homosexuals have always existed as long back as historians can tell, including Alexander the Great, Plato, and Caesar. Many historical people have been labelled as gay, including Socrates, Edward II, and Byron (Williams, 1980). Homosexuality refers to a person's sexual orientation. A homosexual person is attracted to persons of their own gender romantically or sexually. The term homosexual came to relate to immorality in the early 17th century. The Oxford Dictionary updated the definition of gay to "attached to pleasures and dissipations" at the end of the 17th century. Often used as a euphemism: "of a loose and immoral life." "During the nineteenth century, gay was invariably associated with sex.

However, in the 1920s and 1930s, the word began to take on a new connotation. Males who have had sex with other men are referred to as "gay men" in the sexual sense of the term. By the end of 1955, the word gay had officially acquired the newly added definition of homosexual males (Bhullar, 2014). Homosexuality is recognised as one of the possible expressions of

human desire in Hindu religion. A lot of Hindu legendary myths present homosexuality as a natural and pleasurable experience (Olivan & Nancy, 2001). Both men and women are depicted in homosexual sex in Cravings from the Hindu temple (Keene & Michael, 2002).

This third sex or gender, according to Sanskrit scriptures such as the Narada-Smriti, Sushruta Samhita, and others, encompasses people who are often referred to as homosexuals, bisexuals, and transgender. Males with a female nature are characterised as third genders in ancient Vedic writings, alluding to homosexual men or feminine gendered males. Third-gender men claiming both masculine and feminine identities, as well as both receptive and dominating sexual roles, are explicitly described in the Kama Sutra.

Gender and sexuality are frequently linked. Everyone should understand that these two are the same thing. Sex is biological status, according to the American Psychological Association (APA, 2011). It is typically defined as male or female. Gender refers to a person's attitudes, emotions, and behaviours. Gender is not a physical trait; it is a psychological trait (Potter et al., 2008). Gender expression is the enhancement of gender identification, which is the inherent male or female sensation. Many people in today's culture are concerned about morals. Marriage, according to tradition, is a partnership between a man and a woman for the purpose of raising children. With advances in technology, homosexuals can have their sexes altered and live a life of their choosing, whether they choose to be gay or lesbian.

In India, homosexuality is a complex and sensitive topic. There are numerous myths and misunderstandings regarding homosexuality that contribute to stigma, prejudice, and discrimination towards homosexuals. For Indian civil society, homosexuality is a taboo subject and there are no official statistics on the LGBT population. The fact that sexuality, in any form, is rarely discussed freely in India has hampered public discussion of homosexuality. Attitudes regarding homosexuality have altered slightly in recent years.

According to the National AIDS Control Organization (NACO), twenty-five lakh men in India have sex with other men. The majority of research have been conducted in western countries, and they show that anywhere from 25 to 13 percent of the population prefers the same gender.

The Unnatural offences are defined by Section 377 of the Indian Penal Code, which was enacted in 1862. "Whoever wilfully engages in carnal intercourse against the order of nature with any man, woman, or animal shall be punished with life imprisonment, or with imprisonment of either sort for a term not exceeding ten years, and shall be liable to fine," it states. The very first time Delhi High Court decriminalised consensual homosexual relations in private in July 2009, declaring a section of the Indian Penal Code (IPC) that criminalises unnatural sex as unconstitutional, stating that "the section denies a gay person a right to full personhood." The Supreme Court, in a major decision lauded by gender rights advocates, ordered the government to label transgender people a "third gender" and include them in the OBC quota. The National AIDS Control Organization, the Naz Foundation, the Law Commission of India, the National Human Rights Commission of India, and the National Human Rights Commission of India have all stated support for decriminalising homosexuality. In India, same-sex marriage is not legally recognised, and same-sex couples are only given restricted privileges such as a civil union or domestic suitable sex education throughout youth. As a result, many guys who had intercourse with males ended up in harmful sexual relationships. MSMs are at risk for HIV and other sexually transmitted illnesses as a result of their conduct.

### **5.1 Present situation of same sex marriage in India**

In India, the existing rules on same-sex marriage are written in such a way that they do not clearly prohibit same-sex marriage. For example, when the Hindu Marriage Act describes who is eligible to marry under the act, it makes no provision that only persons of the opposite gender can marry. In actuality, the only issue with the prerequisites for marriage is the portion dealing with the bridegroom's and bride's age requirements. Under the Special Marriage Act, the same thing might be seen. Even if the legislation does not appear to ban same-sex weddings, there are still numerous barriers to overcome before same-sex marriages may be legally recognised.

### **5.2 International overview**

Twenty-eight nations, including the United States, have allowed same-sex marriage, and civil unions are recognised in many other Western democracies. However, in many countries, same-sex marriage is still prohibited, and the global spread of LGBTQ+ rights has been uneven. International institutions, such as the United Nations, have passed resolutions in favour of LGBTQ+ rights, but human rights advocates claim that these bodies lack the authority to implement them(*The Changing Landscape of Global LGBTQ+ Rights | Council on Foreign Relations*, 2021).

The research and advocacy organisation Freedom House classifies virtually all of the nations with marriage equality—when same-sex couples have the same legal right to marry as different-sex couples—as “free.” “You see a crackdown on LGBT rights anywhere you have limitations on individuals—in terms of speech, expression, or freedom of assembly,” says Julie Dorf, senior advisor to the Council for Global Equality, a Washington-based organisation that supports LGBTQ+ rights in U.S. foreign policy. She describes it as the “canary in the coal mine.” To explain regional divergences, Javier Corrales, a professor at Amherst College who works on LGBTQ+ rights in Latin America, points to economic levels, the importance of religion in politics, and the general robustness of democracy.

While marriage equality has made the most progress in Western countries, anti-discrimination legislation is gaining popularity across the world. Eighty-one nations and territories, including those that still have sodomy prohibitions, have employment discrimination protections based on gender identity or sexual orientation in 2020(*Marriage Equality: Global Comparisons | Council on Foreign Relations*, 2022).

In 2011, the UN Human Rights(*LGBT Rights | Human Rights Watch*, 2013.) Council commissioned the body's first research on the issue, expressing “grave concern” over violence and discrimination against people based on their sexual orientation and gender identity. The council approved a resolution in 2014 to oppose anti-LGBTQ+ prejudice and violence. The United Nations designated its first-ever independent expert on sexual orientation and gender identity two years later. Graeme Reid, head of Human Rights Watch's lesbian, homosexual,

bisexual, and transgender rights campaign, says, "What is essential here is the slow development of agreement." "Moral pressure is building on member states to address at least the most overt acts of prejudice or violence.

International activists have prioritised anti-violence and anti-discrimination efforts above marriage equality. "There is no reasonable diplomat who believes that forcing same-sex marriage on a country that isn't ready for it is a smart idea," Dorf adds. She also points out that not all nations with equal marriage rights allow same-sex couples to adopt together, and she warns against equating the right to marry with the right to be free of prejudice.

### **5.2.1 United States of America**

On June 26, 2015, the United States Supreme Court decided that the Constitution provides same-sex couples the freedom to marry, thus legalising same-sex marriage in the thirteen states where it had previously been prohibited. The five-to-four decision, which applies to all US territories, occurred amid significant public opinion swings. By 2020, 70% of Americans questioned said they supported same-sex marriage, up from 27% in 1996.

The decision came less than two decades after President Bill Clinton signed the Defense of Marriage Act (DOMA), which defined marriage as a union between a man and a woman, denying same-sex couples federal marriage benefits like health care, social security, and tax benefits, as well as green cards for U.S. citizen spouses. The portions of DOMA that denied government benefits to same-sex couples were knocked down by the Supreme Court in June 2013. Go a Little Further The Global LGBTQ+ Rights Landscape is Changing (*Writing a More Inclusive Playbook: How COVID-19 Is Impacting LGBTQ+ Communities Around the World | Think Global Health*, 2021)

Despite these Supreme Court decisions, there is still a dispute in the United States between proponents of legal equality and those who disagree to marital equality based on religious beliefs. The Supreme Court decided in June 2018 in favour of a Colorado baker who refused to produce a wedding cake for a same-sex marriage because of his religious views, despite the state's civil rights statute. The court, however, declined to make a more general decision on

whether companies had the right to refuse products or services to LGBTQ+ persons for religious grounds. The court concluded in June 2020 that a 1964 civil rights statute against employment sex discrimination also covers discrimination based on sexual orientation or gender identity. In more than half of the states where no such legal safeguards existed before, the judgement prevented LGBTQ+ employees from being fired (*Poland's Slide Toward Homophobic Politics - Carnegie Endowment for International Peace, 2020*).

### **5.2.2 Europe**

Western Europe contains more than half of the nations with marriage equality. The Netherlands (2001), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Denmark (2012), France (2013), the United Kingdom (2013), Luxembourg (2015), Ireland (2015), Finland (2017), Malta (2017), Germany (2017), and Austria (2017) have all legalised same-sex marriage (2019). In 2016, Italy's parliament legalised civil unions for same-sex couples, making it the largest Western European country where same-sex marriage is illegal. Switzerland's legislators decided to allow same-sex marriage in 2020, and the public is likely to vote on the measure in a referendum in 2021. Eastern Europe has a lower level of support. According to a 2017 Pew Research Center study, 16 percent of Belarusians and 9 percent of Ukrainians support legalising same-sex marriage. Poland and Hungary, both of which have constitutional restrictions on same-sex marriage, have 32% and 27% support, respectively. At least 10 additional Central and Eastern European nations have similar bans. Although civil unions are permitted in Estonia, public support for marriage equality in the Baltic nations is minimal. Same-sex relationships are legal in the Czech Republic and Hungary. A Budapest court decided in 2018 that same-sex weddings done outside of the country must be regarded as partnerships. Since then, Hungarian lawmakers and populist Prime Minister Viktor Orban have passed a slew of anti-LGBTQ+ legislation, including laws prohibiting same-sex couples from adopting children and prohibiting the distribution of any content deemed to promote homosexuality or transgender identity to minors under the age of eighteen. The laws were deemed discriminatory by the European Union. "Western Europe contains more than half

of the nations that allow same-sex marriage(*Poland's Slide Toward Homophobic Politics - Carnegie Endowment for International Peace, 2020*)”

Russia declared it illegal to spread “propaganda of unconventional sexual relationships among minors” in 2013. Dozens of individuals have been punished for engaging in protests and posting stories on social media, among other things. Human rights organisations claim the law is a weapon for anti-LGBTQ+ discrimination, and Europe's top human rights court found it unconstitutional in June 2017; while the judgement is binding, the court has limited enforcement powers. Since 2017, hundreds of men suspected of being homosexual have been imprisoned, tortured, and even killed in two distinct government crackdowns in Chechnya, a Russian semiautonomous region. Despite rising support for marriage equality in many European nations, there are still differences. While Ireland became the first country in the world to allow same-sex marriage by a public vote in 2015, legislation to legalise same-sex marriage in Northern Ireland were defeated five times. However, it was eventually approved in 2019 by a vote of the UK Parliament, despite Northern Ireland's legislature being suspended. In a vote in 2013, Croatians passed a constitutional prohibition on same-sex marriage, however the country's parliament eventually legalised civil partnerships a year later. Although a 2018 judgement by the EU's top court stated that countries must protect same-sex couples' rights to freedom of movement and residence, the EU does not force its members to recognise same-sex marriage. A 2013 European Parliament study on human rights and democracy "encourages" EU institutions and member states to recognise same-sex marriage or civil unions as a "political, social, human, and civil rights problem", although the EU cannot compel its members to modify their policies.

Canada was the first Western Hemisphere country to allow same-sex marriage in 2005. Argentina came in second in 2010, Brazil and Uruguay came in third in 2013, Mexico came in fifth in 2015, Colombia came in sixth in 2016, Ecuador came in ninth in 2019, and Costa Rica came in tenth in 2020. Brazil's top court ruled in 2019 that homophobia and transphobia are crimes under a 1989 statute against racism. President Jair Bolsonaro, however, took away the Human Rights Ministry's capacity to examine LGBTQ+ issues within hours after taking office

in 2019. During his candidacy, he was chastised by LGBTQ+ advocacy organisations for making bigoted statements. The level of support for marriage equality varies by location. According to the International LGBTI Association (ILGA), 54 percent of Canadians, 48 percent of Chileans, and 57 percent of Argentines support legalising same-sex marriage. Support for legalisation was significantly lower in Central America, with just 33% of Costa Ricans, 28% of Nicaraguans, and 27% of Ecuadorians in favour. The Inter-American Court of Human Rights decided in favour of marriage equality in 2018, although member states have taken little action as a result of the ruling. Costa Rica is the only Central American country that recognises same-sex couples, while some other countries in the area have weak anti-discrimination laws. In the Caribbean, support for same-sex marriage is equally low, with only 16 percent in Jamaica and 23 percent in the Dominican Republic. Bermuda, a British colony, allowed same-sex domestic partnerships in 2017, but the government has campaigned to reinstate the prohibition. In 2021, a London court of appeals will examine the Bermuda Supreme Court's 2018 judgement declaring same-sex marriage to be illegal.

Chile permits same-gender civil unions, but the country's conservative government has been stalling a measure to legalise marriage equality in Congress for years. President Sebastian Pinera stated in 2021 that he would strive to hasten the bill's approval. Bolivia, Honduras, Nicaragua, and Paraguay have all passed constitutional amendments prohibiting same-sex marriage. Cuba, where homosexuality was formerly punishable by harsh labour camps, has seen significant transformation in recent years. In 2013, the National Assembly enacted an anti-discrimination statute, and a new constitution was adopted in 2019 that eliminated wording that defined marriage as a union between two men and women. Same-sex unions, on the other hand, are still not recognised.

### **5.2.3 Pacific Ocean**

Only Australia and New Zealand are Pacific Rim countries that allow same-sex marriage. After almost eight million Australians approved the proposal in a nationwide referendum that autumn, Australia's parliament decided in December 2017 to alter the law on marriage. In May

2019, Taiwan's legislature enacted a judgement given by the country's top court two years prior, making same-sex marriage lawful. In 2015, a Tokyo district began recognising same-sex partnerships, despite rapidly altering public opinion in Japan. A court in Sapporo ruled in 2020 that the Japanese government's reluctance to recognise same-sex marriages is a violation of the constitution. In a 2018 poll, almost 80% of those aged sixty and under supported same-sex marriage. Bills to allow same-sex marriage or civil partnerships have been introduced in Thailand and Vietnam. According to the ILGA, just 31% of Chinese, 30% of Malaysians, and 14% of Indonesians supported legalising same-sex marriage in 2016. In areas of Indonesia, Malaysia, Myanmar, and Singapore, same-sex relationships between males are prohibited. They are punished in Brunei by being stoned to death, but the government has stated that it would not execute the legislation due to worldwide uproar. Since 2016, human rights organisations have documented an upsurge in threats and violence against LGBTQ+ persons in Indonesia, including discriminatory statements made by a number of public leaders. President Rodrigo Duterte of the Philippines has shown support for legalising same-sex partnerships but not same-sex weddings, while a survey conducted in 2019 found that 73 percent of Filipinos believe homosexuality should be recognised.

#### **5.2.4 Asia's South and Central**

In parts of South and Central Asia, including Bangladesh and Pakistan, same-sex relationships are banned. In 2018, India repealed a colonial-era prohibition on homosexual intercourse, and Bhutan followed suit in 2020. Nepal has established certain anti-discrimination laws based on sexual orientation, and a government-appointed council recommended that same-sex marriage be legalised in 2015. Official papers in Bangladesh, India, Nepal, and Pakistan allow persons to register as a third gender. In South and Central Asia, there is scant data on societal views regarding homosexuality. In 2016, the ILGA reported that 35% of Indians and 30% of Pakistanis felt same-sex marriage should be allowed. Kazakhstan had a 12 percent approval rating.

#### **5.2.5 North Africa and the Middle East**

In much of the area, same-sex relationships are outlawed, and in Iran, Saudi Arabia, and Yemen, they are punished by death. Algeria, Morocco, Oman, Syria, Tunisia, and Gaza all have laws against same-sex activities. Lebanese courts established a possible precedent for decriminalisation in 2018. Israel acknowledges same-sex weddings performed in other countries, but in a 2018 vote, the Knesset, Israel's legislative body, rejected a measure that would have authorised same-sex marriages. Civil advantages are available to same-sex couples, including residency permits for the partners of Israeli citizens. In terms of public sentiments toward same-sex couples, Israel stands out from its neighbours: according to the ILGA study, 49 percent of Israelis believe same-sex marriage should be allowed, compared to 19 percent in the UAE, 16 percent in Egypt, and 14 percent in both Jordan and Morocco.

#### **5.2.6 Africa's Sub-Saharan**

South Africa is the only country in Sub-Saharan Africa that allows gay and lesbian couples to marry. In 2006, the parliament approved same-sex marriage, less than a decade after the constitutional court overturned rules prohibiting men from having sex with women. The post-apartheid constitution was the first in the world to protect people based on their sexual orientation, though a 2016 ILGA poll found only 40% of South Africans support same-sex marriage, and human rights monitors have reported security forces failing to protect lesbians and transgender men's rights. Same-sex relationships are outlawed in much of Africa, and in Mauritania and Sudan, as well as portions of Nigeria and Somalia, they are punished by death. Afro barometer polling conducted between 2016 and 2018 revealed that 78 percent [PDF] of Africans in thirty-four nations were homophobic. Human rights organisations have expressed concern over a crackdown on LGBTQ+ individuals by Tanzanian officials in Dar es Salaam in 2018. Even though the African Union's human rights commission passed a resolution denouncing violence against LGBTQ+ persons in 2014, several African countries sought to block the appointment of a UN expert to investigate anti-LGBTQ+ prejudice in 2016.

However, there have been recent advances: Afro barometer discovered that majorities in three nations, in addition to South Africa, are accepting of homosexuality: Cape Verde, Mauritius,

and Namibia. Mozambique was the first country to legalise same-sex relationships in 2015, with the Seychelles following in 2016, Angola and Botswana in 2019, and Gabon in 2020. Courts in Kenya, Uganda, and Zambia have ruled in favour of LGBTQ+ advocacy groups in recent years.

### **5.3 Current standing of various countries in relation to same-sex marriage**

**To conclude Currently, there is equality in marriage** (*Marriage Equality Around the World - Human Rights Campaign*)

Right now, same-sex unions are permitted in 32 nations: Uruguay, Argentina, Australia, Argentina, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, United Kingdom, United States of America, and United States of America.

#### **Techniques for Legalization**

Through national legislation, same-sex marriage has been made legal in 22 nations. Australia, Ireland, and Switzerland are three of these countries that only approved same-sex marriage through law following national elections.

Ten nations—Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Slovenia (which was followed by national law), South Africa, Taiwan, and the United States of America—have legalised same-sex marriage nationally.

Following court orders, two nations—South Africa and Taiwan—enacted laws making same-sex marriage legal.

#### **Countries with Equal Marriage Laws as of 2022- Recent**

Slovenia: On July 8, 2022, the Slovenian Constitutional Court declared that the prohibition on same-sex unions was unconstitutional. The court instructed the Slovenian parliament six

months to implement the necessary legislation, which it accomplished on October 4. The court's decision was followed promptly by the ruling.

#### **5.4 Where Does International conventions stand?**

Murder, rape, assault, physical abuse, sexual abuse, torture, arbitrary detention, discrimination in education, healthcare, and employment, and violations of basic rights such as the right to freedom of speech and expression, the right to peaceful assembly, and the right to information are just a few examples of violence and discriminatory acts based on sexual orientation and gender identity. For more over two decades, the United Nations system for the monitoring of human rights concerns and other Human Rights treaty organisations, notably the Human Rights Council's monitoring mechanism, have recorded such abuses.

In a speech on Human Rights Day in 2010, the UN Secretary General highlighted his worry over violence and discrimination based on sexual orientation and gender identity. Discrimination, he added, should be opposed in general, and discrimination based on sexual orientation and gender identity, in particular, should be rejected by all men and women of conscience. He went on to say that if there is a conflict between culture and fundamental human rights, the latter should win out. He also made a vow at the end of his address to seek repeal of laws criminalising consensual homosexuality, which leads to discrimination and violence based on sexual orientation and gender identity, as well as encouraging violence(Plummer, 2015).

The Secretary General voiced his worry over continued discrimination and other concerns based on sexual orientation and gender identity on March 7, 2012. Even though sexual orientation and gender identity are highly sensitive topics about which most people do not grow up talking or debating, he believes it is past time to do so since human lives are at risk. He went on to say that he chose to talk on sexual orientation and gender identity issues because it is the responsibility of the United Nations Charter and the Universal Declaration of Human Rights to safeguard the rights of all people everywhere(*OHCHR | OHCHR and the Human Rights of LGBTI People*, 2021.).

Individuals' Human Rights are protected by the International Bill of Human Rights, which includes:

1. The Universal Declaration of Human Rights (UDHR) (Nations, 1948)
2. The International Covenant on Civil and Political Rights (*International Covenant on Civil and Political Rights* | OHCHR, 1976.)
3. International Covenant on Economic, Social, and Cultural Rights (ICESCR)(*International Covenant on Economic, Social and Cultural Rights* | OHCHR, 1976)

These three instruments do not specifically address concerns of discrimination against people based on their sexual orientation or gender identity. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women(*Convention on the Elimination of All Forms of Discrimination against Women*, 1979) (often referred to as an international women's bill of rights) and the United Nations Convention on the Rights(*Convention on the Rights of the Child* | OHCHR, 1989) of the Child (often referred to as an international children's bill of rights) do not address the issues of discrimination and other forms of violence against women separately.

#### **5.4.1 Standards and Obligations under International Human Rights Law**

All people are born free and equal in dignity and rights, according to Article 1 of the Universal Declaration of Human Rights. The concept of equality and universality, as established in the above-mentioned article of the Universal Declaration of Human Rights, underpins the implementation of international human rights legislation. The International Human Rights Law guarantees some basic human rights to all people, regardless of their sexual orientation or gender identity. Right to life; right to family and privacy; right to freedom from torture, arbitrary arrest, and detention; right to freedom of speech and expression; right to peaceful assembly and association; and right to freedom from discrimination are among the basic rights guaranteed by international declarations, covenants, and conventions. Respect for national, regional, and various historical, cultural, and religious backgrounds should be maintained, but

it is the duty of states to promote and protect all human rights and basic freedoms, regardless of their political, economic, cultural, or religious structure, as stated in the Vienna Declaration and Programme of Action(0.1 PHD Thesis *Sexual Orientation and Gender Identity Issues in The Present Legal Scenario Human Rights Perspective PDF | PDF | Homosexuality | Sexual Orientation*, 2017.). The most important human rights principle is the prohibition of discrimination, which is enshrined in the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and other key human rights treaties. The concept of non-discrimination, which is established and expressly specified in the terms of international human rights agreements, states that the rights granted should be made available to all persons without discrimination. It also states that states must guarantee that their laws, regulations, and other programmes are implemented without discrimination. Article 2 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights states that all individuals within their jurisdiction should be guaranteed all the rights mentioned in the Covenants, regardless of race, colour, sex, language, religion, political structure, national or social origin, birth, or citizenship.

The phrase "other status" in the Covenants' prohibitive grounds implies that the grounds of discrimination listed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and other international human rights treaties are not exhaustive. It also suggests that the drafters of the International Human Rights Treaties purposefully included the phrase "other status" as one of the prohibitive grounds of discrimination to provide room for further grounds of discrimination to be included. The International Covenants and Human Rights treaty bodies do not specifically specify prohibitive grounds of discrimination such as sexual orientation, gender identity, health condition, disability, age, and so on. The Human Rights Committee decided in *Toonen v. Australia*(*Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).*) that states have a duty to protect persons from discrimination

based on sexual orientation and gender identity(*Human Rights Library- University of Minnesota*).

#### **5.4.2 The Signatory States' Legal Obligations Under International Human Rights Law**

Individuals within a state's authority are entitled to protection from violence and discrimination based on sexual orientation and gender identity(*Universal Declaration of Human Rights Regular English Version, 1948*). The signatory states' responsibility stems from a number of international human rights conventions. As stated below, the states' obligations to persons within their authority also include the following.

- a. Individuals' right to life, liberty, and security must be safeguarded.

Article 3 of the Universal Declaration of Human Rights ensures that everyone has the right to life, liberty, and security. The right to life is also inherent in every individual(*International Covenant on Civil and Political Rights | OHCHR 1976*), according to Article 6 of the International Covenant on Civil and Political Rights. The above-mentioned rights are to be maintained by the legislation, and no one's right to life shall be taken away arbitrarily. Individuals' lives are protected by the state, and the state must use due care in resolving deprivations of life in a timely manner. States also have a responsibility to investigate and prosecute crimes of violence and deprivation of life with zeal. According to Article 33 of the Convention relating to the Status of Refugees, signatory States are obligated to protect the right to life of refugees, and States shall not expatriate or replace a refugee to a place where they face deprivation of their right to life or freedom because of race, religion, nationality, ethnic origin, or political opinion. Individuals who are afraid of discrimination because of their sexual orientation or gender identity, according to the United Nations High Commissioners for Refugees, may be deemed members of a certain social group. If the concerned individual meets the criteria for refugee status, the States must recognise and protect them in accordance with the provisions of the Convention, and States parties to the Convention must ensure that the refugee is not relocated to a location where their right to life and other freedoms are jeopardised.

b. States' obligations to protect persons from torture, cruel or degrading treatment, and discrimination based on sexual orientation or gender identity.

The right to be free of torture, cruel, brutal, or degrading treatment is unalienable under international human rights law. Individuals are protected from torture, cruel, brutal, or degrading treatment or punishment under Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Human Rights Committee against Torture has praised all signatory states for their responsibility to protect all persons under their authority from torture, cruel, inhuman, or degrading treatment, regardless of sexual orientation or gender identity (*UN General Assembly - Resolutions*). The Committee further stated that States should ban, prevent, and offer remedy for torture and cruel treatment as soon as possible. In its final remark on the State Parties report, the Committee also voiced concern over accusations of abuses and ill-treatment based on sexual orientation and gender identity (*International Covenant on Civil and Political Rights / OHCHR, 1976*).

c. States' obligations to respect the right to privacy as well as the right to be free from arbitrary detention based on sexual orientation or gender identity.

The right to privacy is protected by Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, which state that all individuals within their jurisdiction have the right to privacy protection and are protected from arbitrary detention. It also states that no one's private life, family, home, or communication shall be subjected to arbitrary or unlawful intrusion. Under Article 9 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, all human beings are further protected from arbitrary arrest and imprisonment. In its General Comment no. 16, the Human Rights Committee stated that any interference with the right to privacy and protection against arbitrary interference must be consistent with the articles and preamble of the International Covenants, as well as appear reasonable in the circumstances. Since Toonen's case (*Toonen v. Australia, Communication No. 488/1992, U.N. Doc*

*CCPR/C/50/D/488/1992 (1994).*), the Human Rights Committee has found that legislation criminalising private consenting same-sex activities and behaviour between adults infringe the right to privacy as well as the right to discrimination protection. The Human Rights Committee also rejects the notion that criminalising private consenting same-sex activities between adults is justifiable based on protecting public health and morality.

The Committee further points out that legislation prohibiting private consenting same-sex activities and behaviour are neither essential nor appropriate. In their concluding observations, various Human Rights treaty bodies, including the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child, encourage amendment or repeal of such draconian legislation.

d. The duty to protect people from discrimination based on their sexual orientation or gender identity.

In international human rights legislation, the principles of non-discrimination and equality are enshrined. Discrimination of any sort is prohibited under international human rights legislation, which includes all international covenants, declarations, and conventions. Article 26 of the ICCPR also protects the right to equality before the law, and states parties are required to ban all forms of discrimination. All human rights treaty organisations have confirmed and praised the responsibility of State parties to ban and protect all persons from discrimination on the basis of sexual orientation and gender identity in their general remarks, observations, and messages. Being homosexual or transgendered is not a reason to deny someone the right to enjoy basic human rights. State Parties should ensure that all persons, regardless of their sexual orientation or gender identity, have access to all the rights provided in the Covenant, as directed by the Human Rights Committee. The Human Rights Committee also applauded the inclusion of sexual orientation and gender identity as one of the prohibited grounds of discrimination in existing legal systems. The Committee on Economic, Social, and Cultural Rights has supported the concept of equality and non-discrimination because of sexual orientation and gender

identity in the achievement of the right to livelihood, labour, water, social security, and the highest achievable level of health. In its general comments, the Committee mentioned sexual orientation and gender identity as one of the Covenant's prohibited grounds of discrimination. The Committee on the Rights of the Child, the Committee Against Torture, and the Committee on the Elimination of Discrimination Against Women all include recommendations on the protection of people of all ages from discrimination based on sexual orientation and gender identity in their general comments and observations(*International Covenant on Civil and Political Rights* / OHCHR, 1976).

e. The responsibility of States Parties to guarantee without discrimination the right to freedom of expression, peaceful assembly, and association.

One of the most essential fundamental rights recognised by international human rights legislation is freedom of expression, peaceful assembly, and association. These rights are also protected by Articles 19-20 of the Universal Declaration of Human Rights, as well as Articles 19, 21-22 of the International Covenant on Civil and Political Rights. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of speech, expression, and thinking. It also states that individuals have the right to hold ideas without interference or discrimination. Article 20(1) of the Declaration states that everyone has the right to peaceful assembly without interference or discrimination(*International Covenant on Civil and Political Rights* / OHCHR, 1976).

However, these rights are not absolute, and the International Covenant on Civil and Political Rights allows for reasonable restrictions on these rights for reasons such as national security, public safety, public order, public health, and public morality. Any restriction on the right to freedom of speech, peaceful assembly, and association shall be in conformity with the Covenant's articles and preamble, according to the Human Rights Committee. The Committee further stated that such limits should not infringe on the right to be free from discrimination, which includes sexual orientation and gender identity as one of the prohibited grounds of discrimination.

### **5.4.3 The Yogyakarta Principles**

The International Human Rights Mechanism has seen significant progress toward gender equality and individual protection from violence and discrimination in the States. In reality, international human rights law mandates that States Parties ensure that all persons are protected from discrimination based on sexual orientation and gender identity. However, many nations' responses to human rights breaches and violence based on sexual orientation and gender identity have been unclear and uneven. The International Commission of Jurists and the International Service for Human Rights had committed to develop and propose a set of international principles based on the notions of universality and equality for the protection of individuals of all ages against discrimination and violence based on sexual orientation and gender identity in order to combat the ongoing discrimination and violence based on sexual orientation and gender identity (*International Commission of Jurists*). A notable group of human rights experts created, developed, and discussed these international standards for addressing disputes relating to sexual orientation and gender identity (*Introduction to the Yogyakarta Principles – Yogyakartaprinciples.Org*, 2017). The panel included 29 specialists from 25 different nations. The 'Yogyakarta Principles' were unanimously accepted as part of International Human Rights legislation concerning sexual orientation and gender identity problems during a meeting held at Gadjah Mada University in Yogyakarta, Indonesia from November 6 to November 9, 2006. These human rights principles, established by experts in the field, cover a wide range of human rights norms that apply to a variety of situations including sexual orientation and gender identity. The Yogyakarta Principles outline a number of responsibilities aimed at the government in order to avoid discrimination and violence based on sexual orientation and gender identity. These principles apply to all of the government's organs and officials in a given state. These principles also list duties that must be imposed on different State agencies responsible for health, education, and social welfare, as well as the police system, judiciary, military services, and other services provided on behalf of the State Parties (*Introduction to the Yogyakarta Principles – Yogyakartaprinciples.Org*, 2017).

The Yogyakarta Principles are as follows: -

## Preamble to the Constitution

The Yogyakarta Principle's Preamble includes definitions of important words relating to sexual orientation and gender identity. It also recognises discriminatory actions and violence based on sexual orientation and gender identity and strives to prevent such violations of human rights via the establishment of an adequate legal framework guided by the principles. Right to equality, protection against discrimination, and legal recognition

Principles 1 to 3 state that human rights are generally applicable and without discrimination, and that all people have the right to be recognised before the law.

Criminalizing consenting same-sex activities between adults, for example, violates international human rights pertaining to discrimination protection. The Human Rights(*International Service for Human Rights*) Committee also found the statute criminalising same-sex activities between consenting adults to be in violation of the ICCPR rights(*BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law*, 2012).

## Principles 4 to 11: Right to Life and Security

The right to life, the right to protection against violence, torture, cruel or inhuman treatment, the right to privacy, the right to protection against arbitrary imprisonment, and access to justice are all included in the speech.

There have been several cases of violations of the right to life and security based on sexual orientation and gender identity in recent years. Despite international human rights law dictates that the death penalty may not be imposed on consenting same-sex actions between adults, the death penalty is still enforced in situations involving consensual same-sex acts between adults. The International Human Rights Mechanism recently became aware of a situation involving the arbitrary imprisonment of LGBT individuals. At this instance, eleven men were jailed for consenting same-sex behaviour between adults after being caught in a homosexual nightclub. The United Nations Working Group on Arbitrary Imprisonment stated that detaining males for

consenting same-sex conduct is a serious violation of international human rights law, and that one of the homosexual detainees died as a result of the arbitrary detention(*Criminalization of Same-Sex Relations*, 2012).

#### Discrimination in the exercise of economic, social, and cultural rights is prohibited.

Principles 12 to 18 state that everyone has the right to economic, social, and cultural rights protected by international human rights legislation, such as the right to employment, livelihood, shelter, social security, education, and access to government officials. Furthermore, the police officials intimidated and harassed the participants. Extremist nationalists frequently threaten participants in such gatherings who want to advocate non-discrimination on the grounds of sexual orientation and gender identity(*LGBT Rights - Amnesty International*, 2019).

#### Right to asylum and freedom of movement

Principles 22 and 23 explain and establish that everyone has the right to seek refuge, and that this right includes the right to seek asylum for protection from violence and discrimination based on sexual orientation or gender identity. According to the United Nations High Commissioner for Refugees' recommendations, states must provide protection to refugees who are afraid of persecution because of their sexual orientation or gender identity.

#### Participation in cultural and family life is a right.

Principles 24 to 26 state that everyone, regardless of sexual orientation or gender identity, has the right to a family and to participate in the community's cultural life. It is also stated that the right to participate without prejudice in the administration and other public activities should be safeguarded by the states.

According to the UN Human Rights Committee, States Parties have an obligation to protect individuals from discrimination, and States should also ensure that individuals are not discriminated against because of their sexuality or homosexual relationships in matters relating to the allocation of partnership benefits such as survivors' pensions. Nonetheless, according to a UN Special Rapporteur on Adequate Housing, women from sexual minorities are more likely

to be homeless, discriminated against, and abused. Women belonging to sexual minorities are also at a higher risk of being expelled and prejudiced in higher educational institutions, according to another UN Special Rapporteur on the right to education study.

The UN High Commissioner for Human Rights has also raised concern over legislation that make it illegal for transgender people to have sex reassignment surgery or force transgender people to undergo sterilisation without their permission(*BORN FREE AND EQUAL Sexual Orientation and Gender Identity in International Human Rights Law*,2012).

#### The right to freedom of expression, opinion, and assembly in a peaceful manner

The right to freedom of speech, expression, and opinion; the right to peaceful assembly and association; and the right to choose one's identity without discrimination based on sexuality or transgenderism are all included in Principles 19 to 21. As a result, everyone has the freedom to select their community, express their sexuality, and join peaceful assemblies and groups.

According to the UN Special Rapporteur on racism, discrimination, and other targeted violent acts' report, state authorities in many countries have prohibited a peaceful symposium to promote the rights of sexual minorities and to propagate the right to equality and protection against discrimination based on sexual orientation and gender identity. Furthermore, the police officials intimidated and harassed the participants. Extremist nationalists frequently threaten participants in such gatherings who want to advocate non-discrimination on the grounds of sexual orientation and gender identity.

#### Right to asylum and freedom of movement

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#### The right to take part in cultural and family activities.

Principles 24 to 26 state that everyone, regardless of sexual orientation or gender identity, has the right to a family and to participate in the community's cultural life. It is also stated that the right to participate without prejudice in the administration and other public activities should be safeguarded by the states. According to the UN Human Rights Committee, States Parties have an obligation to protect individuals from discrimination, and States should also ensure that individuals are not discriminated against because of their sexuality or homosexual relationships when it comes to the allocation of partnership benefits such as survivors' pensions.

#### Human Rights Defenders' Protection

The right to promote and defend human rights is inherent in all people, regardless of their sexual orientation or gender identity, according to Principle 27. It goes on to say that states should safeguard the safety of those who are involved in the promotion and defence of human rights.

Individuals of all ages involved in the protection and promotion of the rights of sexual minorities have been threatened, physically and sexually abused, attacked, intimidated, and even murdered, according to the UN Special Rapporteur on the Protection of Human Rights Defenders. The UN Secretary-General's Representative also voiced worry over state authorities' casual approach toward such serious situations.

#### The right to seek remedy for discrimination based on sexual orientation or gender identity.

Principles 28 and 29 state that states should take appropriate legal and legislative measures to address discriminatory acts and breaches of human rights based on sexual orientation and gender identity, as well as to hold offenders accountable for their actions. The UN Commissioner for Human Rights also stated that violence against sexual minorities, as well as the non-liability and acquittal of perpetrators, is a source of great concern, and that States should ensure that individuals are protected from hate crimes, other forms of violence, and discrimination based on sexual orientation and gender identity. The UN High Commissioner further noted that states' failure to safeguard sexual minorities against violations of human

rights, as well as their exclusion from protections and other rights, breaches not just international human rights norms, but also the values of humanity.

Recommendations for Improvement: The Principles also include a number of other recommendations for the efficient operation of international and regional human rights institutions, NGOs, UN agencies, treaty bodies, and other organisations.

The Yogyakarta Principles also describe the duties of various State institutions and other organisations for the promotion and protection of human rights, and they recommend that these Principles be included as standards for their efficient operation. The UN Human Rights Council was informed on December 1, 2006, that breaches of human rights based on sexual orientation and gender identity are a major issue, and that the protection and prevention of such discriminatory actions should remain a priority for the Council. Special processes for sexual orientation and gender identity problems should be enacted by treaty organisations as part of their scheme of relevant rules, it was also proposed.

The protection of human rights is the duty of every individual, as stated in the joint declaration of state representatives from four UN regions, as well as the Yogyakarta Principles.

#### PROTECTION AGAINST DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY UNDER REGIONAL HUMAN RIGHTS BODIES

There has been a drive to define precise regional standards for the protection of human rights since the introduction of the European Convention on Human Rights in 1950. In 1967, the American Convention on Human Rights was adopted, and in 1981, the African Charter on Human and Peoples' Rights was adopted. Other regional treaties for the protection of human rights, covering not just civil and political rights but also economic, social, and cultural rights, came into existence as a result(*THE MAJOR REGIONAL HUMAN RIGHTS INSTRUMENTS AND THE MECHANISMS FOR THEIR IMPLEMENTATION*, 1997.).

#### **5.4.4 European Convention on Human Rights**

The European Convention on Human Rights is a regional instrument for human rights and other fundamental freedoms protection. The convention was made open for signatures on November 4, 1950, and it went into effect in 1953. The Convention is the first of its kind to ensure that the rights enshrined in the Universal Declaration of Human Rights are protected. The instrument has been changed numerous times since its establishment, and many new rights have been added to it that were not initially included in the Convention. Sexual orientation and gender identity are not explicitly mentioned as prohibited grounds of discrimination in the Convention(- Cedh, 1953). However, the European Court of Human Rights has ruled in several cases that discrimination and violence based on sexual orientation and gender identity are serious violations of the right to life, and that laws criminalising consensual same-sex activities between adults are violations of the right to privacy guaranteed by Article 8 of the European Convention on Human Rights.

The European Court of Human Rights held in the landmark case *Dudgeon v. The United Kingdom*(*DUDGEON v. THE UNITED KINGDOM*, 1981.) in 1981 that the law criminalising consensual homosexual acts and subjecting such consenting homosexuals to investigation is a violation of Article 8 of the ECHR, and that such restrictions cannot be justified on moral grounds or for the protection of other rights and freedoms. In the issue at hand, the applicant, who is a member of a sexual minority, claimed that he had been investigated for certain same-sex behaviours and behaviour, and that he was constantly afraid of being harassed or blackmailed as a result. The applicant also claimed that such interference with his right to privacy had caused him psychological distress. As a result, the European Court of Human Rights determined that Article 8 of the ECHR(- Cedh,) had been violated.

The European Court of Human Rights stated in *Norris v. Ireland* (*Norris v. Ireland* (*Application No. 10581/83*) 1988) (1988) that criminalising voluntary homosexual actions between adults cannot be justified on the grounds of producing shock or upsetting the broader public, for whom such consensual same-sex acts are against morals. The applicant in this case argued that the then-Irish statute criminalising consenting same-sex actions constituted to an infringement on his right to respect for his private life, which includes sexuality and sexual

relations. The Court ruled that criminalising adults' consenting same-sex actions and behaviour is a breach of Article 8 of the Convention. In another key judgement, *Modinos v. Cyprus* (*Modinos v. Cyprus (Application No. 15070/89)*, 1993), the European Court of Human Rights echoed the same sentiment (1993). The Court found that the legislation criminalising consenting same-sex actions and behaviour between adults is a constant intrusion into one's private life in this case. In the case at hand, the applicant claimed that he had been subjected to mental harassment and was compelled to live in fear of being prosecuted for having a relationship with a person of the same sex because of the provisions of the law that criminalise homosexual activities. The Court ruled that any interference with the right to privacy, including sexual intercourse, is a breach of Article 8 of the ECHR.

The European Court of Human Rights is not only the first international human rights authority to find that the law criminalising consensual homosexual conduct between adults is a grave breach of human rights, but it also has a considerable and lengthy jurisprudence on the subject. Before it was disbanded in 1998, the European Commission on Human Rights

played an important role in formulating the Court's jurisprudence on instances dealing to sexual orientation issues. The Commission found that the statute requiring a greater age of consent for homosexual acts than for heterosexual actions is discriminatory and in violation of Article 14, which guarantees the right to protection against discrimination on diverse grounds. In another instance, *A.D.T v. The United Kingdom* (*A.D.T. v. United Kingdom (Application no. 35765/97)*, 2000), the applicant claimed that the government had infringed on his right to privacy. The applicant was charged with and found guilty of engaging in consensual same-sex acts with multiple homosexual adults in his own home. The Court ruled that prosecuting and convicting someone for engaging in consenting homosexual acts violates their right to privacy, and hence violates Article 8 of the ECHR. The Court noted that the in question consenting same-sex acts were private in nature, and so the law criminalising them could not be upheld.

The European Court of Human Rights was also essential in ensuring that persons were protected against arbitrary acts and humiliating treatment by state authorities. The applicants

in *Identoba and others v. Georgia (IDENTOBA AND OTHERS v. GEORGIA, 2015)* (2015) claimed that the Georgian authorities failed to protect them against discrimination-based violence. The applicants claimed that a peaceful demonstration for the protection and defence of sexual minorities' rights, organised by an NGO in Tbilisi on the International Day against Homophobia in May 2012, was agitated by other demonstrators as a counter to the applicants' peaceful demonstration. The number of counterdemonstrators outnumbered the supporters of sexual minorities' rights. The petitioners also claimed that the state authorities failed to investigate the case in order to determine the true discriminatory intent behind the attack. The Court determined that Articles 3 and 14 of the Convention were violated in this case. The Court further noted that, according to numerous reports on the LGBT population, there was pervasive homophobia in some parts of Georgia, which was also confirmed by a study by the Council of Europe's Commissioner for Human Rights. Considering the reports, the Court concluded that the violent attacks on the petitioners were motivated by discrimination. The Court also stated in its conclusions that the counterdemonstrators' violent attack and threats violated the applicants' intrinsic right to live in dignity because such conduct would have created dread, worry, and uncertainty. The Court also found that the Georgian authorities failed to protect the rights of human rights defenders since the authorities knew or should have understood the sensitivity and risks associated with such demonstrations in the prevailing homophobic environment. The Court further directs the authorities to conduct a prompt investigation into the case, as discrimination based on sexual orientation or gender identity is considered a provocation to the commission of an offence under Georgian law. The State authorities neglected to investigate the stated instance involving the violent attack on the applicants by counterdemonstrators, despite their commitment to protect individuals' rights to promote and defend human rights. In *M.C. and C.A. v. Romania (2016)*, the applicants contended that the State authorities failed to investigate violent homophobic attacks against them, resulting in a violation of their Convention rights. The petitioners claimed that they were attacked by a gang of six young men and a woman on their way home in the metro because they had participated in the annual LGBT march in Bucharest. The applicants were not only physically assaulted

during this attack, but they were also verbally harassed in public by shouting disparaging remarks. The petitioners also claimed that the state authorities failed to examine the case to determine the discriminating homophobic reason for such an attack. The Court found a serious violation of Articles 3 and 14 of the Convention in the given case because the State authorities failed to investigate the case promptly because their investigation into the applicants' complaint did not consider the discriminatory motives involved in the degrading and cruel treatment of the applicants. The Court's work in defending the human rights of LGBT prisoners is also significant. In *X. v. Turkey*, the Court stated that it is the responsibility of state authorities to safeguard sexual minorities' inmates from cruel, inhuman, or degrading treatment. In the instance at hand, a gay prisoner was confined in solitary confinement after filing a complaint against his fellow inmates' inhumane, degrading acts and bullying based on sexual orientation and gender identity. The homosexual prisoner was held in solitary confinement for almost 8 months. The Court noted that such solitary confinement had a negative impact on the prisoner's mental and physical health, as well as robbing him of his dignity, which amounted to a violation of the right to protection against torture and cruel treatment established in Article 3 of the Convention. The Court went on to say that the main reason for the homosexual prisoner's solitary confinement was not for his protection, but for his sexual orientation, which amounted to discrimination based on sexuality and thus breaches Article 14 as well.

In several judgments, the European Court of Human Rights confirmed sexual minorities' rights, particularly the right to respect for private and family life. In *E.B. v. France*, the applicant claimed that she was discriminated against during the adoption procedure because of her sexual orientation. She also claimed that she had been treated unfairly at every stage of the approval process for the adoption of a child. The Court found that denying a child's adoption based on sexual orientation is a violation of Articles 14 and 8 of the Convention, which provide for the right to protection against discrimination and the right to respect for private and family life, respectively.

The Court also noted that French law enables a single person to adopt a kid, implying that a single person can adopt a child regardless of sexual orientation, but that the refusal of the

adoption request in this case was based on sexual orientation. The European Court of Human Rights also ruled that a prohibition on military duty based on sexuality is a violation of Article 8 of the Convention, which guarantees the right to respect for private life. The applicants in *Lustig-Prean and Beckett v. the United Kingdom*, who were all British armed forces soldiers, claimed that they were discharged from the military because of their sexual orientation. The petitioners also claimed that being discharged from the military because of their sexuality was a flagrant breach of their right to privacy and family life. The Court unanimously decided that there had been a violation of Article 8 of the Convention in the issue at hand. In another case, *Salgueiro da Silva Mouta v. Portugal*, the Court ruled that denial of custody of one's child based on the father's sexual orientation is a breach of the right to respect for family and private life guaranteed by Article 8 of the European Convention on Human Rights. The Court further noted that one of the prohibited grounds of discrimination listed in Article 14 of the Convention is sexual orientation and gender identity. However, the Court's rulings do not apply to private voluntary sadomasochistic acts that can be forbidden for reasons of public health and morals. As it was decided in a case, such violent sexual actions between consenting adults in their own homes can be forbidden for public health reasons. The Court's vast jurisprudence is not restricted to sexual orientation concerns; it also has comprehensive jurisprudence on issues concerning transgendered individuals.

The case of *Rees v. the United Kingdom* (*Rees v. The United Kingdom*, 2017) is one of the first cases before the Supreme Court dealing with gender identification concerns. In the matter at hand, a female claimed to a male transgendered applicant that the United Kingdom's statute, which did not provide him legal status, infringed on his right to privacy and family life.

The Court, on the other hand, determined that there was no infringement of Article 8 of the Convention. The Court stated that the applicant's demands would need the alteration of the entire system for maintaining birth records, which would impose an additional burden on the rest of the population and would also have had significant administrative effects. The Court further stated that the State had fulfilled its obligations by referring to the fact that the applicant's medical care was paid for by the United Kingdom. Nonetheless, the Court

highlighted its concern about the specific challenges faced by transgendered people of all ages and welcomed the adoption of suitable modifications and measures in light of cultural and scientific progress to alleviate the population's misery. In the same instance, the Court found that the applicant's right to marry and have a family, as guaranteed by Article 12 of the Convention, had not been infringed upon. In view of the conventional understanding of marriage, which argues that marriage is a connection between two persons of opposite physical sex, the Court stated that the state could control the freedom to marry and find a family. The Court restated identical views in *Cossey v. the United Kingdom* (*COSSEY v. THE UNITED KINGDOM*, 1984.), stating that there was no rationale on which the Court could vary from the previously resolved case. The Court also found that there had been no infringement of Article 8 of the Convention in the situation at hand.

The Court noted out that the sex reassignment operation did not give the patient all of the biological characteristics of the other sex. In a similar vein to the earlier case, the Court stated that transformation or addition in the preservation of birth records is not a practicable answer. The Court also held that there was no violation of Article 12 of the Convention's right to marry and have a family because States have the authority to regulate marriage norms, which presupposes that the marriage is consummated between two people of opposite sex. The Court also noted that the criteria for opposite sex in marriage are based on reason. In *B. v. France*, the Court decided for the first time that transgendered individuals' recognition norms were infringing on the right to respect for private and family life guaranteed by Article 8 of the Convention. In the case at hand, a male to female transgendered applicant claimed that the French authorities infringed on her right to privacy and family life when they denied her request to change her civil status in the register. The Court further noted the distinction between this case and the previously decided decisions of *Rees v. the United Kingdom* (*Rees v. The United Kingdom*, 2017) and *Cossey v. the United Kingdom* (*COSSEY v. THE UNITED KINGDOM*, 1984). The Court noted the differences between the civil status systems of the United Kingdom and France, asserting that while there were significant obstacles to amending birth certificates in the United Kingdom, this was not the case in France, where the civil status of an individual

was intended to be updated throughout the person's lifetime. The Court also found anomalies in the applicant's legal and apparent sex status based on different official papers and pay slips. As a result, the Court found that the French authorities infringed on the applicant's right to privacy by dismissing her request to alter her civil status. Nonetheless, the Court found that the norms governing transsexual marriage and relationships do not violate the right to private and family life. The Court further maintained that only a biological male, not a female, can be acknowledged as a father of a male transgendered individual. The Christine Goodwin (*Christine Goodwin vs. The United Kingdom*, 2002.) case (2002) marked a watershed moment in the growth and preservation of transgendered people's rights. In this case, the petitioner claimed that her changed gender had gone unnoticed, and that she had been subjected to discrimination in the workplace and social security, as well as having her pension and marriage rights violated. The Court found that the right to respect for private and family life guaranteed by Article 8 of the Convention had been violated. In this decision, the Court relied on current international human rights law as well as recent advances in the legal recognition of transgendered people without regard to their gender identity. The Court further stated that the statute denying transgendered people the right to recognition following sex reassignment surgery cannot be justified on the basis of public policy or morals, and it is also a violation of the Convention's principle of fair balance. The Court also ruled that denying someone the right to marry based on their gender identification is a breach of Article 12, which guarantees everyone the right to marry and have a family without discrimination. The Court also ruled that states have an obligation to set the norms and conditions governing transgender individuals' marriages, and that there were no grounds to justify the denial of the transgender individual's right to marry under any circumstances in the case at hand. Similar opinions were reinforced by the Court in the case of *I. v. the United Kingdom*, which was resolved on the same day. The Court found that the right to respect for private and family life, as well as the right to marry, as contained in Articles 8 and 12 of the Convention, had been violated. The United Kingdom established a framework for transgendered people to petition for legal gender recognition based on the above-mentioned rulings. Other instances involving transgendered people's rights that came

before the Court involved the procedure for legal recognition of a transgendered person who was married before undergoing sex reassignment surgery.

In *Grant v. the United Kingdom* (*Grant v the United Kingdom (European Court of Human Rights) - 23 May 2006 - Sackers, 2006.*), a 68-year-old male to female transgendered applicant argued that the denial of a pension on retirement due to a lack of legal recognition of her changed gender, which was otherwise applicable to women upon reaching the age of 60 years, violated her right to respect for her private and family life as guaranteed by Article 8 of the European Convention on Human Rights. The Court decided that there had been a violation of Article 8 of the Convention in the instance at hand. The Court noted that the situation at hand was comparable to Christine Goodwin's.

The Court acknowledged that the state has an obligation to provide for the norms and other conditions linked to the legal recognition and marriage of transgendered people, and that the lack of such a procedure cannot justify the denial of the transgender community's rights. Following Christine Goodwin's decision, it was upheld that the refusal to accept the gender of transgendered people after sex reassignment surgery cannot be justified on any grounds. Prior to the passage of the Gender Recognition Act of 2004, the claimant in this instance had no chance of obtaining recognition. However, she was able to gain recognition after that, and she could only claim a breach of the right for the time she was unable to obtain recognition from the authorities. In view of the judgements ruled by the European Court of Human Rights, it can be concluded that one of the prohibitive grounds of discrimination stated in Article 14 of the Convention is sexual orientation and gender identity. However, while it is not explicitly stated in the Convention, it is widely accepted that the term "other status," which is used as one of the prohibitive grounds of discrimination, is used intentionally to allow for the inclusion of other grounds of discrimination such as sexual orientation and gender identity. Various rights of gays and transgendered people have been safeguarded by the Court, including the right to marry, the right against discrimination, the right to respect for private and family life, and so on, but these rights are not explicitly guaranteed in the Convention.

#### **5.4.5 African Charter on Human and Peoples' Rights**

The Banjul Charter is the name given to the African Charter on Human and Peoples' Rights. It is a regional international human rights instrument established to promote and preserve individuals' human rights and other inherent freedoms on the African continent. The African Commission on Human and Peoples Rights was founded in 1987 to realise the goals and objectives set forth in the Charter, which are based on the principles of international human rights law. Banjul, Gambia, is the Commission's headquarters. By a Protocol agreed in 1998, the African Court on Human and Peoples' Rights was also established. Discrimination on the basis of national or ethnic origin, language, religion, sex, birth, colour, political or other opinions, and so on is prohibited under the African Charter. The African Charter, like other international and regional conventions and charters, included "other status" among the prohibited grounds of discrimination. Sexual orientation and gender identity are not specifically mentioned as prohibited reasons in the Charter. In fact, the African Court's jurisprudence on the right to protection from discrimination based on sexual orientation and gender identity under the African Regional Mechanism is not as extensive as that of the European Human Rights Mechanism. In most African countries, homosexuality is illegal and regarded a serious crime. In fact, in some parts of the continent, sexual minorities' rights are severely limited or even non-existent. South Africa, on the other hand, is an outlier, with the Constitution prohibiting discrimination based on sexual orientation or gender identity. Nonetheless, Africa remains one of the world's most homophobic areas, with more than 35 countries criminalising consensual same-sex actions between adults. Antihomosexual legislation has lately been proposed or passed in Nigeria, Uganda, and the Gambia, adding to the continent's homophobic milieu. In Nigeria, the Same-sex Marriage (Prohibition) Act of 2013 outlaws same-sex weddings. Not only that, but the country's legal system includes discriminatory regulations that make homosexual clubs and other associated homosexual groups illegal in Nigeria. This limitation on participation in or access to numerous groups and organisations dedicated to the protection of sexual minorities' rights not only breaches the right to peaceful assembly, association, and expression, but also forces sexual minorities to live in

deplorable conditions. Similarly, Uganda's Anti-Homosexuality Act of 2014 and the Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014 demonstrate a homophobic mindset. The Penal Code of Gambia was recently revised to include "aggravated homosexuality" as a crime punishable by life imprisonment, akin to the draconian homophobic laws of Nigeria and Uganda.

#### **5.4.6 The Inter American Convention on Human Rights**

Following the adoption of the Universal Declaration of Human Rights, the process of establishing an Inter-American Regional Mechanism for Human Rights Protection began in 1959 with the preparation of an Inter-American Treaty. Following that, in 1969, the American Convention on Human Rights was established. The Pact of San José, Costa Rica, is another name for the Convention. It lists about twenty-six fundamental freedoms and rights.

The Convention states that States Parties must ensure the protection of human rights and fundamental freedoms enumerated in the Convention and inherent in all people, without discrimination based on national or ethnic origin, birth, sex, colour, language, social or economic status, political or other opinion, or any other social condition.

The Convention enumerates essential human rights such as the right to life, the right to be free from harsh, inhuman, or degrading treatment, the right to privacy, and the right to personal liberty and security. However, discrimination and violence based on sexual orientation and gender identity are not specifically prohibited under the Convention. Individuals belonging to sexual minorities have the right to enjoy human rights and basic freedoms in all aspects of their lives, without discrimination based on their sexual orientation or gender identity, according to the Inter-American Court in the Atala case. In the case at hand, the legal question was whether giving custody of children to a gay parent (Mrs. Atala) would jeopardise the children's moral values and safety. Mrs. Atala and her husband had been married for nine years when they divorced, and their three kids were to live with their mother. Mrs. Atala relocated to live with her new female companion and her kids after a year of divorce, and her husband filed a case against her in a local court. Mrs. Atala's ex-husband claimed that her homosexuality and living

with another gay partner would jeopardise the morals and security of their children living with her. From the local courts, the case made its way to the Supreme Court, where it was determined by a majority that Mrs. Atala's daughters were in danger since their home environment was different from that of their classmates, putting them in a vulnerable position . Despite this, Mrs. Atala filed a complaint with the InterAmerican Court, which unanimously found that state authorities had breached her right to equality and non-discrimination as contained in Articles 1 and 24 of the Convention.

The Court said that discrimination on the basis of sexual orientation is banned under the Inter-American Convention, the Vienna Convention, the criteria set by the European Court, and international human rights law, and homosexuals belong to a protected group under the Convention. As a result, it is a well-established human rights concept that any legislation or conduct that discriminates against homosexuals is banned, and that no law or act of the state authority can violate or discriminate against anybody based on their sexual orientation. It was also noted that state authorities have a responsibility to protect citizens from discrimination and violence based on sexual orientation.

#### Asian Legal Framework for the Protection of Homosexual And Transgendered Individuals

When it comes to the acknowledgment and protection of gay rights, Asian countries lag well behind many other regions of the world. In nearly every Asian country, the major issue is the protection of homosexuals in the existing legal and social context from stigma, discrimination, physical and mental abuse, and other types of violence. Many Asian countries, including Iran, Kuwait, Qatar, Saudi Arabia, the United Arab Emirates, Yemen, Afghanistan, Bhutan, Bangladesh, India, the Maldives, Pakistan, and Sri Lanka, now punish same-sex partnerships. Not only that, but in certain cultures, gays are viewed as morally reprehensible or as persons suffering from mental or physical illness. Homophobic attitudes, combined with a lack of adequate legal protection against discrimination based on sexual orientation, expose almost all homosexual people of all ages to grave human rights violations such as murder, rape, verbal or physical assault, arbitrary detention, denial of the right to assemble, speak, and express oneself,

and discrimination in the fields of education, health, and employment. Moreover, the current international and domestic human rights frameworks do not protect people against discrimination and violence based on their sexual orientation, whether actual or imagined. In the lack of an effective Asia-wide regional framework or treaty to promote or safeguard human rights, homosexuals are denied even more basic rights, such as the ability to live in dignity. It is important to investigate the origins and effects of discrimination and violence based on real or perceived sexual orientation in the legal and social environments of Asian nations.

## **5.5 Sexual Orientation Issues in Asia**

In comparison to other regions of the world, sexual minorities' rights in Asia are limited. Homosexuality and bisexuality are considered undesirable sexual behaviours in most Asian nations, according to cultural norms. Because most bisexuals are not visible as bisexuals, bisexuality does not draw prejudice in the same way that homosexuality does. In many Asian civilizations, however, homosexuality is still seen as a "abnormal" behaviour. Homosexuality is still classified as a mental disease or anomaly in many regions of the continent, despite scientific and other medical advances. Protection against discrimination and violence based on real or perceived sexual orientation is the continent's major human rights concern. In most Asian countries, family, and reproductive rights such as the freedom to marry, the right to reproduce, and so on remain a distant objective. LGBT people in Asian nations face a variety of difficulties, including familial rejection, homelessness, social isolation, bullying, health concerns such as AIDS, drug misuse, mental illnesses, and hate crimes, as well as hate crimes and judicial injustice. Same-sex intercourse is punishable by death in certain Asian nations, especially. These difficulties, along with the lack of strict legislation protecting homosexuals from discrimination and violence, make it difficult for them to live in many regions of Africa. As a result, a comprehensive examination of Asian legislation governing same-sex intercourse and related issues is urgently required.

### **5.5.1 In Asia, there is a law governing same-sex sexual activities.**

In most regions of Asia, consensual same-sex sexual activities between adults are illegal. Furthermore, in certain nations on the continent, such as Iran, Afghanistan, and Brunei, it is considered a criminal offence that carries the death sentence. However, while the Afghan penal code does not expressly outlaw consensual same-sex sexual conduct, the Afghan Constitution allows for resort to Sharia law in some circumstances, which deems same-sex sexual activity to be against morals and hence punishable by death. Iran's penal code further stipulates that same-sex sexual conduct is punishable by death. Hadd penalty for sodomy is prescribed under Articles 108-113 of the Islamic Penal Code of the Islamic Republic of Iran. Sodomy is described as sexual intercourse between male persons, whether it takes the form of penetration or stroking penis between thighs, according to the specified code. It also stipulates a penalty of 74 lashes for consenting immature or juvenile males convicted of sodomy, as well as the death sentence for older men. In Bangladesh, same-sex sexual acts are likewise illegal under section 377 of the Penal Code. For the conduct of the aforementioned offence, the stated legislation specifies a punishment that may include life imprisonment, 10 years in jail, or a fine. Nonetheless, Bangladesh acknowledged “Hijras” as a ‘third sex’ for the purposes of voting, travel, identity, and other civic rights in 2013. Consensual homosexual behaviour between adults is banned by law in Bhutan, and it is also considered immoral and against nature's order. Brunei takes a step back to the mediaeval method of punishment by prescribing the death sentence by stoning for gay activities in a time when people are increasingly concerned about Human Rights. Prior to the introduction of the Syariah Penal Code, the existing Penal Code specified a sentence of ten years in jail for the commission of homosexual activities. The current law poses a major danger to LGBT people's rights and mainstreaming. Similarly, section 377 of the Indian Penal Code deems same-sex sexual acts to be against the natural order. In India, the ancient harsh legislation enacted during the colonial period is still in effect. (In the following chapter, we'll look at the Indian legal framework's sexual orientation and gender identity concerns.)

The Indonesian Penal Code, on the other hand, does not include a sodomy legislation, which means that same-sex sexual encounters between consenting adults are not illegal. The country,

on the other hand, fails to safeguard gays and transgendered people from prejudice and hate crimes. Two guys were recently caned 83 times in Aceh as a punishment for consenting same-sex sexual activity. The sentencing of the accused was seen by a large number of people. Not only that, but Indonesian police recently imprisoned dozens of men, including some foreigners, in a raid on a gay sauna, signalling a growing anti-homosexual sentiment in the world's most populous Muslim country. Although same-sex sexual behaviour is not officially outlawed by law in Iraq, the nation remains dangerous for members of sexual minorities. According to a Human Rights Watch study, Iraqi militia members started a massive campaign targeting a sexual minority in 2009 to punish them for transgressing moral standards and religious norms, since they are deemed sinners. It was also discovered that people belonging to sexual minorities were executed, abducted, and tortured as part of the so-called search for homosexual males or those who do not adhere to the concept of masculinity. Furthermore, the Iraqi government has taken no action to prevent such horrific human rights violations. According to reports, the killings began in Baghdad, which is a bastion of the Mahdi Army, and afterwards extrajudicial executions were carried out by other militia members in different Iraqi towns. Karar Noshi, an Iraqi actor, was also slain lately because of his alleged sexual orientation. He had been receiving death threats because of his look, which was thought to be violating masculine standards. Even though Iraq's legal framework contains no reference to same-sex sexual behaviour and does not prohibit homosexuality, Sharia judges, who are non-state actors, have been known to order the deaths of men and women for engaging in consensual same-sex sexual behaviour and activities.

Consensual sexual intercourse between males is likewise illegal in Kuwait, and gays in Lebanon have a similar situation. In comparison to other Arab nations such as Saudi Arabia and the United Arab Emirates, Lebanon is more accepting of homosexuality. Saudi Arabia has no written penal code, although the country's criminal legislation is based on stringent Islamic Sharia law. Sura 7:80/81 classifies homosexual conduct as a misdemeanour but makes no provision for punishment. Furthermore, while same-sex actions and behaviour are not specified in Sharia law as a crime punishable by death, such as murder, adultery, or apostasy, they are

punished by death in Saudi Arabia. Three gay males were killed by beheading in the nation in 2002. In another example, a guy was sentenced to three years in prison and 450 lashes in Saudi Arabia in 2014 for meeting men on Twitter. Not only that, but Saudi Arabia also vetoed a UN Human Rights Council resolution condemning the use of torture by law enforcement and reaffirming LGBT people's human rights. The situation in the United Arab Emirates and Yemen is similar. All sexual activities outside of heterosexual marriage are prohibited in the United Arab Emirates. Although the Federal Penal Code of 1987 does not specifically address homosexuality, same-sex sexual behaviour in the nation is punished by death(*UN Human Rights Office*,.).

According to Sharia law, homosexual activities are likewise prohibited in Yemen. The punishment for same-sex behaviour is outlined in Article 264 of the 1994 Penal Code(FEDERAL LAW NO (3) OF 1987 ON ISSUANCE OF THE PENAL CODE, 1987.). It claims that homosexual activities performed by unmarried males are punished by 100 whippings or a year in prison, whereas homosexual acts committed by married men are punishable by death by stoning. Homosexuality between women is defined in Article 268 of the 1994 Penal Code as sexual initiatives for the protection of the rights of sexual minorities in Asia are Japan, Israel, Taiwan, and Nepal. Furthermore, Taiwanese justices recently decided in favour of gay marriage, marking a key step toward Taiwan being Asia's first country to allow homosexual marriage(*Taiwan's Top Court Rules in Favour of Same-Sex Marriage - BBC News*, 2017).

In Eastern Asia, the legal position of sexual minorities is considerably better than in Southern Asia, where gay and transgendered people are easy targets for hate and violent crimes. Such human rights breaches and discriminatory acts are not only degrading, but they also have a negative impact on the mental and physical health of the victims, who often hide their sexual orientation and gender identity for fear of harassment. The criminalization of consenting same-sex sexual acts between adults violates not just the right to privacy and family life, but it also exacerbates people's bigoted attitudes against members of sexual minorities. In Hong Kong, Israel, Japan, Nepal, the Philippines, Taiwan, Thailand, Vietnam, and Cyprus, however, this

may not be the case. These Asian countries are regarded to be the most welcoming to sexual minorities. Countries that have acknowledged and profited from rubbing. According to the Code, the perpetrator of a deliberate or voluntary same-sex sexual activity is sentenced to three years in jail, while the perpetrator of same-sex sexual activities committed under duress is sentenced to seven years in prison.

### **5.5.2 Asian nations justify the criminalization of same-sex sexual conduct on the following grounds:**

i. As part of their HIV prevention approach, several states advocate the criminalization of same-sex sexual conduct. Experts all around the world, however, have consistently rejected this logic. The UN Human Rights Committee held in *Toonen v. Australia (1994)*(*Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).*) that criminalising consensual same-sex sexual activity cannot be justified on the grounds of public health because no link was established between continued criminalization of consensual homosexual acts and effective control of the HIV/AIDS virus spread. It was also discovered that, as a result of the prohibition of consensual homosexual actions between adults, many gay people conceal their sexual orientation and avoid participating in public health programmes.

ii. Laws based on religion, such as Sharia law or Bible-based legislation, which condemn homosexuality, provide grounds for certain states to outlaw same-sex sexual conduct. In reality, the Penal Code of 1860, which is one of the most important aspects of British heritage, is used to punish homosexuality in most former European colonies in Asia. However, other historians claim that the terms "homosexual" and "homosexuality" were not used throughout the Bible's time period. They further claim that allusions to same-gender sexual behaviour in the Bible are linked to violence, idolatry, and exploitation associated with the behaviour, implying that God condemns violence and exploitation based on same-gender behaviour. In most Asian countries, there is still a taboo around sexual minorities(*What Does the Bible Say About Homosexuality? - Human Rights Campaign, 2018.*). Although the continent's widespread misconceptions about sexuality and transgenderism are slowly dissipating, it is worth noting that many Asian

countries are currently considering the issue of sexual minorities' protection from discrimination and the decriminalisation of homosexuality and same-sex marriage, but not the social inclusion of homosexual and transgendered people.

## **Chapter-6**

### **Analysis and evaluation of data**

#### **6.0. Introduction**

In the words of Mark Abrahamson(*The SAGE Handbook of Social Research Methods*, 2008)(*People - Emeritus Faculty | Department of Sociology | University of Washington*), analysis and evaluation of data occurs after the pertinent data have been gathered by the investigator. The main function of data analysis is to build an intellectual edifice in which properly sorted and sifted facts and figures are placed in their appropriate settings and consistent relationship, so that general inferences can be drawn from them.(Young & Schmid, 1939.) The analysis of data is to be made with reference to and keeping steadily in mind the purpose of the study. Later the tabulation of data was done in a compact form to explain involved relations. The data was presented in statistical form and was analysed, interpreted and inferences about casual relations among variables were studied. Interview schedules were administered to 1000 respondents based on their responses; an attempt has been made to know about the socio-economic profile of respondents.

**6.1 Research Methodology-** To gather information, “**Purposive- sampling**” method is used. Purposive sampling method is also known as judgment, selective or subjective sampling. In this method of sampling, the researcher relies on his or her own judgment while determining the members of population to participate in the survey.

Purposive sampling is a non-probability sampling method and it is used when “elements selected for the sample are chosen by the judgment of the researcher. Researchers often believe that they can obtain a representative sample by using a sound judgment, which will result in saving time and money.

##### **6.1.1 Justification for using Purposive method of Sampling.**

The subject matter under examination pertains to the analysis of the viability, potential, and obstacles surrounding the institution of same-sex marriages within the context of India. However, it is widely perceived by most Indians that these relationships are socially

unacceptable. Determining an individual's sexual orientation solely based on physical appearance, except for transgender individuals, poses significant challenges. As a result of the persisting social stigma surrounding these types of relationships, individuals continue to feel hesitant about openly revealing their sexual orientation. Individuals may experience offense if they are presented with inquiries pertaining to same-sex relationships. To mitigate potentially uncomfortable circumstances, the researcher has undertaken an online survey. The populations under study were specifically focused on the cities of Delhi and Dehradun. Many of the responses have been collected from the cities of Delhi and Dehradun exclusively. While acknowledging the potential inclusion of respondents from different regions due to the online nature of the study, the researcher aimed to encompass diverse segments of society, including students, academicians, professionals, government employees, and housewives. This sampling approach was chosen to ensure comprehensive coverage.

## **6.2 ANALYSIS AND INTERPRETATION OF DATA**

### **Universe- City of Dehradun and Delhi**

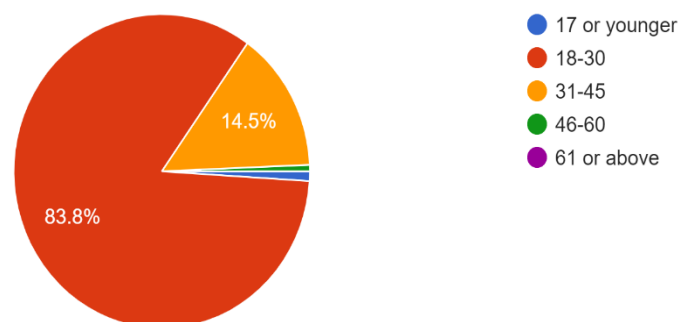
#### **Responses gathered- 1000.**

### **ANALYSIS OF SOCIO ECONOMIC STATUS OF RESPONDENTS**

#### **6.2.1 Classification of respondents based on Age.**

Question 1- Which category below includes your age?

**Figure no. 1**

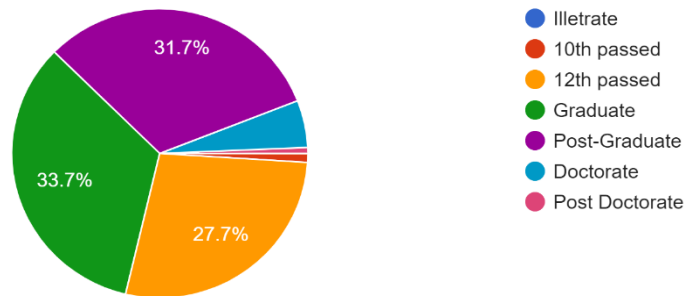


The data presented in Figure no.1 pertains to the age distribution of the respondents. The data indicates that a significant majority of respondents, specifically 83.8%, belong to the age range of 18 to 30 years. In contrast, a notable proportion of 14.5% of participants fall within the age range of 31 to 45 years. A minuscule proportion of participants belong to age groups other than the one under consideration.

### **6.2.2 Classification of respondents based of Educational Qualification**

Question 2- What is your highest level of Education?

**Figure no. 2**

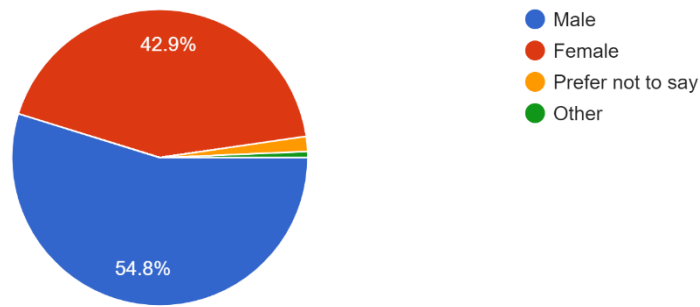


The data presented in Figure no. 2 pertains to the educational qualifications of the respondents. Among the 1000 responses obtained, approximately 33.7% of the participants identified themselves as graduates, approximately 31.7% as post-graduates, and 27.7% as individuals who had completed 12th grade or were undergraduate students. Approximately 5.3% of the participants possessed a Doctoral degree.

### **6.2.3 Classification of respondents based of sex.**

Question 3- How do you classify yourself as?

**Figure no. 3**

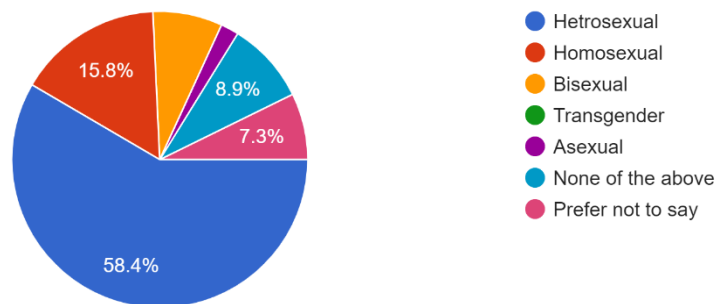


According to the data presented in Figure no. 3, it can be observed that 54.8% of the respondents were identified as males, while 42.9% were identified as females. 2.3% of the participants opted not to disclose their gender.

#### **6.2.4 Classification of respondents based on sexual orientation.**

Question 4- Do you consider yourself to be heterosexual, homosexual, bisexual or something else?

**figure no. 4**

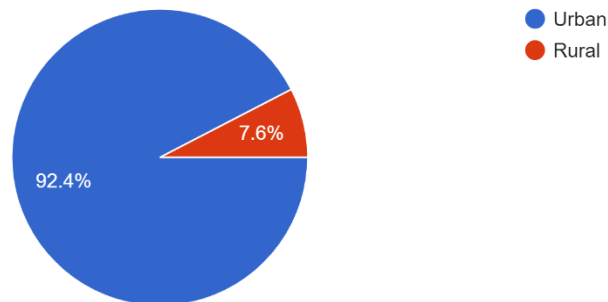


According to the data presented in Figure no.4, it is evident that 58.4% of the respondents identified as heterosexual, while 15.8% identified as homosexual. Approximately 7.6% of the participants identified themselves as "bisexual." Conversely, a proportion of 8.9% of the participants expressed difficulty in aligning themselves with any specific category. A total of 7.3% of the participants chose the option "prefer not to disclose" when responding to the survey.

### **6.2.5 Classification of respondents based on Area of residence.**

Question 5- Area of residence

**(Figure no. 5)**

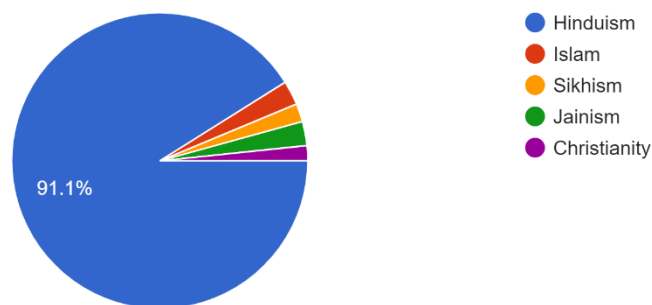


The data presented in Figure no. 5 indicates the distribution of respondents based on their area of residence. Among the one thousand respondents, it was observed that a significant majority, specifically 92.4%, resided in urban areas, while the remaining 7.6% were from rural areas.

### **6.2.6 Classification of respondents based on religion.**

Question 6- Religion?

**Figure no. 6**



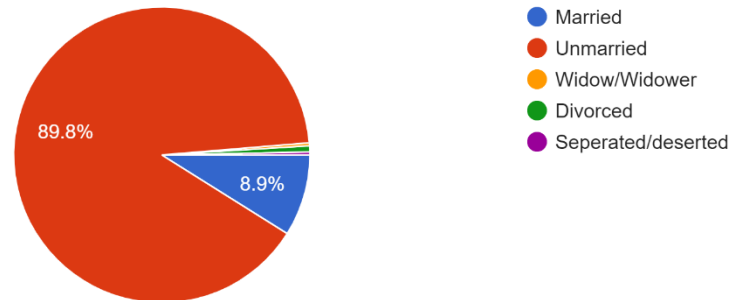
According to Figure no.6, the data reveals the distribution of respondents based on their religious affiliation. It indicates that 91.1% of the respondents identified as Hindus, approximately 2.6% identified as Muslims, and 1.7% identified as Christians. Consequently, many of the participants, specifically 95.7 percent, identified themselves as Hindus. It is

important to note that within the legal context, the term Hindu encompasses individuals who adhere to Sikhism (2%) and Jainism (2.6%) as well.

### **6.2.7 Classification of respondents based on marital status.**

Question 7- Marital status?

**Figure no. 7**

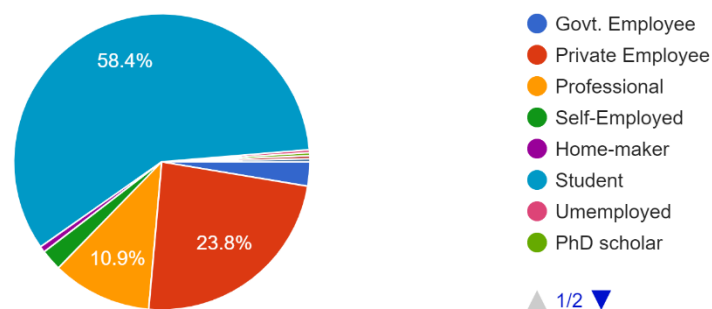


The collected data (Figure no. 7) indicates that among the one thousand respondents, 8.9 percent were married, 89.8 percent were unmarried (constituting the majority), and 1.3 percent were categorized as widows, widowers, divorced, or living separately from their spouses.

### **6.2.8 Classification of respondents based on occupation.**

Question 8- What is your occupation?

**Figure no. 8**



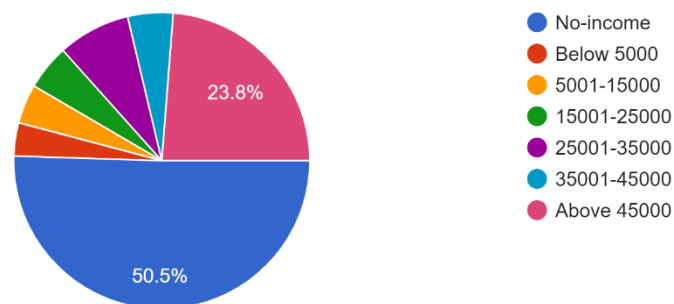
The data presented in Figure no. 8 indicates that individuals from various categories of respondents, including government employees, private employees, professionals, self-employed individuals, housewives, students, advocates, and retired personnel, participated in

the survey. The study found that a significant proportion of the participants, specifically 58.4%, identified themselves as students. In contrast, 23.8% and 10.9% of the respondents fell into the categories of Private employees and Professionals, respectively. Among the respondents, a minority comprising 6.9% identified themselves as self-employed, individuals holding a PhD, scholars, unemployed individuals, or homemakers.

### **6.2.9 Classification of respondents based on Monthly earning.**

Question 9- What is your monthly income?

**Figure no. 9**



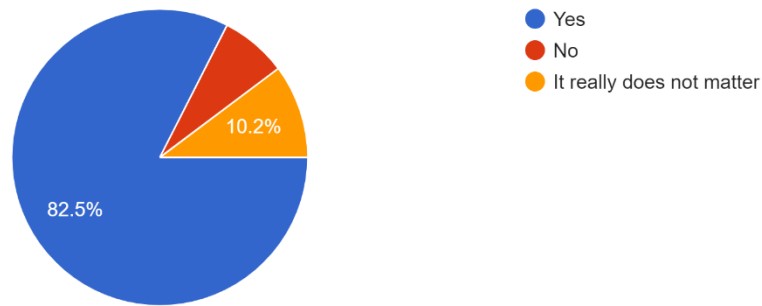
The collected data, specifically Figure no. 9, reveals that 50.5 percent of the respondents reported no income. Additionally, 4.3 percent of the respondents had a monthly income ranging from 5001 to 15,000 rupees, while 5 percent fell within the income bracket of 15,001 to 25,000 rupees. Furthermore, 7.9 percent of the respondents reported a monthly income between 25,001 and 35,000 rupees. A smaller proportion, 3.5 percent, had a monthly income below 5000 rupees. Conversely, 5 percent of the respondents reported a monthly income between 35,001 and 45,000 rupees. Lastly, 23.8 percent of the respondents belonged to the income group of 45,001 rupees and above.

Following an examination of the socio-economic status of the participants, we shall now proceed to analyse the responses provided by the respondents in relation to the query posed by the interviewer during the implementation of the survey.

### **6.3 ANALYSIS OF ANSWERS OF THE RESPONDENTS**

Question 1- Do you favour special laws and privileges on same-sex marriages in India?

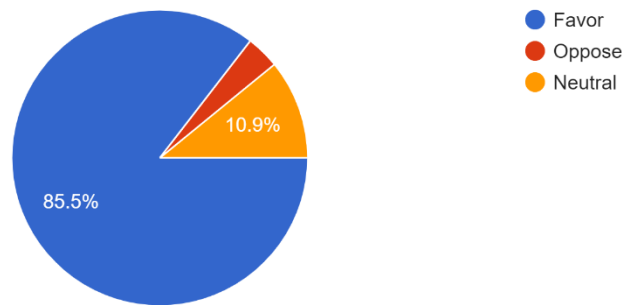
**Figure no. 10**



The collected data from Figure no. 10 indicates that among one thousand respondents, most 82.5 percent expressed support for the implementation of special laws and privileges pertaining to same-sex marriages in India. Conversely, 7.3 percent of respondents opposed the notion of enacting specific legislation for the marriage rights of LGBT individuals. The remaining 10.2 percent of respondents expressed indifference towards this matter. For the individuals in question, this matter does not elicit significant concern. In conclusion, it can be inferred by researchers that approximately 92% of the respondent's expressed acceptance towards the concept of "same sex" marriages.

**Question 2- Do you favour or oppose allowing gay or lesbian couples to adopt a child?**

**Figure no. 11**

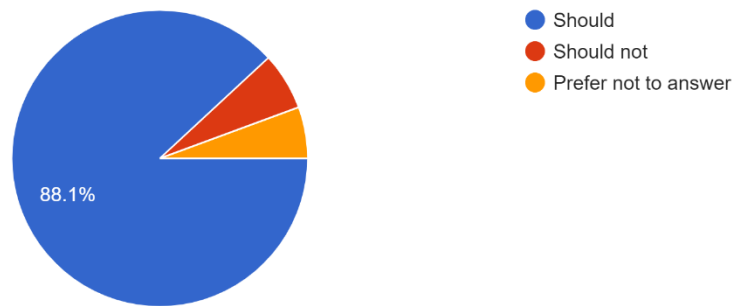


The collected data (Figure no. 11) indicates that among a sample of one thousand participants, most 85.5 percent expressed support for the proposition of permitting LGBT couples to adopt children. Frequently, individuals who are against same-sex marriages often present the argument that such unions could potentially result in child sexual exploitation. Additionally, it is worth noting that 10.9 percent of respondents expressed neutrality towards this issue. A

minuscule proportion of participants, specifically 3.6% of the respondents, expressed the viewpoint that the ability to adopt a child should not be granted to couples of the same sex.

**Question 3- Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?**

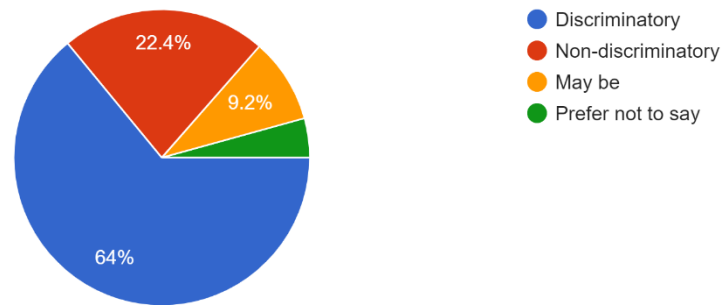
**Figure no. 12**



The data presented in Figure 12 indicates that among a sample of one thousand participants, a significant majority of 88.1 percent expressed the belief that same-sex marriages should be granted equal rights to those of traditional marriages. These rights include mutual inheritance, the right to companionship, and the right to cohabitation, among others. In contrast, a minority of 6.3% of the participants expressed their opposition towards the notion of granting equal rights to couples of the same sex. Regarding the remaining respondents, specifically 5.6% of the total sample, it was observed that they chose to abstain from expressing their opinions on the matter at hand. Consequently, the interviewer holds the perspective that if individuals were adequately informed about this matter, they might also exhibit a favourable disposition towards legislation in Favor of same-sex marriages.

**Question 4- Isn't it discriminatory for it to be illegal for two men or two women to marry?**

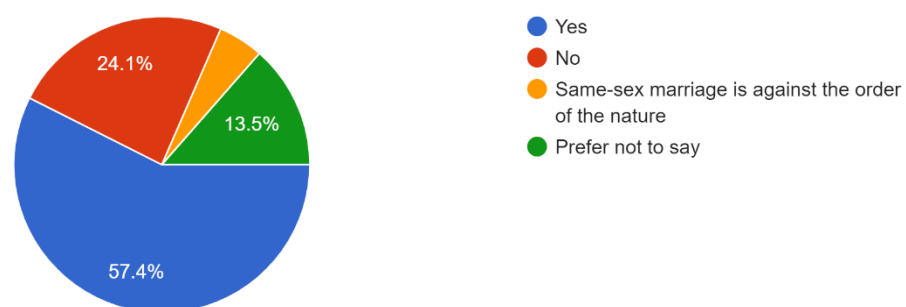
**Figure no. 13**



The collected data from Figure no. 13 indicates that among one thousand respondents, a majority of 64% expressed the belief that the prohibition of same-sex marriage constitutes a form of discrimination. The right to privacy has been firmly established as a fundamental right by the Apex Court in the prominent case of Justice K.S. Puttaswamy v. Union of India (CIVIL) NO. 231 OF 2016 CONTEMPT PETITION (CIVIL) NO. 444 OF 2016 IN WRIT PETITION (CIVIL) NO. 2017). The case also highlighted the assertion that sexual orientation constitutes an aspect of the right to privacy as stipulated in Article 21 of the Indian Constitution. In contrast, a notable proportion of the participants, specifically 22.4%, expressed strong opposition towards the concept of same-sex marriages. A total of 9.2% of the participants indicated "Maybe" as their chosen response. A minuscule proportion of participants refrained from expressing their viewpoint on this matter.

**Question 5- Doesn't all opposition to same-sex marriages boil down to homophobia?**

**Figure no. 14**

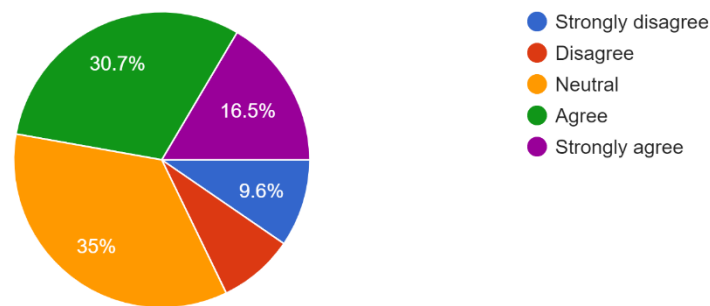


The data presented in Figure no. 14 indicates that among a sample of one thousand participants, most 57.4 percent expressed the belief that most people in India are opposed to same-sex marriages. This suggests that such relationships are still widely stigmatized in Indian society,

likely due to the presence of homophobia, which can be defined as the fear or prejudice against homosexuality (as per the definition provided by Merriam-Webster). A total of 5% of participants conveyed their perspective that they disapprove of such relationships due to their perceived violation of the natural order, namely, their unnatural nature. A total of 24.1% of the participants conveyed their viewpoint that the opposition to the concept of same-sex marriage cannot be attributed to homophobia. A total of 13.5% of the participants refrained from providing their viewpoint on the matter.

**Question 6- Couldn't same-sex marriage lead to strengthening of marriage as an Institution?**

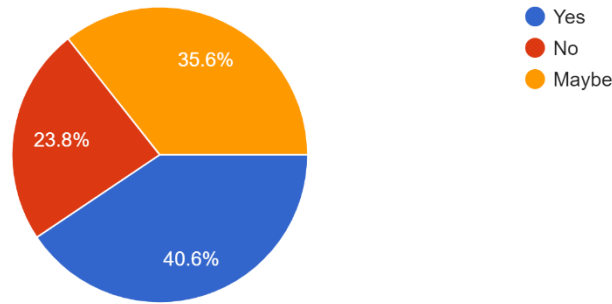
**Figure no. 15**



The data presented in Figure no. 15 indicates that among a sample size of one thousand participants, the majority, comprising 35 percent, expressed a neutral stance towards the question at hand. The individuals in question did not provide any subjective viewpoint regarding this matter. In contrast, a notable proportion of participants, specifically 30.7%, expressed the belief that such relationships possess the potential to evolve into a harmonious marital union, thereby fostering a robust bond between partners. A total of 16.5% of the participants expressed a strong conviction that this measure would enhance the institution of marriage. A minority of respondents, specifically 9.6% and 8.2%, held a contrary perspective, asserting that these changes would have a detrimental impact on the institution of marriage.

**Question 7- If we oppose same-sex marriages, should we support civil partnerships(*Civil Unions vs. Marriage - FindLaw, 2023*)?**

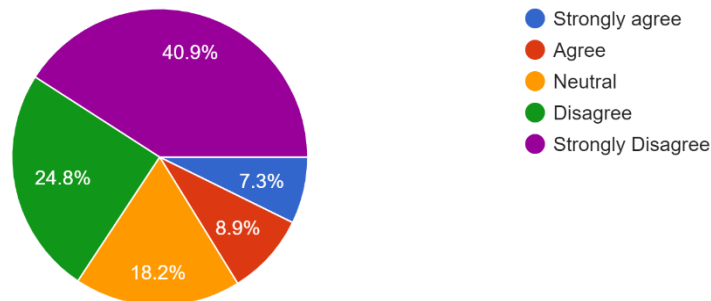
**Figure no. 16**



The collected data (Figure no. 16) indicates that among a sample of one thousand respondents, 40.6 percent expressed support for civil partnerships as an alternative to same-sex marriages in India. Additionally, 35.6 percent of respondents responded with "Maybe," suggesting that if provided with further information, they may potentially support the concept of civil partnerships. Of the remaining respondents, 23.8% expressed a negative response, indicating their opposition to the concept of civil partnerships.

**Question 8- Allowing same-sex couple to marry would undermine the traditional family value system?**

**Figure no. 17**

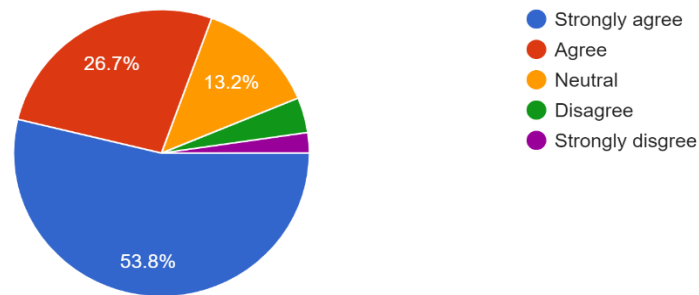


The collected data (Figure no. 17) indicates that among a sample of one thousand respondents, 40.9 percent expressed a negative viewpoint (Strongly disagree). This implies that, from their perspective, same-sex marriages would not have a detrimental impact on traditional family values. A proportion of 24.8% of the participants also conveyed a negative viewpoint, albeit to a lesser extent compared to the 40.9% of the participants. However, in accordance with their perspective, it is argued that this would not have any impact on the fundamental structure of traditional family values. A respective 7.2% and 8.9% of participants held the belief that these

relationships would have a detrimental impact on the family structure, leading them to express opposition towards same-sex marriages. A total of 18.2% of the participants maintained a neutral stance, indicating that they did not express any opinions in favor or against the subject matter.

**Question 9- Same-sex couples can be as good parents as heterosexual couples?**

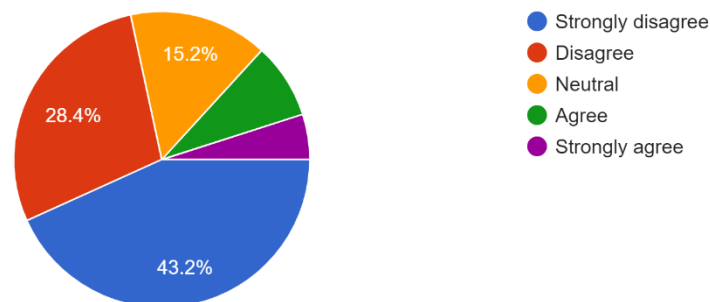
**Figure no. 18**



The collected data (Figure no. 18) indicates that among a sample of one thousand participants, 53.8% expressed a strong belief in the capability of same-sex couples to be good parents, comparable to heterosexual couples. A notable proportion of the participants, specifically 26.7%, exhibited support for same-sex relationships and expressed the belief that individuals in such relationships have the potential to be competent parents if given the opportunity. A total of 13.2% of the participants expressed a neutral stance towards the given inquiry. A minuscule proportion of participants expressed strong opposition to the notion of same-sex couples of having a child.

**Question 10- Same-sex marriage would go against my religious belief?**

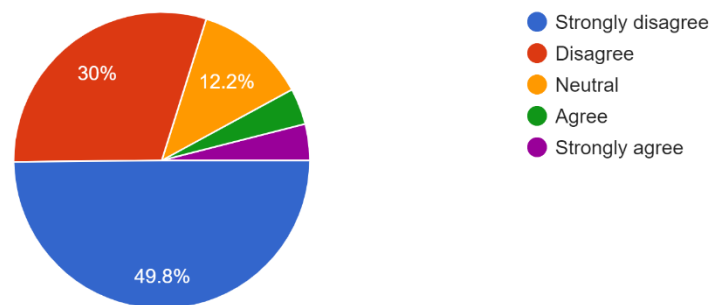
**(Figure no. 19)**



The data presented in Figure no. 19 indicates that among a sample of one thousand participants, 43.2% and 28.4% respectively expressed strong disagreement or disagreement with the question, asserting that the concept of same-sex marriage does not contradict their religious beliefs. In contrast, a notable proportion of 15.2% of participants expressed a neutral stance towards the inquiry. 13.2 % of the participants conveyed their perspective that the concept of same-sex marriage is contrary to their religious convictions.

**Question 11-Marriage is a sacred institution and hence should be permissible between male and female?**

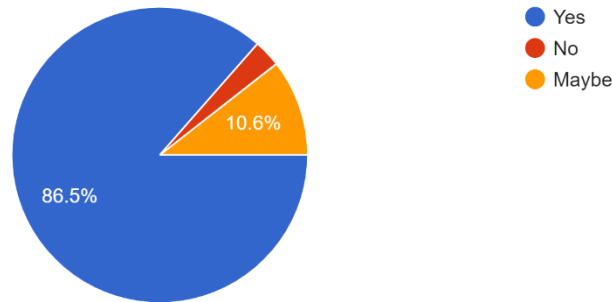
**Figure no. 20**



The data presented in Figure no. 20 indicates that among a sample of one thousand participants, most respondents, specifically over 79% (comprising 49.8% and 30% of the total respondents), expressed the belief that the institution of marriage should not be restricted solely to heterosexual couples. The granting of marriage rights should extend to same-sex couples as well. They expressed their endorsement for the concept of "same-sex marriages" within the Indian context. A total of 12.2% of the participants expressed a neutral stance towards the concept of same-sex marriage. A minority of 8% of respondents expressed dissatisfaction with the concept of "same sex" marriages.

**Question 12- Would you accept a family member if they are from LGBT community?**

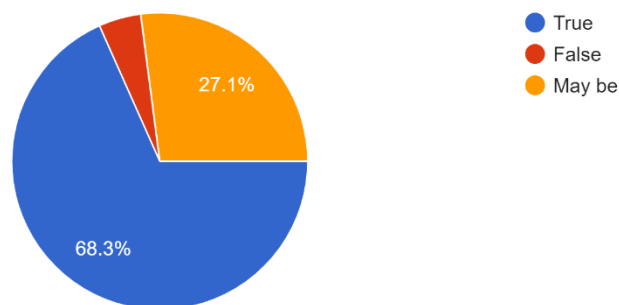
**Figure no. 21**



The data presented in Figure no. 21 indicates that among a sample size of one thousand participants, a significant majority of respondents, specifically 86.5%, exhibited a favorable attitude of acceptance towards the LGBT community. The individuals were willing to extend their acceptance to include family members if they belonged to the same community. Among the participants surveyed, a proportion of 10.6% indicated uncertainty regarding their willingness to accept a family member under consideration. A mere 2.9% of participants exhibited signs of intolerance towards their family members upon discovering their affiliation with the LGBT community.

**Question 13- While most Indians still view LGBT rights negatively, the needle seems to be moving towards a higher level of acceptance and tolerance.**

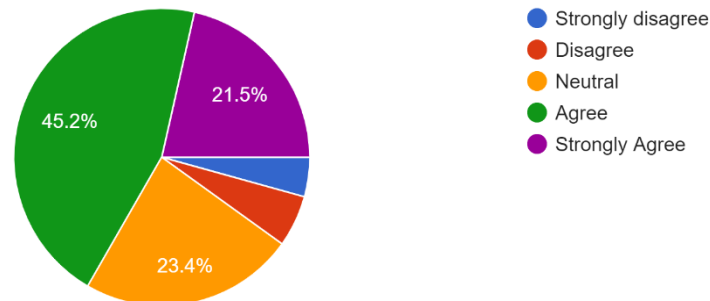
**Figure no.22**



The collected data (Figure no. 22) indicates that among a sample of one thousand participants, a significant majority (68.3%) expressed the belief that India is exhibiting increased tolerance towards LGBT rights. Conversely, 27.1% of respondents expressed uncertainty regarding this matter. A minuscule proportion of the participants expressed disbelief, suggesting that they perceived this phenomenon as an unfamiliar cultural practice.

**Question 14- Those who oppose same-sex marriage frequently cite societal opinion and underlying values as the basis for their views.**

**Figure no. 23**



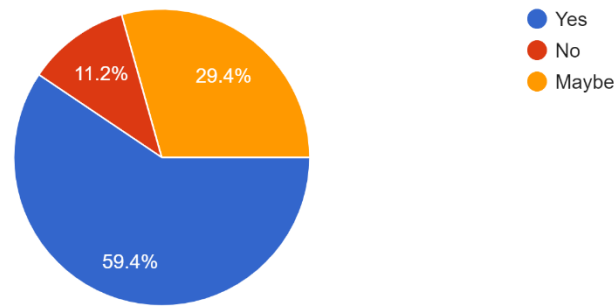
The data presented in Figure no. 23 indicates that among a sample of one thousand participants, a significant proportion (45.2% + 21.5%) expressed the belief that opposition to same-sex marriage stems from societal influences. This perspective is rooted in the longstanding societal perception of marriage as exclusively between individuals of opposite genders. According to their perspective, same-sex relationships are perceived as a cultural phenomenon primarily observed in Western societies, potentially posing a threat to the traditional concept of family. A total of 23.4% of the participants expressed a neutral stance in response to this inquiry. A minuscule proportion of participants expressed dissent and asserted the absence of any societal pressure in this regard.

**Hypothesis**

**Giving legal status to marriages among LGBT community may result into removal of mental agony suffered by this community and it may promote sense of security among them.**

**Question no. 15- Do you think that granting equal marital rights to homosexual couples will change the discriminatory attitude of the society towards the LGBTQ+ community?**

**Figure no. 24**



The collected data (Figure no. 24) indicates that among a sample of one thousand participants, a significant majority of respondents (59.4%) expressed the belief that the legalization of same-sex marriage would lead to a transformation in societal discrimination against the LGBTQ+ community. Therefore, the hypothesis, as formulated, has been substantiated by this response. Approximately 29.4% of the participants expressed uncertainty regarding this shift in attitude. However, over time, even these individuals harbor a slight inclination that this change may indeed influence people's attitudes and alleviate the stigma associated with such relationships. A total of 11.2% of individuals expressed a strong conviction that no change would occur.

## **Chapter 7**

### **Same Sex Marriages: Possibilities and Challenges (The Way Forward)**

#### **7.0. INTRODUCTION**

The fight against the old draconian law of section 377 IPC, which prohibits carnal intercourse between same-sex couples and is a violation of their fundamental rights, is still going on, as the supreme court declared it unconstitutional in *Navtej Singh Johar v Union of India* (*Navtej Singh Johar vs Union Of India Ministry Of Law And ... on 6 September, 2018*), but did not consider or pay attention to the civil rights of same-sex couples who want to start a family by adopting children. As CJI Dipak Mishra stated in the Navtej judgement, same-sex couples are couples who are attracted to the same sex, such as lesbians (women and men) and gays (men and men), and it can take many forms, from romantic to homosocial-close relationships. As CJI Dipak Mishra stated in the Navtej judgement, it's not about only sexuality as society believes. We currently have some rules on adoption as well, although not for all classes, such as same-sex couples or unmarried couples. This homosexual relationship is not new to our heterogeneous society the erotic temple sculptures in Tanjore, Khajuraho, and Konark exhibit gay motifs, and ancient texts such as the Kamasutra mention it, and certain mediaeval texts provide evidence that it existed prior to the pre-colonial period.

#### **7.1 Marriage as a Right**

Marriage is one of the universal social structures that human society has built to rule and regulate man's life. It is the foundation of any society. Children learn to become citizens in their families; they learn about relationships in their families; they learn what is expected of them in society, how to act, and how to be in their families (“Right to Marry under Right to Life : Panoramic View - Legal India | Legal Helpline - Law News, Articles & Legal Tips,” 2012). The conventional concept of marriage, which consists of one man and one woman in a monogamous and permanent relationship, is central to the nuclear family (*Navtej Singh Johar vs Union Of India Ministry Of Law And ... on 6 September, 2018*). To ensure a healthier society,

we must promote and safeguard marriage. Marriage is legally recognised as a valid way to unite people. Society supports the union of two souls since the major goal of marriage is to produce and raise children until they can care for themselves. All members of the family have rights, such as the right to respect private and family life, the right to marry and start a family, which are the foundations of justice, freedom, and peace. From a legal standpoint, the definition of marriage can be examined. "The state of being linked to a person of the opposite sex as husband or wife in a legal, consenting, and contractual relationship recognised and sanctioned by and dissolvable only by law," according to a legal definition. Marriage is a legally binding compact between two people that brings their property, money, and lives together. Marriage is a body for the execution of religious duties, according to Hindu law. In Hindu law, it is considered a holy union. It's also considered a flesh-to-flesh and blood-to-blood marriage. It is not a civil transaction, but a holy rite. Sec. 5 of the Hindu Marriage Act of 1955 grants the right to marry under certain conditions.

The Quran stipulates that "every person must marry" in Muslim law. Marriage, according to the Quran, is the sole method to fulfil one's desires. Marriage (nikah) is described as a contract between two people for the purpose of procreation and the legalisation of offspring. Under Article 21 of the Indian Constitution, "No person shall be deprived of his life or personal liberty unless according to procedure established by law," the right to marry is a component of the right to life. A few Indian examples may be mentioned in the context of the right to marriage. Even prior to marriage, a person suffering from venereal disease cannot be claimed to have any right to marry as long as he is not totally cured of the ailment.

Mr.'X' v. Hospital 'Z'(Mr. "X" vs Hospital "Z" on 21 September, 1998): The Court had based its decision on the facts of the case, finding that it was permissible for the hospital or the doctor in question to reveal such information to persons connected to the girl he intended to marry, and that she had a right to know about the appellant's H.I.V. positive status. If that was the case, there was no need for the Court to go further and declare in general what rights and obligations arise in such situations as the right to privacy or confidentiality, whether such persons are entitled to be married or not, whether such persons would commit a crime if they married, or

whether such rights are suspended during illness. As a result, all of the Court's observations in the aforementioned matter were superfluous, especially since the subject was not considered following notice to all parties involved. In that light, the court decided that the observations made by this Court, except to the extent of holding, as mentioned earlier, that the appellant's right to divulge his HIV positive status to his finance's relatives was not impaired in any way, were uncalled for. With these observations, we are able to dismiss these applications. The right to marry is protected by the United Nations Human Rights Charter, which falls under the heading of "right to family." This privilege is not explicitly mentioned in the Indian Constitution. However, it is interpreted that the Right to Marry is a universal right under Art 21. It is open to everyone, although it is unclear whether it includes same-sex marriage. Marriage rights are recognised internationally, although there is no specific law in India that governs marriage rights. Marriage rights are referenced in several covenants; however, they do not include marriages between people of the same gender. The right to marry is protected by the Indian constitution, however it is not a basic right.

Since ancient times, the caste system has remained an inflexible aspect of Indian culture. It is an evil that has tainted and unfairness the Hindu tradition's laws and regulations. Discrimination based on the caste system has damaged society and fostered divisions amongst members of different castes(*Law Preventing Marriage Equality in Society | ProBono India, 2020*). Marriage is regarded as a sacred institution in Indian culture. Even in today's world, there are still people who adhere to stringent caste restrictions. In Hindu society, marriages are based on caste; inter-caste marriages are considered a sin and are not permitted by the elders. There are a variety of reasons why Hindu culture is opposed to inter-caste weddings, including fear of societal standards and social status, loss of reputation, cultural differences, backward superstitions, and the torment that the family and couple must endure at the hands of society. The consequences of refusing to approve inter-caste marriages are numerous. It stifles societal growth, creates schisms among different socioeconomic groups and classes, and jeopardises national unity. In the name of honour-killings, couples in inter-caste marriages have been driven to commit suicide or slain on several occasions. Although The Supreme Court of India

considered(*Lata Singh vs State Of U.P. & Another on 7 July, 2006*) the right to marriage as a component of the right to life under Art 21 of the Indian Constitution, stating, "This is a free and democratic country, and once a person becomes a major, he or she can marry whomever he or she wishes." If the boy's or girl's parents do not approve of such an inter-caste marriage, the most they may do is cut off social relations with their child, but they cannot threaten, perpetrate, or instigate acts of violence, or harass the individual who undergoes such an inter-caste marriage." Both parents in this case were adults who were free to marry anyone they wanted.' Inter-caste marriage is not prohibited by the Hindu Marriage Act or any other law.' In reality, inter-caste marriages are in the national interest since they will abolish the caste structure. According to the National Council for Applied Economic Research (NCAER) and the University of Maryland's India Human Development Survey (IHDS), just 5% of Indians have married someone from a different caste. When married women aged 15 to 49 were asked if their marriage was inter-caste, only 5.4 percent replied yes, with the proportion slightly greater in urban India than in rural India(*Just 5% of Indian Marriages Are Inter-Caste: Survey - The Hindu*, 2014). A religion, unlike a caste, is a way of life. Religion has considerably more profound and far-reaching implications on how you live your life, think, view people, and so on than castes. As a result, the issues faced by interfaith couples are even more intricate and extensive. People marrying outside their faith face a greater societal shame than those marrying outside their caste. India's culture is conservative(*The Ascent of Conservative Civil Society in India - The Mobilization of Conservative Civil Society - Carnegie Europe - Carnegie Endowment for International Peace*, 2018). Even in modern times, when the world is shrinking, people remain hesitant to form long-term relationships with people of different castes and religions. Accepting same-sex marriages becomes more difficult in a situation where the minor matter of caste is such a taboo. Same-sex marriages are unthinkable in a society where people are killed for mixing castes or religions. As the major purpose of marriage is to ensure a healthier society, we promote and safeguard marriage. Marriage is legally recognised as a valid way to unite people. Society supports the union of two souls since the fundamental goal of marriage is to produce and raise children, as well as to care for them until they can care for

themselves. President George W. Bush “recognises the importance of marriage and has stated that he will support a constitutional amendment that protects marriage from risks posed by cultural collapse. Marriage must continue to be the social norm for family life. We cannot rejuvenate our country if more than half of our children are born into families where there is no marriage within a decade. The objective of marriage is to combine a man and a woman spiritually, emotionally, and physically in a covenantal relationship with their Creator as husband and wife. Spiritually, in the sense that completing religious responsibilities provides spiritual benefit”(Villani et al., 2019).

### **7.1.1 Global view**

"Miya biwi razi, toh kya karega Kazi?" says a common Urdu proverb. What can the judge do when the husband-and-wife consent? This relates to the fact that marriage is primarily viewed as a contract between two people around the world. Many people believe that marriage has always been governed by the state. Even in the West, the state has just recently taken control marriages. Marriages were not performed or validated by the church or the state in mediaeval Europe. Marriage was regarded as a secular arrangement, even though it was created by God. celibacy, regarded as a higher state, was the domain of the church. Priests did not execute marriages instead, they blessed them in the same way that they blessed other secular endeavours like sowing crops or opening workshops.

The priest's benediction at the church door gradually became a blessing at the altar inside the church due to pressure from powerful families in mediaeval Europe. As a result, the newlyweds took the sacrament jointly. From the thirteenth century onwards, the church began to exert greater control over people's sexual life. As a result, the priest began to perform wedding ceremonies and record them in a church register. This is when the modern tradition of registering weddings with the government began. ‘What is essentially required for marriage is a very simple type of consent,’ observed a Christian historian of marriage in 1905. When Episcopal Bishop John Shellby Spong wrote, ‘The church does not in fact, marry anyone,’ he was referring to this truth. People married one another.’ Section 60 of the Indian Christian

Act, which requires that "the age of the man intending to be married shall not be under twenty-one years, and the age of the woman intending to be married shall not be under eighteen years," reflects a similar underlying assumption in slightly less direct language.

### **7.1.2 Indian View**

In terms of marriage, Indian democracy, while like western democracy in many ways, offers an alternate and less authoritarian paradigm. A marriage is valid in Western countries only after the state issues a licence, or authorization for the marriage to take place. Religious marriages are allowed in India even if they are not registered or the parties do not get a licence. This means that any Hindu priest or scholar can marry two Hindus at a temple or at home, and any Muslim can marry anyplace. According to the Hindu Marriage Act, any Hindu marriage that is "solemnised in conformity with the traditional rites and rituals of either party thereto" is legal. Marriage in Islam is a contract, not a sacrament. The reality is that the vast majority of Indians nowadays do not have their weddings registered with the government, despite the fact that they are legally married through customary rites.

Two to twelve sorts of weddings are listed in ancient Hindu law, some of which are more socially acceptable than others but all of which are lawful. Among these sorts, the gandharva vivaha is marriage by mutual consent, which is listed further in the text. No parental approval, no rituals, and no witnesses are required for a Gandharva marriage. The marriage of Shakuntala and Dushyant is likely the most well-known example of this type. Two ancient types, family arranged marriage and gandharva marriage, have survived and are commonly accepted in India today (popularly known as Love marriage). Marriage laws in India continue to operate under the assumption that marriage is only for opposite-sex couples. Even though none of India's personal laws specifically define marriage, there is a strong heterosexist bias. 'A marriage may be solemnised between any two Hindus, if certain conditions are met,' according to the Hindu Marriage Act of 1955. Bigamy, insanity, marriage before the groom's 21st birthday and the bride's 18th birthday, and some types of biological relationships between the two are all prohibited, unless community customs allow it. The genders of the two 'Hindus' are unknown.

Gender, on the other hand, is presumed and occurs in the third age requirement. Most people nowadays presume that a bride is biologically a girl, and a groom is naturally a male.

The fundamental ritual of a Muslim marriage consists of the officiant (any Muslim Male) asking the bride and groom if they consent to the marriage; if they respond yes, the marriage is lawful.

## **7.2 RELIGIOUS STANDING OF SAME SEX MARRIAGES**

Figure no- 25- Religious standing on same-sex marriage



Family laws in India are categorized under two heads i.e., personal and secular laws:

- Secular laws are applied to all the citizens regardless of their faith, caste etc.
- Personal laws differ from religion to religion. There are primarily four personal laws governing marriages in India.
- Hindus, Sikhs, Buddhists and Jains are governed by the Hindu Marriage Act, 1955
- Muslims are governed by Muslim Personal Law.
- Christians are governed by Christian marriage Act.
- Parsis are governed by the Parsi Marriage and Divorce Act, 1936.

Figure 26- Personal Laws vis-à-vis Homosexuality

**Hinduism:** While the followers of Hinduism have different stances on homosexuality. However, there is enough literature available in Hinduism that speaks volume about same-sex relationships and as an extension to same-sex marriages. There are temples carvings in India depicting same-sex relationships. Instances can also be found in various mythological stories such as **God Ayappa** being born out of Lord Shiva and Lord Vishnu. Story of **Bhagiratha** being born from two women who had sexual intercourse under divine blessings, description of homosexual acts in Kamasutra, a transgender character '**Sikhandi**' in Mahabharata and homosexual Tantric rituals are some historical evidences of same-sex relationships. However, in certain texts homosexuality is condemned but it is mainly on the premise that humans give unnecessary importance to sex.

**Islam:** Islamic Shariah law is extracted from the Quran and Muhammad's Sunnah. It's very clear in Islam that homosexuality is a punishable sin. This view remains the same in all four primary schools of Sunni jurisprudence. Further according to Islamic principles Muhammad stated that effeminate men and masculine women deserves to be cursed and should be thrown out of houses.

**Christianity:** The only confusion regarding homosexuality in Christianity is about the question that how should homosexuals be treated. Should they be considered as criminals or should their behavior be rectified. In both cases, the position is clear that **homosexuality is condemned in Christianity**.

**Parsis:** In Zoroastrianism too, homosexuality is considered something evil and is strongly forbidden. However, there are certain followers who support LGBT+ people and consider the above interpretation as a distortion of the basic principle of "good thought, good word, good deed".

**Jainism and Buddhism:** In Jains, the stance is very clear. They discourage all kinds of sexual activities that are not done for the purpose of reproduction which means apart from homosexuality, even premarital sex, heterosexual sex or sex for fun is also not allowed.

While **Buddhists** say that till the time any sexual activity is consensual and is out of affection it is permissible. Dalai Lama also has a similar stance that homosexual sex is allowed provided nobody is harmed and it's completely consensual.

**Sikhism:** In Sikhism, since the religious texts remain silent on this aspect, they don't hold any same-sex marriages in their gurdwaras.

## Personal laws vis-à-vis Homosexuality



### 7.2.1 Hinduism

There is plenty of Hindu literature accessible that explains Hinduism's position on homosexuality and, by extension, same-sex weddings. In India, homosexuality has a long history. Sexual practises between women are depicted in ancient texts such as the Rig-Veda, which dates to roughly 1500 BC, as well as sculptures and relics, as discoveries of a feminine world where sexuality was based on pleasure and fertility. Some historical evidence of same-sex relationships includes the description of homosexual actions in the Kama Sutra, the sculptures of the temple at Khajuraho, the character of 'Sikhandi' in the Mahabharata, and evidences of sodomy in Tantric ceremonies. With the arrival of Vedic Brahmanism and, subsequently, British Colonialism, these experiences began to lose their relevance. Females who have sexual intercourse with a girl are subjected to harsh punishments in the Manu smriti,

which requires proof of such relations during the era. Both sexual systems coexisted until British Colonialism, when the destruction of representations of homosexual expression and sexual expression in general became more systematic and apparent, notwithstanding oscillations in relative repression and freedom.

### **7.2.2 Muslim**

The Qur'an and Muhammad's Sunnah are used to create Islamic Shari'ah law. Under this legislation, homosexuality is not only a sin, but also a crime against God. In the topic of homosexuality, the four mainline schools of Sunni jurisprudence now disagree on how to deal with it, although they all agree that homosexuality is punishable by death. "If you find anyone acting as Lot's people did, kill the one who does it and the one to whom it is done," Muhammad said. He even went so far as to attack homosexuality's "appearance," cursing effeminate males and manly women and telling his followers to "throw them out of your households." His succeeding predecessors inevitably accepted this anti-homosexuality ruling. Even moderate Muslims consider homosexuality to be disgusting and unacceptably immoral.

### **7.2.3 Christianity**

In the Christian world, there has been a lot of discussion about the stance of homosexuality. One line opposes the concept, while the other claims that homosexuals should be accepted to find a greater calling in God and mend their ways. After modern Western countries began to legalise homosexuality, there was a division in thought. Homosexuality, on the other hand, has generally been condemned by Christianity.

## **7.3 SAME SEX UNION AND MARRIAGE**

As Marriage and the family are frequently regarded as fundamental to society. Same-sex marriage is a unique concept, with stories of such unions abounding in places as diverse as Italy, Nigeria, and India, nonetheless, they do not have the same legal status as opposite-sex weddings. The religious connotations of the word 'marriage' further complicate matters, as many people cannot distinguish between the legal status of married people and the religious

implications of marriage as a sacrament, creating a roadblock to same-sex marriage in the form of the perceived condemnation of homosexuality found in many interpretations of the world's major religions.

Children are frequently raised with a specific social ideal of marriage and family, which includes choosing a spouse of the opposite sex, committing to a stable, monogamous relationship, and having one or more children. Marriage is also frequently viewed as a religious institution rather than strictly a civil one, with a religious ceremony frequently fulfilling both religious and legal requirements for a valid marriage (though the religious aspect of marriage may include several rituals that are unrelated to the legal aspect of marriage). As a result, traditional notions of marriage as being between one man and one woman of the same race, religion, or caste have been upheld in both legal and social attitudes for years, and the preservation of the 'sanctity of marriage' has been used to justify attitudes that were considered discriminatory by those seeking legal and social reform. Inter-racial, inter-caste, and inter-religious weddings, for example, were frequently rejected on religious grounds, and the legal protection afforded to these unions can be seen as a transition away from a solely religious understanding of marriage. While religious conservatives may favour a more limiting definition of marriage, the legal idea of marriage has evolved over time to the point where even unmarried cohabiting couples in some nations are granted some rights traditionally associated with marriage (*In a First, Gurgaon Court Recognizes Lesbian Marriage | Gurgaon News - Times of India*, 2011).

### **7.3.1 Can bride and the groom be of same sex?**

In India, 'personal laws' pertaining to each religion specify the marital regulations that apply to the members of that religion. For many of its opponents, same-sex marriages become a religious issue, not just a legal one, with the result that the transformation of a romantic relationship's 'private' nature into the 'public' status of marriage becomes the subject of debate involving concepts like religious freedom, separation of church and state, and the relationship between law and morality. The last of these principles is particularly significant in

understanding the rationale behind laws that criminalise intimate contact between two people of the same gender, which is yet another apparently "personal" act in an individual's private realm that many countries have decided to legislate(Ruth Vanita, 2000).

In most lesbian marriages reported in India during the previous two decades, one woman pretended to be the groom while the other pretended to be the bride. Several couples carried out the groom's rite by inserting 'sindoor' into the bride's hair parting. Some naturally female grooms have had or are planning to have a sex-change procedure. Others don't intend to offend, but they do have short hair and dress in shirt and trousers. When two women in India publicly claim the right to marry (as opposed to secretly marrying each other in death), their claim appears to be based on their portrayal of themselves as a couple in which one woman is the bride and the other is the groom, even though they are both females.

A popular Hindu perspective of same-sex relationships is that same-sex lovers were formerly cross-sex lovers or spouses, as asserted by various priests and teachers. In that situation, the groom, despite being a woman biologically, may be seen as a man in spirit.

It's no surprise, then, that LGBT rights activists frequently seek to overturn the criminalization of intimate contact between members of the same sex before advocating for legal recognition of same-sex partnerships. Disrupting traditional concepts of 'marriage' could lead to more activism, such as allowing partners in such relationships to adopt children with equal parental rights for each partner, thus challenging the traditional family structure. While'sodomy' laws are impractical to apply rigorously, they generate a perception of gays as a criminal class that hinders any possible development of the institutions of marriage and family to include them. In India, section 377 of the Indian Penal Code, 1860 (IPC) has served this purpose by allowing police to persecute sexual minorities, albeit real prosecutions have been rare. Not all activists, however, want to take this path. Radical strains of LGBT ideology oppose the institution of marriage, stating that same-sex couples do not need to emulate opposite-sex couples by forming families that look like heterosexual families(*Section 377 Verdict: Indian Supreme Court Decriminalises Gay Sex*, 2018).

### **7.3.2 Same-Sex Marriage Not Illegal**

Same-sex marriages are not illegal in India or the West, unlike bigamy. This is because marriage is not the same as engaging in any sexual behaviour. This distinction appears to be recognised even by the police. When two Muslim men, Harfan, 28, the groom, and Mustafa, 22, the bride, married in Garhmukteshwar, Ghaziabad in 2004, Harfan's relatives handed both men over to the police, who refused to arrest them since, while sodomy is illegal in India, same-sex marriage is not.

### **Arguments in Favour or Against Legalization of Homosexual Marriages in India**

Article 14 of India's constitution guarantees all citizens equality before the law and equal protection under the law. It could be argued that the lack of suitable measures providing for marriage between persons of the same sex places them in a position where they are not on the same footing as two people of opposing sexes, thereby violating Article 14.

The successful use of Article 14 in the Naz Foundation case, as well as Amnesty International's inclusion of sexual orientation in its notice of 'sex' for the purpose of defining discrimination on the basis of sex in their 2001 report on violence against sexual minorities, could provide grounds for a challenge to marriage laws claiming discrimination on the basis of sexual orientation. The ability to separate religious and civil aspects of same-sex marriage in family-centric India appears to be very likely to depend on the ability to separate religious and civil aspects of same-sex marriage, something that has worked very well with inter-religious marriages, as demonstrated by the enactment of the Special Marriage Act, 1954. In all societies we know of, the primary goal of family (marriage) is population regeneration. (functionalist theory). Extending marriage "rights" to homosexuals and lesbians is rational from the standpoint of love marriage, but it proves to be a complete failure from the standpoint of marriage as a social institution. Second, Gay Marriage is not merely a civil rights issue, but also a question of how we plan to define our family structure as a community.

Thus, pro-marriage activity can be justified by arguing that the right should be available to everyone, regardless of sexual orientation, and that the individual should be free to choose

whether to use it. Instead of impeding LGBT people's liberty by forcing them into a heterosexual institution, legalising same-sex marriage liberates LGBT individuals by allowing them to do as they wish.

As a result, the reading down of section 377 of the Indian Penal Code is critical to the shift in social and legal attitudes required to recognise and legalise same-sex weddings in India. Homophobic social views will no longer have the apparent sanction that they do now if there is no law seen to criminalise homosexuality. As the paper discuss the stigma and discrimination that same-sex couples face in mainstream society in every aspect of their lives, as well as how society views them as a couple, with a special focus on family laws such as adoption and marriage, and how, even if the law allows them to adopt, social stigma prevents them from doing so. The focus on the legal barriers they confront, such as regulations that are designed expressly for opposite-sex couples by interpreting the Hindu Adoption and Maintenance Act, the Juvenile Justice Act, and the government's regulations, they are discriminatory towards same-sex couples, these rules make it difficult for citizens to exercise their rights as citizens of the country, and so are in violation of the Indian constitution(*(PDF) Same-Sex Couples Adoptions Rights in India*, 2020). Third, the paper conducts a comparative analysis with other nations, particularly the United States, the United Kingdom, and South Africa, to see how they have enacted legislation governing the same sex-couples. Finally, it will discuss how laws discriminate against same-sex couples and why they should be permitted to marriage.

### **7.3.3. Same-Sex Couples: A Taboo In The Society**

India is a pluralistic society in which different populations have varied ideas and norms but are nonetheless bound by a common thread of togetherness, which is one of the country's unique characteristics. However, bad apples in society taint the whole society and influence other people's thinking, which is primarily religious or political in nature, resulting in taboo or feelings of hatred in the minds of people. The same-sex attraction is a natural phenomenon that occurs in almost every part of the world, and India is no exception. In ancient India, there is evidence of erotic scriptures on the temples of Konark and Khajuraho(Vanita, 2002), and the

2,000-year-old Kamasutra (“Leg. Recognit. Same-Sex Partnerships A Study Natl. Eur. Int. Law,” 2001) is evidence that shows homosexuality was rooted in Indian culture, and during the Mughal rule in India, the case of homosexuality was prevalent. However, instead of eliminating the stigma, it is now increasing, and people rarely discuss same-sex couples because they are considered inappropriate. Even though the court has decriminalised it, society will not accept it. They are robbed of their political, economic, and social rights, and they never participate in society's functioning, believing that they are protected by remaining alone. If they are discussed, they may be lynched or considered anti-national, as in the film *Fire*, directed by Deepa Mehta and Nandita Das, about a lesbian couple who tries to break the taboo and become a topic of discussion on television, news channels, and in society, but the film received a lot of backlash from Hindu fanatics and was not released, Extreme Hindu nationalists attacked the cinema hall because they were insensitive. The Mahila Aghadi filed a petition in court, claiming that lesbianism will bring marriage to an end. There are some predetermined norms in society based on this religious belief, such as the fact that only opposite-sex couples can marry and that same-sex couples are denied rights such as family ceremonies, child adoption, government beneficiary schemes, medical and educational facilities, and so on. Even though the law recognises marriage between consenting adults of the opposite sex, they face opposition from society and state machinery such as the police if they marry without their parents' consent. As a result, they prefer to live away from the khap panchayats or panch system in the society, which forces their families to kill them. So, if opposite same-sex couples face discrimination, we can only imagine the discrimination faced by same-sex couples. For example, in *Monia v Amardeep* (*Moina Khosla vs Amardeep Singh Khosla on 31 January, 1986*), a man and woman married under Hindu law, and after marriage, it was discovered that the man was homosexual. The wife filed a decree in the Delhi high court, and the court held that the marriage had not been consummated, and thus the wife is entitled to a decree of nullity. The society's religious beliefs are barriers to same-sex couples, and data suggests that the right-wing is conservative and hostile to same-sex relationships on moral grounds.

Some regard it as a "sickness," as Dr. Benjamin Rush, a signer of the Declaration of Independence, argues that black people's complexion is dark due to the endemic leprosy disease, and that if this disease is healed, they will be able to achieve equality with white people. This is analogous to homosexuality, where society views their relationship as a "sickness" and science supports this taboo. Baba Ramdev, a yoga teacher and business magnate, described homosexuality as a mental ailment that can be treated with yoga and gays(*The Billionaire Yogi Behind Modi's Rise - The New York Times*, 2018). people were held against their will at clinics and forced to undergo treatment to cure their homosexuality. As a result, religious and philosophical conventions that hold that sex is only for procreation and homosexuality is unnatural continue to exist in society(Berliner, 1987).

Family is regarded as a microcosm of society and vital to one's existence, and every citizen has the right to live with the family of their choosing. The Universal Declaration of Human Rights states that the family is the natural and fundamental group unit of society, and that states are obligated to protect people's family rights. However, same-sex couples are never entitled to this, and they face discrimination when it comes to adopting a child. There are many same-sex couples in society who do not want to expose their identity because society or their family will not accept it. If they notify their family, their parents are startled and push them to marry the opposite gender. If they reject or elope, the couple's family files a bogus FIR with the police station, claiming the other spouse is kidnapped. The police's ruthless behaviour or conduct towards them is terrible, treating them as criminals who are denied food and drink or are treated harshly because of their partner's behaviour or way of life. Lata Hemchand, a psychologist, shares her experience with homosexual conversion treatment, in which nude suggestive nude photographs are displayed to them, along with a mild shock to their wrist when a photo of same sex appears.

Because of the family's social prestige, the couples were willing to take on any challenge to get rid of it. When confronted with exposure, some people chose to commit themselves rather than face the stigma, blackmail, and shame of society(Williams, 2007). If we take the example of a sportswoman who has won multiple gold medals for her country despite adversity in her life,

when she publicly discloses her relationship with a same-sex partner, she receives a lot of backlash from society, including threats from her elder sister to reveal her identity, and she has been disqualified from races multiple times due to hormone secretions that are not similar to females. Professors at the educational institute believe that homosexuality is a psychiatric condition, and that gays spread HIV/AIDS, and that homosexuality cannot exist, according to them, homosexuality is a Western concept, and homosexuality did not exist in India. As a result, same-sex couples remain taboo in India, as many medical schools and educational institutions refuse to teach about sexuality, believing homosexuals to be deviant(*International Journal of Multidisciplinary Educational Research* , 2019)(Cretney, 2006).

They receive a lot of slurs on their orientation and face hostile discrimination from the country's netizens, as Bollywood celebrity Karan Johar shares in his biography "The Unsuitable Boy," where he shares the backlash, he received from society due to his sexual orientation and how he sometimes doubted his sexual identity due to others' perceptions. Every day, he receives messages on social media about his sexual orientation, including rumours of a relationship with Sharukh Khan, which he accepted because there was no such relationship, and twitter abuse, including posts like "You fucking homo, leave our country" or "Get out, you're polluting our nation, you're dirtying society" or "Shove [IPC Section] 377 up you're a\*\*" This happens to me on a daily basis, and I've learned to laugh it off(*An Unsuitable Boy - Karan Johar.Pdf - PDFCOFFEE.COM*, 2017). I am unconcerned. I've created an iron armour that shields me from all this nonsense. At airports, people can be unpleasant and ask me questions to my face." He also adopted two children recently, and because of this, he has received a lot of backlashes from society. Many people believe that adopted children by same-sex couples do not receive the same benefits as heterosexual couples, and that the child's development in terms of health is inadequate, affecting the child's health. However, this is not true; the child receives the benefit of two fathers. So, if people like Karan Johar, who is economically and politically powerful, face backlash and appear in the news or on social media platforms openly, there are a lot of people from the vulnerable section who do not have socioeconomic or political power and never appear in the media or because of family or religious beliefs. And, while the media

is known as the fourth pillar of democracy, in today's reality, it is a tool of the country's dominating group, acting as their puppets.

After the reading down of section 377, two young people from Kerala married in the temple according to the rites and have been in a relationship for 14 years, but due to the stigma in the society, they did not want to expose their identity, and when they tried to tell their family, the response from the family was shocking, and according to them, the 6 December is not compliant, independence still there is a lot to fight against the conservative beliefs and rights of marriage and adoption.

#### **7.4. Legal Impediments for Same-Sex Couples**

In Navtej Johor, there is a new event for homosexuals this year. This discriminatory element was decriminalised by the Supreme Court, but the festival would be incomplete without basic or necessary rights, and the real question is whether we are stalling on that or if we are providing them hollow books with no content. The judiciary has acknowledged the rights of same-sex couples, but only on paper, not in practise, because people's societal stigma prevents them from using their rights. However, not all rights are recognised, such as family and adoption. And even if their rights are recognised, they will be unable to exercise them. It is not only the judiciary's responsibility, but in a democracy like ours, the legislature should also remove the ancient conservative taboo against same-sex couples in society, granting them full citizenship rights. The judiciary should remain apolitical and nonreligious in delivering justice, but in the Suresh Koushal judgment(*Suresh Kumar Koushal & Anr vs Naz Foundation & Ors on 11 December, 2013*), the court gave very vague and illogical reasons for section 377 as intra vires of the constitution, saying that only a small number of cases are reported against the section and that it is not violative of fundamental rights. In Arun Kumar Sreeja v. Inspector general of registration(*Arunkumar and Sreeja v. The State WP(MD) No. 4125 of 2019 | Law and Sexuality, 2019*), the Madras High Court ruled that a marriage between a man and a transwoman under the Hindu marriage act is valid if both professing Hindu religion and

directed to register their marriage. As a result, each organ in a democracy has its own power, and if one does not act democratically, the others should serve as checks and balances.

The judiciary upheld the right of same-sex couples by decriminalising the contentious section, and now the legislature should amend oppressive laws in terms of same-sex couples' family rights that are in violation of the constitution, such as the Hindu Adoption and Maintenance Act, 1956 (Mulla & Desai, 2013) and the Juvenile Justice (Care and Protection) Act, 2015 (THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015 NO. 2 OF 2016), which provide the capacity of the person to adopt the child and only allowed married couples to adopt the child. The Ministry of Women and Child Development's guidelines under the Juvenile Justice Regulation for Adoption explicitly state that marital status is not considered when adopting. This means that single parents can adopt, but couples who want to adopt together must be married and both spouses must consent (MINISTRY OF WOMEN AND CHILD DEVELOPMENT NOTIFICATION New Delhi, the 23rd September, 2022). These adoption laws are discriminatory for same-sex couples because the statute only permits married couples or single parents to adopt a child, defeating the objective of the act because homosexuality has been decriminalised, but the policy is still discriminatory for same-sex couples. These acts clearly specify the capability for child adoption, stating that unmarried single people or married couples can adopt children, but unmarried couples or same-sex couples cannot adopt children.

The law is not static, but rather latent, as it evolves in response to changing demands and circumstances. These actions are in violation of Articles 14, 15, and 21 of the Indian Constitution and are unconstitutional. The constitution's Article 14 specifies equality before the law and equal protection under the law, yet the act discriminates between married and unmarried couples because marriage isn't just for procreation, people marry or live-in relationships for love and friendship. As a result, these actions fail the Article 14 classification test because the classification is unjust, unfair, and unreasonable, and there is no discernible difference or rational nexus that the legislature wanted to achieve. Article 15 states that no one shall be discriminated against based on sex, which includes sexual orientation, and same-sex

couples, who are in the minority, face hostile prejudice because of society's stereotype thinking. As a result, Article 15 of the Constitution protects these marriages. According to Article 21, same sex couples have the right to individual choice, autonomy, and self-determination. Whether individuals wish to marry or not is a personal decision, and any rules that are arbitrary, discriminatory, or unreasonable are unconstitutional and unconstitutional. In the case of *Maneka Gandhi v. Union of India* (*Maneka Gandhi vs Union Of India on 25 January, 1978*), it was decided that no one shall be denied the right to a reasonable life expectancy because of a legal procedure, and that the procedure cannot be arbitrary or have a chilling effect on the constitution which does not pass the classification test, and there is no discernible difference or rational nexus, such as distinguishing same-sex couples does not serve any logical purpose, such as section 377 and 365, where the former is about unnatural offences (decriminalised) in which sex with consent is an offence and the latter defines sex with consent as a non-offense. As a result, the classification is invalid and unconstitutional. The government should utilise its power in accordance with the constitution's foundations and treat people with dignity during the legislative process.

These laws were enacted at a time when homosexuality was illegal and same-sex couples were ignored by the government. When we consider the aim of these acts, we may see why they are necessary at that time. In 1914, the Hindu Law Committee, led by Sir B.N. Rau, was appointed to make recommendations for a uniform Hindu code, and a draught bill was referred to the provincial committee of the parliament in 1948. Based on the recommendations, the bill was introduced in the parliament in 1948 to codify the law, which was based on the traditional customs of the time based on religion and sacred values of the community (THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956) and the law was based on the traditional customs of the time based on religion and sacred values of the As a result, the act's goal is to ensure the welfare of children while also allowing those who have been unable to reproduce a child to have a family, which is a win-win situation for both spouses and children.

## **7.5. Comparative Analysis with Foreign Jurisdictions**

In foreign jurisdictions, although same-sex couples are denied their complete rights, but most countries have legalised same sex marriage, such as the United States, South Africa, and even the United Kingdom, which enacted draconian legislation in India, but we are still on a snail's pace and have not amended or realised for the rights of same-sex couples as equal citizens of the country.

The HAMA and JJ Acts, for example, did not recognise the rights of adoption for same-sex couples, but there is no reference in these acts that a single homosexual cannot adopt a child; rather, these acts allow a single person to adopt regardless of his or her sexual orientation or gender. These legislation also permitted couples to adopt a child, but only for married couples, not same-sex couples, as the UK had comparable acts as HAMA, which initially discriminated against couples in terms of adoption, prescribing for married couples or singles, but not same-sex couples. The Adoption and Children Act 2000(*Adoption and Children Act 2002*) was passed in England and Wales, allowing same-sex unmarried couples to adopt children. This act was supported by the Labour Party, which passed regulations that made discrimination based on sexual orientation illegal, eventually leading to the Equality Act 2010(*Gay and Lesbian Adoption Laws - FindLaw, 2023*). As a result, India should alter the law or political parties should include such concerns in their manifestos rather than religion and caste politics and consider through the eyes of the minority rather than the majority's religious convictions. Adoption is not a gender issue; it is a child rights issue. If the kid's welfare is at stake, other forms of discrimination are absurd, as many children are in foster care or have been abandoned. South Africa, popularly known as the Rainbow Nation, is a former British colony like India and a common law country that has backed homosexual rights, but 72 percent of the public believes that same-sex cohabitation is morally unacceptable(Gyamerah et al., 2019). In 1994, South Africa approved its preamble, which envisions everyone's rights, and the Bill of Rights, which guarantees everyone certain inalienable rights such as dignity, liberty, and freedom. The South African constitutional court ruled in *Minsters of Home Affairs V. Fourie*(*Minister of Home Affairs and Another vs. Marie Adriaana Fourie and Another; Lesbian and Gay Equality Project and Others vs. Minister of Home Affairs and Others,2005*) in favour of lesbian couples

who challenged discriminatory marriage regulations for same-sex couples, which the government supported based on religion and procreation. However, the court condemned the inhumane treatment of same-sex couples under apartheid movements and rejected stereotypes that are still pervasive in the country and around the world. Following many rallies by anti-gay apartheid activists, the court ordered the government to change the rules, resulting in the Civil Union Act being amended to include rights for same-sex couples. Despite religious and societal stigma, the court and government pushed for the rights of same-sex couples and demonstrated that they are the same as their heterosexual counterparts. And, as in the case of *Du Toit and Others v. Minister of Welfare and Population Development and Others* (*Du Toit and Another v Minister of Welfare and Population Development and Others (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006 ; 2003 (2) SA 198 (CC) (10 September 2002)*), this judgement paves the path for their right, the case in which a lesbian couple sues the government for discrimination based on married and unmarried couples, which prevents same-sex couples from adopting together. The court found that the Child Care Act is discriminatory not just to same-sex couples' rights, but also to the child's best interests, and that families are fundamental cornerstones of African society to which everyone should have access. Initially, South Africa, like India, had disputed laws and conservative thinking in society, and while South Africa enacted its constitution later than India, we have yet to break the shackles of stigma against them in society and have not recognised their rights. In terms of political and independence movements, India and South Africa have a long history. India should take a page from South Africa's book and use the constitution as a vehicle for social change. If we look at developed countries like the United States of America, which was the first to adopt constitution values of individual liberty, same-sex couples still face stigma in society. According to a general social survey, in 1988 and 1991, 77 percent of people thought same-sex relationships were morally wrong, but that number dropped to 40 percent in 2014 and 2015. This is owing to the judiciary's active participation in filling gaps in the law caused by societal stigma and legislative inaction. In *De Boer v. Snyder* (Fore, 2012), the state of Michigan's legislation prohibiting same-sex couples from adopting and marrying together was challenged.

The state ban, according to Judge Friedman, is unlawful and violates the constitution. After the case of *United States v. Windsor* (*United States v. Windsor* | *Oyez*, 2013) in 2013, in which two women married in Canada and registered their marriage in New York, giving same-sex couples the right to marry, one of the partners died, and the other partner applied for estate tax exemption, but was denied due to the federal Defense of Marriage Act (DOMA), which defines marriage as a union between a man and a woman. The court deemed the section unconstitutional and declared it to be in violation of the constitution's equal protection clause. The *Obergefell v. Hodges* (*SCOTUS* | *Obergefell v. Hodges Ruling credited with the creation of 'Right to Same-Sex Marriage' in USA, heavily criticized for its "ruinous consequence for religious liberty"* | *SCC Blog*, 2020) case was a watershed moment in the history of the United States Supreme Court. Following widespread protests by human rights activists and homosexual organisations, the Supreme Court overturned its decision in the *Baker v Nelson* case, upholding homosexuals' rights and declaring that discriminating against them violates constitutional provisions such as due process of law, in which the value of individual liberty is treated equally in society rather than the majority. Following that judgement, numerous states, including New York (Kumar Panchal, 2020), California, and others, altered their laws to support civil rights for same-sex couples, such as adoption. As a result, most countries have disregarded conservative society's notions and amended laws that are discriminatory for the vulnerable sections of the country, such as adoption laws for same-sex couples, and India has also taken a progressive step by decriminalising Section 377, which is the first step and signifies that we are entering into a new era for recognition of civil rights for same-sex couples (*Section 377 and Beyond A New Era for Transgender Equality?*, 2019). As a result, when forming a government, it is important to consider constitutional ethos, which respects individual rights and must pay attention to minority concerns. As in the United Kingdom, where the legislature took a leading role in defending the rights of same-sex couples and removing the stigma from society. In the United States or South Africa, the judiciary protects constitutional ideals and advocates for the rights of same-sex couples, which the legislative ignores. Not like the *Suresh Koushal* decision (*Suresh Kumar Koushal & Anr vs Naz*

*Foundation & Ors on 11 December, 2013*), in which the court presented very ambiguous and illogical reasoning for declaring section 377 to be *intra vires* of the constitution, claiming that only a limited number of cases were reported against it and that it did not violate fundamental rights. India is also a signatory to the Yogyakarta Principle (*Introduction to the Yogyakarta Principles – Yogyakartaprinciples.Org, 2007*), which was adopted by international human rights activists to raise awareness about sexual orientation and gender identity in the world and make the planet more inclusive for all. It also states that all people are born free and equal in dignity, and the state is required to repeal laws that discriminate against people based on their gender or sexual orientation. The concept of gender equality is not unique to any one country but it is a globally cherished ideal that has been acknowledged as a fundamental right. Instead of cultural perceptions, the Supreme Court invalidated section 377 IPC, and the legislature should immediately draught laws to protect their adoption rights by modifying the current discriminatory statute for same-sex couples. If the government does not alter current laws because to majoritarian conceptions and vote bank politics, the judiciary, as the US judiciary did for the rights of the same-sex couple, should take an active role based on constitutional power.

As a result, the government should approve laws amending the law for same-sex couples, disregarding society's conservative views and working in accordance with the constitution. In India, where rapid modernization has been accompanied by the rise of conservative and revivalist ideas, this opposition in the name of tradition, culture, and religion, however misguided, will be strong and will act as an impediment to liberal legislation. For example, in the courts, all petitions are not equal, as the Supreme Court dismissed the petition and gave more weight to what the majority wanted, rather than the minority's wishes. However, oligarchy is not acceptable in a democratic society like India, which operates according to the constitution. As a result, the family is regarded as a microcosm of society; one cannot live without or desires family. As a result, it believes that amending discriminatory laws is the most practical method of achieving legislative acceptance of same-sex adoption.

The government provides citizens and non-citizens with certain privileges. Citizens of the country have some Fundamental Rights (Part 3) guaranteed by Article 32 of the Constitution, as well as some Fundamental Duties as specified in Part 4A. The right to marry is enshrined in Article 21 of the Indian Constitution as a freedom of choice in choosing a mate. Marriage is a religious idea in India and the foundation of a civilised society, so a relationship is formed. The law then comes in and binds the two parties with certain rights and obligations once it has been constituted. "People give up some of their own liberty in exchange for some shared security," it is said. This is referred to as the Social Contract Theory.

According to Article 21 of the Indian Constitution, the right to marriage is an element of the right to life. Despite the fact that it is not directly specified in the Constitution, the Hon'ble Supreme Court has added it into Article 21 by virtue of Article 32. It is also recognised in the Human Rights Charter as part of the right to begin a family. One such case is *Lata Singh vs. State of Uttar Pradesh (Lata Singh vs State Of U.P. & Another on 7 July, 2006.)*, Petitioner Lata Singh (hereafter referred to as Petitioner) and her husband were threatened by Petitioner's brothers because they belonged to different castes, according to the case law. The criminal proceedings were later annulled under Section 482 of the Code of Criminal Procedure, 1973, after the writ petition was filed under Sections 366 and 368 of the Indian Penal Code, 1860. In India's legal history, the case of *Lata Singh v. State of Uttar Pradesh* represents a watershed moment. In this case, the Hon'ble Justices Ashok Bhan and Markandey Katju, JJ. granted a writ petition filed by a woman called Lata Singh under Article 32 for the enforcement of her right to marry a person of her choice against her will. The Supreme Court ruled in her favour and ordered that she be protected by the police.

Same-sex couples are also citizens of India, with equal rights in the socioeconomic, political, and cultural spheres. Because our society is secular, socialist, democratic, and republican (*Constitution of India*, ), all citizens are treated equally regardless of sexual orientation or gender. It is clear from the Supreme Court of India's decision in *Navtej Singh v. Union of India (Navtej Singh Johar vs Union Of India Ministry Of Law And ... on 6 September, 2018)* that section 377 is in violation of Article 14 of the Indian constitution because it is wholly

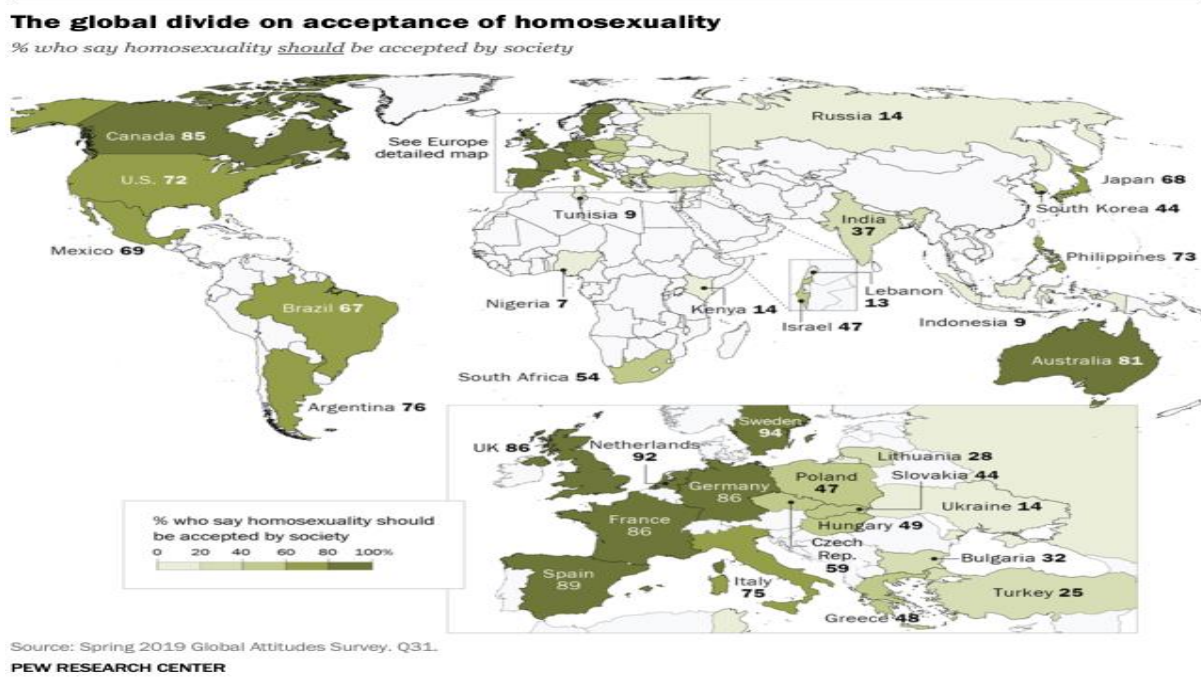
arbitrary, vague, and has an unlawful goal, and that section 377 is decriminalised. This also applies to adoption laws that discriminate against same-sex couples, and Article 21 and the Yogyakarta principle vouch for the right to self-identity. In the judgement, Justice Nariman clarifies parliamentary legislative understanding by enacting the Mental Healthcare Act, 2017, which defines mental illness and dispels all societal misconceptions about same-sex couples, as most people believe that children adopted by same-sex couples lead to unhealthy mental and physical development. The right of every citizen of India to live in dignity and privacy, including the right to choose their own choices of intimacy and manner in which they want to spend their lives, is protected by the constitution, according to the K.S. Puttaswamy decision (*Justice K.S. Puttaswamy (Retd) ... vs Union Of India And Ors. on 24 August, 2017*). According to J. Chandrachud, legislation should not be based on moral concepts that are incompatible with the constitution, and same-sex couples' rights are hampered by structures such as caste, gender, class, religion, and community, which are not only forbidden for same-sex couples but for all. The adoption laws are discriminatory because they fail to meet the classification test of Article 14 of the constitution because the laws for adoption specifically mention capacity only for married couples and single people. If married couples can adopt, why can't unmarried or same-sex couples? Marriage is a social norm, but not all citizens follow these norms, and Article 21 supports the right to live one's life as one wishes. Our constitution is based on the vision of an inclusive society that embraces individuals' varied perspectives rather than majoritarian ideologies. The peaceful and progressive nations repealed rules that discriminate against same-sex couples, allowing both partners to adopt children jointly through judicial declarations or legislation. It is then up to the individuals to marry or not, and the laws should be non-discriminatory for all so that the LGBT community has equal rights in all aspects. The government should amend the laws in India for a same-sex couple, or the judiciary could do so because our constitution is progressive, as in the Sabarimala temple case, where the laws are discriminatory and violate the constitution. Some states are making progress, while others are sticking to their old values. As a result, either through the judiciary or through parliamentary law, India should also adopt this progressive step for their rights.

## 7.6. Global Divide on Homosexuality persists.

Despite major changes in laws and norms surrounding the issue of same-sex marriage and the rights of LGBTQIA+ people around the world, public opinion on the acceptance of homosexuality in society remains sharply divided by country, region and economic development.

This can be depicted with the help of a figure no. 27 (*Country Specific Methodology - Pew Research Center Methods | Pew Research Center, 2019*)

**Figure no.- 27- The global divide on acceptance of homosexuality**



## Acceptance of homosexuality over time

% who say homosexuality *should* be accepted by society

	2002	2007	2011	2013	2019	'13-'19 Change
	%	%	%	%	%	
South Africa	33	-	-	32	54	+22
India	-	-	-	15	37	+22
Turkey	22	14	11	9	25	+16
Japan	54	49	55	54	68	+14
U.S.	51	49	60	60	72	+12
UK	74	71	81	76	86	+10
France	77	83	86	77	86	+9
Mexico	54	60	52	61	69	+8
Brazil	-	-	61	60	67	+7
Israel	-	38	48	40	47	+7
Tunisia	-	-	-	2	9	+7
Kenya	1	3	3	8	14	+6
Indonesia	-	3	5	3	9	+6
Nigeria	-	-	-	1	7	+6
Canada	69	70	-	80	85	+5
Poland	40	45	34	42	47	+5
South Korea	25	18	-	39	44	+5
Australia	-	-	-	79	81	+2
Argentina	66	72	-	74	76	+2
Spain	-	82	91	88	89	+1
Italy*	72	65	-	74	75	+1
Philippines	64	-	-	73	73	0
Germany	83	81	87	87	86	-1
Russia	22	20	15	16	14	-2
Greece	-	-	-	53	48	-5
Lebanon	21	18	17	18	13	-5
Czech Rep.**	83	83	-	80	59	-21
Sweden	-	86	-	-	94	-
Netherlands	-	-	-	-	92	-
Hungary	-	-	-	-	49	-
Bulgaria	38	39	-	-	32	-
Lithuania	-	-	21	-	28	-
Slovakia**	68	66	-	-	44	-
Ukraine	17	19	15	-	14	-

Note: Statistically significant differences shown in **bold**.

\*In Italy, 2019 survey was conducted via telephone, while previous years were conducted face to face.

\*\*In Czech Republic and Slovakia, 2019 surveys were conducted via face-to-face interviewing, while previous years were conducted via telephone. These mode changes might affect overall responses to this question.

Source: Spring 2019 Global Attitudes Survey.

PEW RESEARCH CENTER

Figure no. 28- Acceptance of Homosexuality over time (*Appendix A | Pew Research Center, 2019*)

Interpretation of Figure- As per the opinion of researcher, as far as Indian situation is concerned, researcher can infer that in 2013, the tolerance towards homosexuality had merely 15% but again when the research had conducted by Pew Research Centre in 2019, the tolerance had increased by 22% i.e. from 15 to 37%. According to the researcher opinion, the reason behind this changed perception is due to the landmark judgement of the Apex Court i.e. Navtej Singh Johar v. UOI (*Navtej Singh Johar vs Union Of India Ministry Of Law And ... on 6 September, 2018*). Law has always been acted as the means of social change. As the Apex court of the nation has decriminalized the consensual same-sex relationships, due to this people also

perceived this in a positive manner and accepted these kinds of relations as well. This can be well illustrated with the help of an illustration, like under Classical Hindu customs, widow used to follow Sati Pratha System after the demise of her husband. But after the enforcement of Sati Abolition Regulation, 1829, that system was abolished. Hence, law has always been acted as “means of social change” in a society.

After decimalization of consensual same-sex relationships, it is obvious that people from LGBT community need a sense of belongingness and companionship which can be guaranteed to them as well by way of marriage. So, recognizing same-sex marriages in India is currently the need of the hour.

### **7.7 Recent instances of same-sex marriages in India vis-à-vis Government of India’s standing on the same.**

While the LGBT community still faces discrimination, the Navtej Singh Johar judgement(*Navtej Singh Johar vs Union Of India Ministry Of Law And ... on 6 September, 2018*) has helped to dispel some of the lingering fears and taboos associated with being out as LGBT, and has given its members a renewed sense of confidence and safety. Since then, there have been several reports of same-sex marriages from countries all over the world, including India.

#### **Recent Instances- Aftermath of Navtej Singh Johar Case**

***Arun Kumar Sreeja v. The Inspector General of Registration and others***(*Arunkumar and Sreeja v. The State WP(MD) No. 4125 of 2019 | Law and Sexuality, 2019*)

In a decision released on April 22, 2019, the Madurai Bench of the Madras High Court ruled that under the Hindu Marriage Act of 1955, a marriage between a male and a trans-woman that is duly solemnised is legitimate (Hindu Marriage Act, 1955). According to the Hindu Marriage Act of 1955, a "Transwoman-A Bride" is a woman who has chosen to transition into

**Chinmayee Jena @ Sonu Krishna Jena v. State of Orrisa and Others**(*CHINMAYEE JENA VS STATE OF ODISHA & OTHERS - South Asian Translaw Database, 2020*)-

On August 24, 2020, the Orissa High Court ruled in favour of a 24-year-old woman who had petitioned to reunite with her same-sex partner after he had been forcibly separated from her by his mother and uncle.

Both individuals in this case were of legal adult age when they entered their live-in relationship in 2017, and they have been actively enjoying a consensual relationship ever since.

A same-sex live-in pair is allowed to remain together- Orrisa High Court

**Abhijit Iyer Mitra v. Union of India and Another** (*Abhijit Iyer Mitra v. Union of India and Another*, 2021)

A public interest litigation (PIL) petition has been filed in the Delhi High Court to have the court rule that same-sex couples are entitled to marry under the Hindu Marriage Act of 1955.

As stated in the petition submitted on behalf of activists and members of the LGBTQ community, the Hindu Marriage Act (the Act) does not distinguish between homosexual and heterosexual couples when it comes to the legality of marriage.

Petitioners include Gopi Shankar M, an intersex activist from Tamil Nadu who ran for assembly in 2016, Abhijit Iyer Mitra, a member of the LGBT community and commentator on security and foreign policy, Giti Thandani, a founder member of Sakhi Collective Journal of contemporary and historical lesbian life in India, and G. Oorvasi, a transgender activist.

The petition further argues that Section 5 of the Act makes no mention of whether or not the "two Hindus" getting married must be a Hindu male and a Hindu woman.

The petition argues that "any two Hindus" can get married in India according to Section 5 of the Act.

Despite the Supreme Court's 2016 decision to decriminalise consensual homosexual acts by reading down section 377 of the Indian Penal Code, the PIL claims that gay couples in India are still unable to be married.

Petitioners claim that "no formal bar exists under the Hindu Marriage Act of 1955 and the Special Marriage Act of 1954 banning gay marriage," yet no such marriages are being registered anywhere in the country, including in Delhi.

Because Section 5 of the Hindu Marriage Act of 1955 does not differentiate between Homosexual and Hetrosexual couples, the petitioners are asking for a declaration that same-sex couples have the same right to marry as heterosexual couples.

In their appeal, Advocates Mukesh Sharma and Raghav Awasthi argue that the ban on gay marriage violates the constitutionally protected rights of LGBT individuals.

It is argued in the petition that "the non-recognition of the rights of gay couples, especially when their sexuality has been recognised as such as valid by the Hon'ble Supreme Court of India, is violative of various provisions of the Constitution of India as well as various conventions that India as a sovereign State is signatory of."

It is noted that in its judgements in the 2014 NALSA case and the 2018 Navtej Singh Johar case, which decriminalised homosexuality, the Supreme Court acknowledged the right to choose sexual identity as a basic right forming part of the right to privacy and individual autonomy under Article 21.

Invoking Article 21 of the Constitution, it is argued that the Right to Marry is a recognised part of the Right to life, and that it is neither radical nor complicated to attempt to expand that Right to couples of the same sex.

The petition goes on to say that a violation of the Right to Equality occurs when members of one group are treated differently than members of another group who are entitled to the same right. Lesbian, gay, bisexual, and transgender (LGBT) people are not eligible for the same advantages that are given to heterosexual couples.

The petitioners argue that their request for equal protection rights enforcement is limited to that "involves making sure that everyone gets to enjoy their rights without facing any kind of discrimination. In addition to being in direct violation of the Right to Equality guaranteed by the Constitution of India, the ban on LGBT marriage on the grounds of sexual orientation and gender identity amounts to an act of unequivocal discrimination against these individuals."

This debate is based on the twin tenets of equality and non-discrimination, which are held in high esteem around the world. Ultimately, the petitioner argues, international human rights law recognises the inherent worth and dignity of every person from the moment of their birth.

Forcing members of the LGBT community to live in a marriage less environment (at least for them) by not allowing them to marry as per their own choice in India is like saying, "There is no one for you to marry, or at least no method for you to marry a person you love." "

It is argued that the institution of marriage would not be harmed by the legalisation of gay marriages, and that the opposite, that the LGBT population be prevented from getting married, would lead to a rise in the prevalence of mental illness.

"The Human Rights Charter explicitly protects the right to marry for those who desire to do so, providing further evidence of the universality of this fundamental freedom. All people, regardless of their sexual orientation or gender identity, have the right to marry "this petition stated.

The High Court of Kerala is currently considering a similar suit that seeks to recognise homosexual marriages under the Special Marriage Act. Nikesh and Sonu, the first 'married' gay couple in Kerala, filed a petition contesting the provisions of the Special Marriage Act 1954 insofar as they do not allow the registration of homosexual weddings.

***Vaibhav Jain & Anr v Union of India***(*Vaibhav Jain & Anr vs Union Of India & Anr on 14 October, 2020*), two gay couples who wed in Washington, D.C. contend that the Foreign Marriage Act 1969 should be revised to apply it to relationships between people of the same sex. The fact that it does not acknowledge the same is also a reason why it is unconstitutional. It was the High Court's request that the Union government and the Indian Consulate General in New York respond to the petition. As a whole, we are all aware that the Union Government has been adamantly opposed to calls to recognise same-sex marriage under the Special Marriage Act, giving as its reasoning that the Act is part of a "larger legislative framework" that only recognises marriage between men and women, and that any changes to the Act will inevitably lead to chaos because of the impossibility of nationwide adaptability.

**Dr. Kavita Arora and Another V. Union of India & Another**(*Dr. Kavita Arora and Another V. Union of India & Another*, 2020)- W.P. (C) 7692/2020-

After a government official refused to solemnise their marriage because of their sexual orientation, Dr. Kavita Arora and another filed a petition with the Supreme Court of India. In their petition, they argue that now more than ever before, it is crucial to name one's spouse on health and life insurance policies, to protect one's right to inheritance, and to guarantee access to the joint house, financial, and other resources.

**Response of Central Government-** Central Government officials argued that same-sex couples "cannot claim a fundamental right to same-sex marriage." It further argued that the traditional Indian family unit of a husband, wife, and children is not analogous to same-sex partnerships. The Centre argued before the court that personal and codified law principles would also be broken if marriages between homosexual partners were legally recognised. The administration maintained that the issue of whether or not same-sex marriage should be legally recognised is largely a legislative one, and so should not be decided by judges alone.

**Some highlights from the Centre's affidavit**

- “Fundamental Right under Article 21 is subject to the procedure established by law and the same cannot be expanded to include the fundamental right for same-sex marriage to be recognized under the laws of the country which in fact mandates the contrary.
- Considerations of social morality are relevant in considering the validity of legislation and it is for the legislature to judge and enforce such social morality and public acceptance based on Indian ethos.
- In our country, despite statutory recognition of the relationship of marriage between a biological man and a biological woman, marriage necessarily depends upon age-old customs, rituals, practices, cultural ethos and societal values.
- Statutory recognition of marriage as a union between a 'man' and a 'woman' is intrinsically linked to the recognition of heterogeneous institution of marriage and the acceptance of the Indian society based on its cultural and societal values”.

**Delhi High Court Grants Protection to Lesbian Woman Married Against Her Wishes, Directs Steps For Dissolution Of Marriage (March, 2021)** (*Delhi High Court Grants Protection To Lesbian Woman Married Against Her Wishes, Directs Steps For Dissolution Of Marriage, 2021*)

The petitioner, who is a lesbian, was threatened with being "cured" of her sexual orientation after being married against her will to a male. On March 7, 2021, she ran away from her husband's house and went to the New Delhi non-profit ANHAD for help. A safe house operated by a different NGO offered her temporary sanctuary, but when the Petitioner's family members showed up, they demanded that she be returned to them.

A bench of the Delhi High Court presided by Justice Mukta Gupta today served notice on the petition of a lesbian woman who had been married against her will to a guy chosen by her family. The court also ordered the Delhi Police to provide the woman with full safety.

Also noteworthy is the court's progressive position, which included interacting with the woman and her husband and directing that dissolution of the marriage may be pursued as soon as possible.

*"An adult woman cannot be forced to stay with her marital or parental family against her wishes," the Court said.*

**Same-Sex Couple's Protection Plea- "Society Still Grappling To Come To Terms With Same-Sex Orientation": Madras HC Directs In-Camera Hearing**

**Facts in brief**

First Petitioner (about 22 years old) has a B.Sc. in Mathematics and is working toward an M.B.A., whereas Second Petitioner (around 20 years old) is studying for a B.A. in Tamil.

The Petitioners have known one other for the past two years, and they have testified together that their friendship has developed into love, and that they intend to be lifelong partners.

For the Court, "there was so much clarity in what the Petitioners wished to portray" because "the Petitioners did not mince any words."

Unfortunately for the Petitioners, their parents found out about their relationship and did not approve.

Due to the sensitivity of the situation, the Madras High Court, which is hearing a protection application filed by a same-sex couple, decided on Monday (22nd March, 2021) to move the hearing into closed session and set a new hearing date for March 29.

The Bench of Justice N. Anand Venkatesh made the crucial observation, " "The current situation calls for more compassion and understanding on everyone's part since it exemplifies the ongoing struggle of society to accept people of different sexual orientations. This Court prefers to hear the parties in-camera due to the sensitivity of the subject matter."

What's at issue in this case.

It should be emphasised that the fourth and fifth Respondents, who are the fathers of the respective petitioners, are contesting the petitioners' claim that they are in a same-sex relationship.

Counsel for the Petitioners claimed that their parents' inability to accept their same-sex relationship led to two missing girls' FIRs being filed with the sixth and seventh respondents.

It was also argued that the petitioners' physical safety is in jeopardy, and that they are being forced to look for protection in all the wrong places.

Finally, the Petitioners asked that the Respondent Police Department be instructed to take no action that may be construed as harassment of them, and to make sure that the Petitioners' lives and safety were not in risk from the actions of the Fourth and Fifth Respondents.

But the Government Advocate, who heard the case on behalf of the Respondent Police, argued that the Respondent Police would be directed to safeguard the petitioners' safety.

The case will be heard behind closed doors on March 29, 2021, as ordered by the court.

On Monday (29th March, 2021), Justice N. Anand Venkatesh of the Madras High Court stated that he was in the process of changing his mind regarding the problem of same-sex couples filing for protection while he was working on their case.

*Same-Sex Relationships- "I Am Trying to Break My Own Preconceived Notions": Madras High Court Judge*

*Udit Sood and Ors. v. Union of India and Anr* ('Nobody Is Dying Because They Don't Have Marriage Certificates': Centre Opposes Urgent Hearing Of Plea For Same-Sex Marriage Recognition, 2022).<sup>2</sup> The Union of India argued before the Delhi High Court against an urgent hearing of a group of petitions seeking recognition to same-sex marriages in India under various personal laws, claiming, "You don't need marriage certificate for hospitals, nobody is dying because they don't have marriage certificate."

*S. Sushama and another v Commissioner of Police and others.* (*S. Sushama and another v Commissioner of Police and others.*, 2021).<sup>3</sup>

The Madras High Court has issued extensive rules to prevent police harassment of members of the LGBTQIA+ community in response to missing person's reports filed by their parents.

*Justice Anand Venkatesh* wrote for a single bench that a shift in attitude toward LGBTQIA+ partnerships is necessary while hearing a writ case brought by two lesbian women against police harassment. Because their relationship is not accepted by society, they are targets of hatred.

The Supreme Court has noted that new laws are required to end social prejudice against the LGBTQIA+ community and safeguard its members' safety and well-being. The court made note of how attitudes are shifting due to legislative measures concerning people with disabilities and mental illness. With regards to the LGBTQIA+ population, the Court has also urged similar legislative initiatives.

The LGBTQIA+ community cannot be allowed to remain in a precarious situation where their safety is not guaranteed until the legislature passes a bill. Until the law can take over and guarantee everyone's safety and security, this void is being filled by issuing guidelines", the Court declared, imposing rules and regulations.

*Zainab Patel v. Union of India & Ors (December-2021)* (Delhi High Court Issues Notice on Pleas Seeking Recognition of Transgender and Lesbian Marriages - Law Insider India, 2021)

Two cases filed in the Delhi High Court seek Central Government recognition of weddings between transgender and gay individuals.

The requests were included in a larger group of complaints over the legalisation and registration of same-sex marriages in the country. On February 3, a Division Bench chaired by Chief Justice DN Patel and Justice Jyoti Singh will hear the petitions.

Zainab Patel, a Director (Inclusion and Diversity) at KPMG India, has filed a petition to make transgender marriages lawful in the country. As well as being a member of the National Council for Transgender Persons, Patel is the chair of the LGBTQIA+ subgroup of FICCI's Diversity and Inclusion Committee.

"The Petitioner and crores of Transgender persons are relegated to second class citizenship if they are not allowed to marry the person of their choice, regardless of their gender identity or sexual orientation or that of their partner. Her Petition argues that this "makes a mockery" of the decades-long fight for transgender people's rights to receive constitutional and legislative protections.

Patel claims that in 2016, before she transitioned, she and her husband/partner engaged into a civil union in South Africa, but that she was unable to have the Indian government recognise their union.

The petition argues that transgender people, "like all persons," want to create "loving and committed relationships that are acknowledged and encouraged by society and the law."

Since the Supreme Court decided in favour of transgender people in NALSA v. Union of India, it is argued that her civil union should now be recognised under the law.

According to the petition, the Union's own Transgender Persons (Protection of Rights) Act, 2019, establishes the National Council for Transgender People and recognises transgender people in the gender of their choice, prohibits discrimination in education and employment, and makes it illegal to harass or assault a transgender person. The petition seeks a ruling that

transgender and other LGBT people are guaranteed the same right to marry as anybody else under Article 21 of the Indian Constitution.

It has also been requested that matrimonial statutes and the rules and regulations adopted thereunder, to the extent that they are interpreted as requiring one'male' or 'bridegroom' and one'female' or 'bride,' be understood as gender-neutral.

It is Patel's fervent wish that "all marriages between couples in which either one or both partners are transgender or gender non-conforming or who otherwise do not identify with the sex assigned at birth may be solemnised under matrimonial statutes regardless of their gender identity and sexual orientation."

The Bench also considered a plea from a lesbian couple who said they had gotten married in Varanasi.

### **PRIVATE MEMBERS BILLS BY PARLIAMENTARIANS- RECENT EXAMPLES**

#### **The Special Marriage (Amendment) Bill, 2022**

Supriya Sule, an NCP MP from Baramati, introduced the legislation. A staunch supporter of the LGBTQ community, Ms. Sule has spoken out on matters like transgender rights and more, as documented in the online archive PinkList India. Before it was overturned, she was one of the few legislators to publicly oppose s. 377.

The proposed legislation aimed to amend the Special Marriage Act by adding a new section 4A, which would legalise marriages between men who have reached the age of 21, and women who have reached the age of 18. Transgender, non-binary, agender, and intersex people are not included in the measure. In addition, the document aimed to change references to husband or wife to spouse in Articles 15, 22, 23, and 27. It would make several petitions before the Delhi High Court moot if it were to become law. But the government's opposition to the Delhi High Court's gender-neutral implementation of the Special Marriage Act means that this law cannot pass.

When it comes to marrying as a heterosexual couple, the Special Marriage Act is notoriously difficult to navigate. The process includes giving people a chance to voice their concerns and wait for a resolution before moving forward. If a lesbian, gay, bisexual, transgender, or queer

person wants to be married, they will have to go through a lot of hoops to fulfil these regulations, and they will have absolutely no chance of success if their families don't approve. As has happened with interfaith couples in countries with so-called "love jihad" laws, public knowledge of their relationship could lead to violent attacks. Since the Special Marriage Act does not change the Hindu Marriage Act, Assistant Professor of Law at Jindal Global Law School Saptarshi Mandal argues that its application will be excessively restrictive. A marriage between two Hindus under the Special Marriage Act shall still be subject to the Hindu Succession Act, as provided for in Section 21A of the Special Marriage Act. Because of this, they argue that this clause is null and void until Hindu law also recognises same-sex marriage. It's also important to remember that, unless all ancillary rights, like the right to inherit, are likewise safeguarded, a marriage of equals does not automatically guarantee equal rights.

Any change that excludes some groups or makes gay marriage more difficult should be reviewed. But I feel obligated to point out that marriage is not the ultimate objective for all LGBT couples or the queer rights movement, and that others have questioned whether or not the marriage movement also sufficiently addresses caste issues, which are embedded in the Indian marriage environment.

### **Equal Protection of Rights for LGBTQIA+ Persons Bill, 2021**

Dr. Senthilkumar S. introduced the second measure, which sought, maybe for the first time, a set charter of rights for the 'LGBTQIA+ community. The legislation aimed to grant a wide variety of protections, such as those relating to abortion, guardianship, and surrogacy. Not only did it aim to end sexual harassment and bullying in schools, but also discrimination in housing and employment.

It was also difficult to work with the bill because of the phrases it defined. Scholars of gender studies will be baffled by a primary reading of S. 2(b), the section defining sexual orientation. It states that a person's sexual orientation can be defined by how they feel about or relate to other people. It also incorrectly characterises queer people as those who identify as neither male nor female. In common usage, the phrase encompasses not only those who do not adhere to a strict binary gender system, but all members of the LGBTAQIA+ community.

To add insult to injury, the measure does nothing to change the laws that would be necessary to implement these protections. The current draught of the bill would require significant

changes to the Surrogacy Act, Personal Laws, Surrogacy (Regulation) Act, and Artificial Reproductive Technologies Act. Such alterations are not included in the bill. However, this wasn't the only issue. What exactly each right would entail was never specified in the bill. It's unclear whether "the right to surrogacy" refers to the ability to become a surrogate or the ability to hire a surrogate. Explain the concept of workplace discrimination. Second, it failed to protect rights generally by failing to specify an enforcement mechanism or a remedy. To what extent could these protections be enforced? Would they result in legal consequences? Ultimately, this measure creates more confusion than it resolves.

**Writ Petition (Civil) no. 1011/2022 titled "Supriyo @ Supriya Chakraborty & Anr. v. Union of India"** (Breaking: Two Men Move Supreme Court Seeking Recognition of SAME-SEX MARRIAGE Under the Special Marriage Act, 2022)

Two Hyderabad homosexual men have filed a new public interest litigation (PIL) with the Supreme Court of India, arguing that the Special Marriage Act, 1954 should be amended to allow same-sex marriages.

Justice DY. Chandrachud, the current Chief Justice of the Supreme Court, will preside over today's hearing.

Supriyo Chakraborty and Abhay Dang, who filed the case, had been together for nearly a decade. In the wake of the pandemic, both spouses and their families were confronted with the reality of their own mortality. During the second wave, they were both infected with COVID. After getting over their illness, they decided to celebrate their 9th anniversary with family and friends by having a wedding-cum-commitment ceremony. In December of 2021, they conducted a commitment ceremony when their loved ones gave their approval to their partnership.

According to the petitioners, the Special Marriage Act violates India's constitution because it treats same-sex couples differently than heterosexual ones, denying them the legal protections, social recognition, and status that come with marriage.

Petitioners said the Indian Supreme Court has always upheld their freedom to marry someone of a different caste or religion. The legalisation of marriage between people of the same gender

is the next logical step in this constitutional evolution. The Supreme Court's decisions in the Navtej Singh Johar and Puttaswamy cases established that LGBTQ+ people are entitled to the same protections under the Constitution as any other citizen. A growing number of people are filing petitions demanding that citizens who identify as LGBTQ+ be granted the same right to marry as any other citizen.

The Special Marriage Act, the Foreign Marriage Act, and the Hindu Marriage Act all recognise same-sex marriage as valid, but there are currently 9 petitions pending in the Delhi High Court and the Kerala High Court to have them recognised. Before the Kerala High Court earlier this month, the Deputy Solicitor General said that the Ministry is working toward transferring all writ cases to the Supreme Court.

**Supreme Court Transfers to Itself Petitions Pending in High Courts For Recognition Of Same-Sex Marriage- January, 2023**(Supreme Court Transfers to Itself All Petitions on Same-Sex Marriage - *The Hindu*, 2023)

*Case Title: SUPRIYO @ SUPRIYA CHAKRABORTY AND ANR. v. UNION OF INDIA/ W.P.(C) No. 1011/2022 PIL-W; KAVITA ARORA AND ANR. v. UNION OF INDIA AND ANR; ADITI ANAND AND ANR. v. UNION OF INDIA; VAIBHAV JAIN AND ANR. v. UNION OF INDIA AND ANR; NITIN KARANI AND ANR. v. UNION OF INDIA AND ANR.*

On Friday, a group of petitions calling for same-sex marriage recognition in India was sent to the Supreme Court for consideration. Chief Justice DY Chandrachud, Justice PS Narasimha, and Justice JB Pardiwala will hear the case. If petitioners cannot afford an attorney or get to Delhi, the bench has given them permission to appear on a videoconferencing service and present their arguments. The new due date for the group of petitions is March 13, 2023.

Before the primary case was even heard, the lawyers informed the bench that numerous other applications were being transferred to the Supreme Court from various high courts, such as the High Court of Delhi, the High Court of Gujarat, and the High Court of Kerala. While delivering the directive, CJI Chandrachud said, " "We order that all petitions on this topic, which are currently pending before various high courts, be transferred to this court. Every petitioner has

the option to appear on a virtual platform and present their arguments, eliminating any barrier to participation for those who cannot afford legal representation or get to Delhi. Anyone who needs the same will be given the link. To Central Government Agencies: Please Take Notice. The deadline for counter affidavits is 15 February 2023. Plan your March 13th route using this list."

The panel designated Advocate Arundhati Katju to represent petitioners and Advocate Kanu Agarwal to represent the Union of India, and they were tasked with compiling relevant precedents, documents, and laws.

Supriyo Chakraborty and Abhay Dang had a PIL included in the group of filings. They've been together for nearly a decade, and in December 2021 they had a commitment ceremony attended by their parents, extended family, and friends to celebrate their love and devotion to one another. They are now trying to get their marriage recognised under the Special Marriage Act. One of the PILs was filed by a couple who had been together for 17 years: Parth Phiroze Mehrotra and Uday Raj Anand. They claim to be raising two children together at the moment, but since they are unable to legally tie the knot, they are unable to establish a parental relationship with either of their children. A second same-sex couple had filed a PIL; an Indian national and a Citizen of the United States of America (USA) who had married and registered their marriage in the USA in 2014 and now sought to register their marriage under the Foreign Marriage Act, 1969. The batch of petitions included requests for transfer to the Supreme Court from the Delhi High Court and the Kerala High Court.

**A Supreme Court bench led by Chief Justice DY Chandrachud and including Justices PS Narasimha and JB Pardiwala today issued notice on a petition filed by a homosexual couple challenging provisions of public notice and objection to marriage contemplated under the Special Marriage Act and the Foreign Marriage Act.-(Utkarsh Saxena and Anr. v. Union of India, 2023)**

**Utkarsh Saxena and Anr. v. Union of India (Utkarsh Saxena and Anr. v. Union of India, 2023)-2023**

Utkarsh Saxena and Ananya Kotia, who have been together for 14 years and who have stated that such provisions act as a deterrent to already vulnerable same-sex couples, who are forced to publicise their relationship and risk ostracism, persecution, and violence, say that such provisions do not serve any purpose.

A 30-day notice period must be given to the Marriage Officer in the District where one of the parties has resided, as per Sections 5-9 of the SMA. During this time, "any individual" is entitled to oppose to the marriage being solemnised. This "notice and objections" structure is also found in Sections 5–10 of the Foreign Marriage Act.

Petitioners argue that these requirements are an unreasonable infringement of citizens' right to privacy and place an unfair burden on the freedom of parties to make private decisions.

When two people of the same sex choose to start a family together, they may find themselves in a position where they cannot tell their families or the public about their relationship. Even though sections 5–9 of the SMA have the effect of formally covering same-sex relationships, the right to marry would remain illusory for a large number of individuals, on grounds only of the fear of social rejection and physical harm. Despite the fact that interfaith couples do have the legal right to marry under SMA, this right is now unattainable because to the notice-and-objection requirements."

The argument also states that the same prerequisites are not present for marriages solemnised under personal laws that are either not registered or are being sought for registration under the SMA.

The petition also calls for a change to the Special Marriage Act and the Foreign Marriage Act to make them non-discriminatory on the basis of gender, sexual orientation, or identity.

It challenges the constitutionality of SMA Sections 2(b) and 4(c) to the extent that they have been interpreted to limit the application of the SMA to cis-gendered heterosexual relationships via the use of the terms "man" and "woman" and "male" and "female."

It is hoped that the SMA will be interpreted to include women and girls wherever the term "man" or "male" appears (including trans-women).

Section 4(c), which refers to a "bride" and a "bridegroom," is also being challenged on the grounds that it discriminates against homosexual couples.

## **Recent Developments- May 2023**

In a significant development, the Bar Council of India has announced its intention to approach the Supreme Court, urging them to defer the decision on same-sex marriage to the legislative process. According to the council, an overwhelming majority of over 99.9% of the population is opposed to the idea of same-sex marriage. This move by the Bar Council of India highlights the growing debate surrounding this contentious issue and the desire to involve the legislative branch in determining the fate of same-sex marriage in the country. (*“More Than 99.9% People Opposed To Same-Sex Marriage”, Bar Council Of India To Request Supreme Court To Leave Issue To Legislative Process, 2023*)

"Shows Heinous Indifference": Law Students Condemn BCI's Resolution Requesting Supreme Court To Defer Same-Sex Marriage Issue To Parliament"-*(LIVELAWS NEWS NETWORK, 2023)*

### **7.8. (MARRIAGE EQUALITY CASE)**

The composition of the 5-judge bench, which will preside over a series of petitions seeking legal recognition for same-sex marriage, has been officially announced by the Supreme Court. In a significant development, the composition of the bench for an upcoming case has been announced. The esteemed panel will be led by none other than Chief Justice of India DY Chandrachud, a highly respected figure in the legal fraternity. Joining him on the bench are Justice Sanjay Kishan Kaul, Justice Ravindra Bhat, Justice Hima Kohli, and Justice PS Narasimha, all of whom bring their own expertise and experience to the table. This diverse and accomplished group of justices is expected to bring a wealth of knowledge and insight to the case at hand. In a significant development, it has been announced that the bench will commence hearing the cases starting from April 18, 2023

On March 13, 2023, a significant development took place as a three-judge panel, led by Chief Justice DY Chandrachud and including Justices PS Narasimha and JB Pardiwala, made the decision to refer the petitions to a Constitution Bench.

*“Gender Not A Concept Of What Your Genitals Are, It Is Far More Complex: CJI DY Chandrachud Orally Remarks In Marriage Equality Case”-(Padmakshi Sharma, 2023b)*

On the first day of hearings for a group of petitions asking for same-sex marriage to be legalized in India, the main points made to the Constitution bench of the Supreme Court were that marriage is a way to help queer people fit into society better and end the stigma against them.

Mukul Rohatgi, a senior lawyer, claimed that marriage should be recognized as a basic right for queer people. This right is implicit in Articles 14, 19, and 21 of the Indian Constitution. He said that the rights protected by the Constitution, such as equality, justice, brotherhood, and freedom, were for everyone. Rohatgi said that if queer people's rights were the same as those of straight people, there was no reason why they shouldn't be able to get married. He talked about how marriage rights have changed around the world, including in the US and the UK. Rohatgi said that the gay community wouldn't be accepted until they were the same as the straight community. He said that the idea of marriage itself had changed in the last 100 years, with child weddings and multiple marriages being made illegal under Hindu law. He also said that the test of how well something is liked by most people was not a good reason to ignore people's rights that are protected by the Constitution. Rohatgi also said that it wasn't enough for gay people to be able to make their own decisions in private. He said it was also important for the State to give them the same right as other social groups to be recognized. He used reservations as an example and said that backward groups needed affirmative action to get them on the same level as everyone else and help them blend into society.

Senior lawyer Rakesh Dwivedi said that same-sex couples couldn't be treated the same as heterosexual partners. He said that relationships between people of different sexes were what kept the human race going, while relationships between people of the same sex existed before but never claimed equality. He said that the two marriages are different and should be treated differently. He also said that the state and the Special Marriage Act should respect the right to get married.

*“Same Sex Marriage Issue Cannot Be Decided Without Hearing All States And UTs: Centre To Supreme Court”-(Same Sex Marriage Issue Cannot Be Decided Without Hearing All States And UTs: Centre To Supreme Court, 2023)*

The solicitor-general stated they have written letters to seven state governments, receiving seven responses. Rajasthan has expressed opposition, while others require extensive debate.(Awstika Das, 2023)

During the proceedings of the Supreme Court Constitution bench, a perplexing issue arose regarding the determination of the respective ages of the partners in accordance with the stipulations outlined in the Special Marriage Act, 1954

*“More People In Urban Areas Coming Out Of Closet Doesn't Mean Same-Sex Marriage Is "Urban-Elitist" Concept, Govt Has Not Shown Data: Supreme Court”*-(Padmakshi Sharma, 2023)

The Delhi District Court Bar Associations voted against the Supreme Court's same-sex marriage recognition case. Instead of a judicial case, the resolution proposes a legislative procedure with stakeholder input. Marriage and its social, psychological, and physical effects are "nascent and experimentative," the resolution states. It stresses democratic discourse in Parliament, where elected representatives can consider constituent issues. The resolution highlights the highest court's duty in ensuring law and order.(Nupur Thapliyal, 2023)

Chief Justice DY Chandrachud emphasized that Parliament has the power to legislate on marriage and divorce, and the Supreme Court's interference in such matters should be addressed by the legislature. Senior Advocate Maneka Guruswamy argued that the basic structure belongs to the community and cannot be excluded from the guarantee under the constitution. Guruswamy argued that the petitioners seek a "workable interpretation" of the Special Marriage Act to recognize their relationships, but CJI and Justice Bhat argued that changes in the Act would impact personal laws. Senior Advocate Jayna Kothari argued that every individual has a fundamental right to family, and that recognition should fall under Article 21 of the Constitution, regardless of gender identity or sexual orientation.

*“Preventing Queer Marriages May Lead To Lavender Marriages, Nothing More Detrimental Than Gay Man Cheating A Lady That Way: Sr. Adv Saurabh Kirpal”*-(Livelaws News Network, 2023)

The Union of India has called on the Supreme Court to leave the issue of granting LGBTQIA+ members equal rights to marry and regulate such marriages to the legislature's discretion. Solicitor-General Tushar Mehta argued that India's legislative policy traditionally recognizes a 'conventional man' and 'conventional woman', and that the right to marry is not absolute, even among heterosexual couples. He argued that the judiciary is ill-equipped to handle situations arising from ruling in favor of LGBTQIA+ petitioners seeking marriage equality. He argued that the court's exercise would be restrained by four fundamental principles: cannot change the law's character, substitute legislative intent, read words of larger amplitude, and use different lenses for heterosexual and non-heterosexual couples.

The Supreme Court questioned the Union Government's willingness to grant social welfare benefits to same-sex couples without legal recognition. The Constitution bench emphasized that recognition should be association, not marriage, and that financial security measures should be provided. Justice Kaul emphasized that many people would have come out of the closet after the decriminalization of homosexuality in 2018. The Supreme Court assured the court that they would assist in removing barriers without legal recognition.

The Solicitor General of India notified the Supreme Court that the Central Government is willing to appoint a committee to review the legal rights of same-sex couples without marriage. The cabinet secretary will coordinate multiple ministries for the committee. The government will address petitioner concerns about financial security, shared bank accounts, and life insurance policies. The committee will decide LGBTQ couples' right to marry regardless of the Union's concessions. Justice S Ravindra Bhat noted that if the government's exercise benefits LGBTQIA+ couples, it could lead to more rights. Even if unaccepted, the equal recognition movement will continue.

The Supreme Court discussed the rights of adoption granted to different family types, including live-in relationships and single parents, on the ninth day of the marriage equality case. The bench discussed the welfare of children in light of demands for legal recognition for same-sex marriages. ASG Bhati argued that the basic structure of marriage was a union of a man and a woman, and that gender fluidity was impermissible. She argued that the welfare of children was paramount and could not be exposed even for an iota of compromise or uncertainty. The bench also discussed various scenarios where children were raised in settings other than those

involving a biological mother and father. ASG Bhati argued that the "ideal mode" was being naturally born to a biological man and a woman, and that the law had provided other alternatives for children who did not have that. She added that adoption could not be seen as an alternate to biological birth. CJI DY Chandrachud interjected that law does recognize that you can adopt for a variety of reasons, and there is no compulsion of having biological birth. Law recognizes that there may be situations apart from the "ideal family" having their own biological children. The architecture of child-centric laws is carefully crafted with the child being paramount.

Dr. Sasmit Patra, representing two organizations and arguing at his personal capacity as a member of Rajya Sabha MP, raised three points: the capacity and functionality of parliament, the role of the polity, and the impact on public polity due to absence of legislative action. He argued that 42 laws of the country will be affected if the Court makes a declaration in favor of the petitioners. In this context, Solicitor General cited the example of a Colorado baker who was prosecuted after refusing to create a wedding cake for a gay couple, stating that any declaration would bind every individual in the country who is not before their lordships. He added that whenever a declaration was made by legislature, legislature had the power to regulate the fall out. The court cannot predict the fallout and has written letters to state governments. Seven responses were received, with Rajasthan opposing the petitioners' position. Advocate J Sai Deepak, representing a women's organization, argued that the petitioners' prayers had individualized the "social institution" of marriage.

He argued that the "norm" should be allowed to participate in the proceedings, as the judiciary cannot substitute it. Deepak also emphasized that the object of dampatiya in Hindu law is procreation and that the Yogyakarta Principles leave it to countries to decide if they want recognition in marital relations. (*Giving Same-Sex Marriages Legal Recognition Will Make Laws On Adoption, Surrogacy Unworkable : NCPCR Tells Supreme Court, 2023*)

The Supreme Court reserved judgment on a batch of petitions seeking legal recognition for same-sex marriages after ten days of hearing. The bench, consisting of Chief Justices of India, listened to twenty petitions filed by same-sex couples, transgender persons, and LGBTQIA+ activists challenging the provisions of the Special Marriage Act 1954, Hindu Marriage Act 1955, and Foreign Marriage Act 1969. The bench confined the issue to the Special Marriage

Act and did not touch personal laws. The Union Government expressed willingness to consider granting rights to same-sex couples short of legal recognition as marriage, such as welfare measures and social security. The bench also mulled whether a declaration of right to marry could be issued without interfering with existing statutes. The National Commission for the Protection of Child Rights expressed concerns about allowing same-sex couples to adopt, while the Delhi Commission supported the petitions and backed the right of same-sex couples to adopt.

## **7.9. Conclusion**

Even if same-sex relationships between consenting adults are allowed in India now, same-sex marriage is still not recognized by the law. The Indian government has made it very plain that they do not support the legalization of same-sex marriages. However, there are progressive courts throughout India that will stand up for same-sex couples and support the institution of same-sex marriages. The federal government, however, has not responded positively to this admission. The study's author expresses hope that the current dispute can be settled speedily so that all citizens of the country can live without fear of retaliation for expressing their opinions.

## **Chapter 8**

### **Conclusion And Suggestions**

#### **8.0. Introduction**

Many people preach that homosexuality is a sin that should be avoided at all costs. When the concept of homosexuality enters the picture, the behaviour alters. Some see it as a destroyer of moral standards, religion, and cultural ideas, while others see it as a deviant conduct that is neither natural nor unnatural. People have an unfavourable perception of homosexuality, believing that it leads to an increase in violence, sexually transmitted illnesses, and drug usage. The higher rate of separation and break-up in homosexual relationships also provides a highly unstable environment for homosexual children raised through adoption or otherwise, which can have a significant psychological impact on such youngsters. Furthermore, many people believe that gay behaviour undermines traditional family values. Transgendered people are frequently denied higher education, employment, dismissed from their jobs, denied housing and public amenities at hotels and restaurants, and even harassed, beaten, and murdered because of their gender nonconformity. Suicide and depression are the major causes of mortality among gays and lesbians, according to the United States Department of Health and Human Services' Secretary's Task Force on Youth Suicide: Gay and Lesbian Youth Suicide. Gay and lesbian teenagers attempt suicide twice as often as heterosexual teenagers. Every year, gays account for more than a third of all teen suicides. Similarly, they face rejection from society, their families, and their parents as a result of their sexual orientation. In a survey of 194 homosexual and lesbian teenagers, 25% were verbally abused by their parents, and nearly 10% faced threats or actual violence. They are also not supported in their academic pursuits or other cultural activities. This kind of distinction between gays and heterosexuals causes homosexuals a lot of anxiety. They are afraid to speak up and express their feelings. Transgender activists and homosexuals are fighting back against violence and discrimination across the country. Since then, many countries have decriminalised gay behaviour, and some have recognised homosexual relationships as civil unions rather than marriages. Homosexuals are frequently subjected to a variety of social, economic, political, and legal discriminations.

“Prescriptions against sodomy have extremely ancient roots,” stated the US Supreme Court in *Bowers V Hardwick* in 1986. Individual decisions about gay behaviour have been subject to state interference throughout Western civilization's history. The moral and ethical principles of Judeo-Christian morality and ethics condemn certain behaviours.

Under Roman law, homosexual sodomy was a deadly offence. The first English act criminalising sodomy was passed during the English Reformation, when powers of the ecclesiastical courts were transferred to the King's Courts. "The notorious crime against nature," according to Blackstone, is a horrific deed "of deeper malignity" than rape, a heinous conduct "whose mere mention is a shame to human nature," and "a crime not suitable to be spoken." The law recognised homosexuality as a medical disorder in the early 1900s. 'Classes of mentally defectives should be broadened to include gays and other sex perverts,' according to an excerpt from a US Senate document from the time. Homosexuality is an unnatural offence, according to the Indian penal code of 1860. Many gay, lesbian, and bisexual people have formed social and legal movements in the last few years. The civil rights movements for lesbians, gays, bisexuals, and transgender people (LGBT) have broadened their goals to include human rights, privacy, and human dignity all around the world.

### India

In India, homosexuality has a long history. Around 1500 BC, an ancient document known as the Rig-Veda mentions various sculptures and remnants depicting sexual actions between women, where sexuality was based on pleasure and procreation. In mediaeval Muslim history, Muslim nawabs and Hindu aristocrats kept young boys for homosexuality. Tantric rituals also contain indications of sodomy and same-sex relationships. With the introduction of Vedic Brahmanism and British Colonialism, these experiences lost their relevance. The rising patriarchy suppressed homosexuality after the Aryan invasion in 1500 B.C. There are references in the manuscritti to punishments for homosexuality and lesbians such as caste loss, large monetary fines, and whipping. If it was discovered in a woman, she was labelled a luring of maids and sentenced to be shaved bald, have two fingers cut off, and then paraded on a donkey. In India, homosexuality gradually became an offence and was criminalised.

## **8.1. Legal response towards homosexuality in India**

There is no explicit reference of homosexuality or homophobia in any Indian legal statute or any specific laws on the subject. However, under section 377 of the Indian Penal Code, 1860, homosexual behaviour was considered an unnatural offence. Where has it been stated that.

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

The conduct was referred to as an unnatural offence in this clause, and the term 'carnal intercourse' refers to sexual intercourse between men, also known as a gay relationship. In India, homosexual relationships are still frowned upon. After a long wait, the Delhi High Court issued its decision on the constitutionality of Section 377 of the Indian Penal Code (Naz Foundation against Govt of NCT Delhi). The constitutional validity of Section 377 of the Indian penal code was challenged as a violation of the Indian Constitution's fundamental rights provision. The Delhi High Court ruled that just because a measure is opposed by the public does not mean that people's rights can be violated. It is a testament to democracy's strength that only the crowd can raise their voices. The time has come to speak up, and LGBT campaigners have begun a campaign to legalise homosexuality.

## **8.2. Opposing grounds of Section 377 of Indian Penal Code**

The constitutional safeguards enshrined in Articles 14 and 21 are violated by Section 377. It has the sin of unjustified classification and is arbitrary in the way it unfairly targets gays or the gay community, infringing on their article 14 rights. Section 377 also infringes on the right to privacy, which is a condition precedent to Article 21. The broadened breadth and ambit of Article 21's right to life and personal liberty laid the seed for future development of the law increasing this most basic of fundamental rights. As a result, many sexual expressions or orientations fall under the wider right to life and personal liberty umbrella. Similarly, a person's dignity is too crucial to live in a society, and it is founded on the acceptance of a person's bodily

or spiritual integrity. As a result, homosexuals have the right to live in society with dignity, and they have the freedom to marry someone of the same sex who is of a different sexual orientation. The term "individual dignity" is specifically included in the Indian constitution's preamble. Homosexuals have the same dignity as any other Indian citizen. Section 377 also sends the message that homosexuals are less valuable than other people; it demeans them and infringes on their right to live with dignity in an unconstitutional way. Another major structural hindrance created by section 377 is the breach of Article 19 of the Indian constitution, which guarantees freedom of speech, expression, and other rights to which homosexuals are denied access. After the Naz Foundation lawsuit, gays will most likely be permitted to live a decent life. Following a medical team's visit to Tihar jail in New Delhi in 1994, a dispute emerged over accusations of gay activity in the male wards. Despite the fact that a World Health Organization investigation of 55 jails in 31 countries found a greater rate of HIV transmission among prisoners than among the general population, the Tihar Prison administrators denied any homosexual conduct in the facility. In April 1994, a Public Interest Litigation (ABVA vs. Union of India and Others) was launched in the Delhi High Court, seeing this as an appropriate time. Sec 377 should be declared unconstitutional on the grounds that it violates the right to privacy, which is a part of the fundamental right to life and liberty guaranteed by Article 21 of the Constitution and recognised by the 1948 International Convention on Human Rights; it also violates Article 14 of the Constitution because it discriminates against people based on their sexual orientation.

### **8.2.1. Marriage**

Social norms, tradition, custom, or culture, according to the Universal Declaration of Human Rights, cannot be used to prevent a person from expressing his fundamental and constitutional rights. There would have been no progressive legislation established in our country if we accepted the justifications supplied by cultural beliefs, governmental policy, and societal values that are used to restrict a person's right. Even though sati, dowry, child marriage, and infanticide are all culturally based traditions, the government has taken attempts to prevent them. Based on the entire debate over whether same-sex marriage should be legalised or not. This is a

religious rather than a political discussion. Homosexuality is not a sin, it is simply a means of pursuing happiness, particularly sexual happiness, or desire. Apart from blind prejudice, there is no reason why two gay individuals cannot marry in a civil ceremony that will grant them the same rights and protections as heterosexual couples. Aren't we living in a time when the individual's right to choose is respected? Isn't India supposed to be a free country? Homosexuals have been labelled as queer in our society. However, homosexuality is neither new nor anti-Indian culture, it has always existed and has always been prosecuted under Section-377 of the Indian Penal Code, which is based on the British Offences against Persons Act. What is the best way to deal with same-sex marriages? The concerns are numerous and complicated. However, the feasibility and desirability of such a strategy must be determined. In any case, there is a rising belief that our current way of criminalising same-sex sexual activity neither benefits homosexuals nor protects society. To progress in the direction of human rights, we must legitimise same-sex weddings. This never-ending fight for marriage equality is the most pressing issue of our time. It's significant because it's not only about marital rights but it's about human rights, according to Tim Duggan, an Australian gay rights activist. The fight for same-sex marriage legislation has become a prominent part of western culture today. The concept of same-sex marriage was unthinkable twenty or thirty years ago. However, with the arrival of western culture came a new type of marriage that is not recognised in many countries. State legislatures have been deeply involved in public arguments about how to define marriage and whether it should be limited to relationships involving one man and one woman, or whether same-sex couples should also be allowed to marry. Most countries have made it illegal to marry someone of the same gender, however most countries have made it legal to marry someone of the same gender as a civil union. Around the world, efforts were made to socialise homosexuals.

Although the systematic disparities are nevertheless maintained in nations that restrict same-sex partners access to marriage. Human Rights Watch examines this disparity through the prism of international human rights legislation and practise in this briefing paper. Marriage is a fundamental human right. Straightforward application of international anti-discrimination

legislation dictates that gay and lesbian couples, like heterosexual couples, should have the same right: there is no "exception" to the reach of international anti-discrimination law for civil marriage. Furthermore, as the international examples cited in this briefing demonstrate, states are increasingly recognising this right. Many jurisdictions have created a parallel framework for regulating same-sex partnerships in response to the need for equality in relationship recognition. Many countries and communities have passed laws governing so-called "civil unions" or "domestic partnerships." Such steps have signified progress, but it has been insufficient. Most attempts to create a status that resembles marriage have serious flaws. This could be due to lingering prejudices against same-sex couples or intrinsically unequal understandings of what defines a "committed relationship."

Governments that are committed to equality cannot properly reserve certain aspects of civil life as exempt zones where inequality is tolerated. Human rights principles demand that governments prohibit discrimination in civil marriage based on sexual orientation and make marriage open to all.

### **8.2.2. Recognizing Relationships: International Law and Practice**

The strength of international anti-discrimination safeguards—including rights based on both sex and sexual orientation—clearly matters when evaluating who should have the right to marry and how. Discrimination based on sex is prohibited under the International Covenant on Civil and Political Rights (ICCPR), to which the India is a signatory. The United Nations Human Rights Committee, which monitors compliance with and adjudicates violations under the ICCPR, found in the 1994 case of *Nicholas Toonen v Australia* that laws punishing consensual, adult homosexual activity violate the ICCPR's anti-discrimination principles.

The Human Rights Committee specifically held that "sexual orientation" was a protected status under the ICCPR, concluding that references to "sex" in articles 2 and 26 should be interpreted to encompass sexual orientation. The same logic applies to civil marriage: denying gay and lesbian couples the right to marry is a form of discrimination based on sexual orientation.

In many nations, eliminating discrimination in civil marriage access has become a pressing concern. The Netherlands' and Belgium's legislatures granted full civil marriage to same-sex

couples in 2001 and 2003, respectively. In 2003, courts in the Canadian provinces of Ontario and British Columbia allowed same-sex couples to marry, and the Canadian parliament is expected to expand the same-sex marriage option across the country within a year. These are, however, merely the most recent and far-reaching changes in a global movement to recognise same-sex relationships. Denmark was the first country to allow registered partnerships to same-sex couples in 1989. Norway, Sweden, Iceland, and Finland followed suit in the years after, and the Scandinavian countries signed a treaty in 1995 to recognise each other's registered partnerships. Hungary recognised "common-law" marriages between partners of the same sex in 1995. Since then, Croatia, France, Germany, and Portugal have produced registration forms for same-sex couples across the European continent. This kind of recognition isn't restricted to Europe. The 1996 constitution of South Africa expressly prohibits discrimination based on sexual orientation. Several significant court decisions based on this article have upheld gay and lesbian couples' rights to equal spousal benefits, adoption, and childcare, as well as foreign partner immigration rights. "The family and family life with gays and lesbians are capable of establishing... are in all significant respects indistinguishable from those of spouses, and in human terms as important to gay and lesbian same-sex partners as they are to spouses," according to the South African Constitutional Court.

The Law Reform Commission of South Africa released a report on September 1, 2003, calling the lack of formal legal recognition for same-sex marriage illegal. The Same-sex relationships are recognised at the national level in Brazil, Colombia, Costa Rica, the Czech Republic, Israel, and New Zealand, among others, for at least some of the advantages of marriage. Same-sex relationships are recognised at the municipal level in a number of jurisdictions across the globe, including Argentina, Australia, Brazil, Italy, Spain, and Switzerland, as well as the state of Vermont in the United States.

Expanding access to the rights entailed in civil marriage has had little impact on underlying moral and cultural values in any of these countries. Rather, it has emphasised the significance of civic equality while preserving individual freedom of expression and religion. In previous centuries, most nations established a civil law system that governed both the formation and

dissolution of marriages. Legislators have worked to ensure that marriage is only entered with free and full mutual consent, that partners have equal rights within marriage, and that property is distributed fairly when a marriage ends. As a result, governmental marriage policy has frequently deviated from religious principles. Countries, for example, have legalised divorce and remarriage, even though local religions may prohibit both. As a result, there is a strong precedence for civil marriage laws to recognise marriages that are not recognised by religious norms. Without infringing on religions' rights to maintain their own laws and traditions, civil marriage laws can be altered to eliminate discrimination based on sexual orientation. However, as long as the state recognises marriage as a legal marker of relationships, it should be guided by international equality and anti-discrimination rules.

The UN has also showed flexibility in endorsing developing rather than rigid conceptions of family. "The notion of the family may differ in some areas from state to state, and even from region to region within a state," according to the United Nations Human Rights Committee. "It is therefore not possible to offer the concept a standard definition." According to the United Nations Committee on the Rights of the Child, it is important to examine "diverse family structures deriving from distinct cultural patterns and growing family connections" while "evaluating the home environment."

### **8.3. Step Forward**

Members of the LGBT community are frequently required to demonstrate their worth and value in the job, as well as in society at large. In the United States and a few other nations, their prospects are improving, but there is still much work to be done before the LGBT community is respected globally.

USA: Since June 26, 2015, when the United States Supreme Court declared in *Obergefell v. Hodges* that state-level restrictions on same-sex marriage are unconstitutional, overruling *Baker v. Nelson*, same-sex marriage has been lawful nationwide in the United States. The court decided that denying same-sex couples marriage licences and refusing to recognise weddings

completed in other jurisdictions violates the Fourteenth Amendment's Due Process and Equal Protection sections.

UK: In July 2013, the United Kingdom's Parliament passed legislation allowing same-sex marriage in England and Wales, which went into effect on March 13, 2014, and the first same-sex marriages took place on March 29, 2014. The Scottish Parliament enacted legislation allowing same-sex marriage in February 2014, and it went into effect on December 16, 2014. On December 16, 2014, the first same-sex marriage ceremonies were held for same-sex couples who had previously been in civil partnerships. On December 31, 2014, the first same-sex marriage ceremonies for couples who were not married in a civil partnership took place. The Northern Ireland Executive has declared that it would not draught legislation to legalise same-sex marriage in the province. Civil partnerships are recognised for same-sex weddings from other jurisdictions.

South Africa: Since the Civil Union Act took effect on November 30, 2006, same-sex marriage has been allowed in South Africa. The Constitutional Court's decision in the case of *Minister of Home Affairs v Fourie* on 1 December 2005 expanded the common-law definition of marriage to include same-sex spouses—as the South African Constitution guarantees equal protection under the law to all citizens regardless of sexual orientation—and gave Parliament one year to correct the marriage statutes' inequity. The National Assembly enacted a bill enabling same-sex couples to legally marry on November 14, 2006, by a vote of 230 to 41, and the National Council of Provinces approved it on November 28 by a vote of 36 to 11; the law went into force two days later. South Africa was the fifth country to legalise same-sex marriage, the first (and alone, as of June 2015) in Africa, the first in the Southern Hemisphere, the first republic, and the second outside of Europe.

Australia: Under Australian federal law, same-sex unions are treated as de facto unions, while each Australian state and territory is free to enact their own rules regarding same-sex relationship registers and same-sex partnership systems. The definition of marriage in the

federal Marriage Act (1961), as revised in 2004 by the Howard Government, prohibits same-sex couples from marrying.

### **8.3.1. Civil Unions or Marriage?**

Many jurisdictions have created a parallel framework for regulating same-sex partnerships in response to the need for equality in relationship recognition. Many countries and communities have passed laws governing so-called "civil unions" or "domestic partnerships." In certain cases (such as France), this create a status that is open to both same-sex and heterosexual couples, whereas marriage is reserved for heterosexual couples only. In some cases (like as Germany), the status is only available to same-sex couples, with marriage being the only way for heterosexual relationships to be recognised officially. Such steps have signified progress, but it has been insufficient. Most attempts to create a status that resembles marriage have serious flaws. This could be due to lingering prejudices against same-sex couples or intrinsically unequal understandings of what defines a "committed relationship." Domestic partners seeking official registration in the U.S. state of New York, for example, must demonstrate that they have lived together for two years; yet a man and a woman intending to marry can do so without being questioned about how long they have known each other or where they have lived. When it comes to showing that their relationship is "real," same-sex couples confront an unfair and discriminating burden. Similarly, some jurisdictions require same-sex couples to show that they share finances or that they publicly portray themselves as a pair. The burden imposed is not only unjust, but also dangerous in situations where publicly expressing one's homosexuality can lead to discrimination or violence—where one may lose one's job or home without legal recourse. Furthermore, unlike marriage, "civil unions" do not come with the same guarantee of recognition by other jurisdictions. The recognition of marriages across international borders is governed by an international agreement.

The doctrine of comity, which has been defined in US law as the "recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience and to the rights of its own citizens who are protected by its laws"—normally applies even to countries that are not parties to it. It

is up to nations to justify their refusal to recognise international marriages. The onus is frequently placed on partners in "civil unions" to justify their acceptance outside, which is unfair. When partners in a civil union travel to a jurisdiction that does not recognise them, this might have serious and painful implications. Even a partner's entitlement to child custody may be jeopardised. Finally, segregating same-sex unions into a unique legal status is a type of acknowledgment of "separate but equal." Separate is never equal: the history with racial segregation exemplifies how maintaining discreteness only serves to perpetuate prejudice. Even if the rights provided by civil unions on paper are identical to those entailed in civil marriage, the insistence on a separate nomenclature guarantees that those partnerships will still be stigmatised as second-class. Governments that are committed to equality cannot properly reserve certain aspects of civil life as exempt zones where inequality is tolerated. Human rights principles demand that states prohibit discrimination in civil marriage based on sexual orientation and make marriage open to all.

### **Interpretation of Result- Hypotheses**

**HYPOTHESIS NO. 1- The time has come when the law should interfere with the evolution of the institutions for solemnizing same-sex marriage.** - Based on a comprehensive analysis of both doctrinal and empirical research, the researcher has arrived at the finding that the hypothesis under investigation is partially supported. This conclusion is based on the identification of several instances wherein the judiciary has demonstrated a commitment to safeguarding the rights of same sex married couples. However, it is important to note that the Indian government maintains a firm stance against the recognition of same-sex marriages within the Indian context. The matter is currently under judicial consideration regarding this issue. Multiple stakeholders expressed the perspective that the formulation of this decision or any legislation pertaining to this matter should be exclusively undertaken by a legislative entity. The data gathered in this context indicates that among a sample of one thousand participants, a significant majority of 88.1 percent expressed the belief that same-sex marriages should be granted equivalent rights to those of traditional marriages. These rights

include but are not limited to mutual inheritance, the right to companionship, and the right to cohabitation. In contrast, a total of 6.3% of the participants expressed their opposition towards the notion of granting equal rights to couples of the same sex. Regarding the remaining respondents, specifically 5.6% of the total sample, it was observed that they opted to withhold their opinions on this matter. Consequently, the interviewer posits that with adequate knowledge regarding this matter, they may also exhibit a favourable disposition towards legislation endorsing same-sex marriages. (Hypothesis Proved)

**HYPOTHESIS NO. 2- Giving legal status to same-sex marriages may result in the removal of mental agony.** Following the decriminalization of homosexuality among consenting adults, the societal stigma and moral condemnation associated with such relationships have progressively diminished. The collected data (Figure no. 24- Chapter-6) indicates that among a sample of one thousand participants, a significant majority of respondents (59.4%) expressed the belief that the legalization of same-sex marriage would lead to a transformation in societal attitudes towards the LGBTQ+ community, reducing discrimination. Therefore, the hypothesis, as formulated, has been substantiated by this response. Approximately 29.4% of participants expressed uncertainty regarding this shift in attitude. However, over time, even these individuals harbor a modicum of belief that it has the potential to alter societal perspectives and alleviate the stigma associated with such relationships. A total of 11.2% of individuals expressed a strong conviction that no change would occur. (Hypothesis Proved)

**HYPOTHESIS NO. 3- Legal recognition in the form of marriage may result in the removal of a taboo attached to same-sex relations and promote a sense of security as well as societal acceptance-** The data collected from Figure no. 24 in Chapter 6 reveals that within a sample size of one thousand participants, a substantial majority of respondents (59.4%) held the view that the legalization of same-sex marriage would bring about a notable shift in societal perspectives regarding the LGBTQ+ community, resulting in a decrease in discriminatory practices. Thus, the formulated hypothesis has been validated by the observed response. The shift in attitude was met with uncertainty by approximately 29.4% of the participants.

Nevertheless, as time progresses, even these individuals develop a small degree of conviction that it possesses the capability to modify societal viewpoints and mitigate the negative connotations linked to such relationships. Approximately 11.2% of individuals held a firm belief that no change would take place. (Hypothesis Proved)

#### **8.4. SUGGESTIONS**

As Marriage has a strong religious and cultural importance in India. It is regarded as a sacrament, and religious ceremonies constitute a necessary part of the ceremony. Marriage and divorce are controlled by personal law, which recognises the importance of cultural interaction and any rule that would govern the same. Marriages in these communities are codified and regulated by the Christian Marriage Act, the Shariat Act for Muslims, and the Parsi Marriage and Divorce Act for the Parsi community. The special marriage act is a secular alternative to religious personal law that oversees marriages between members of various religions. The procedures and criteria for a lawful Hindu marriage are governed by the Hindu Marriage Act of 1955 where Sikhs, Jains, and Buddhists are also covered by the law. Traditional readings of the statute only allow for heterosexual partnerships, however supporters for LGBTQIA rights have claimed that the act should be interpreted to allow for same-sex marriage. A petition was filed in the Delhi High Court on September 8, 2020, seeking a ruling that the Hindu Marriage Act, 1955 recognises the right of same-sex couples to marry. As homosexual interactions were decriminalised in 2018 because of the Navtej Johar decision, the PIL claims that there has been no legislative movement on same-sex marriage in India. Furthermore, progress toward the destigmatization and protection of this vulnerable group can only be made if same-sex couples are granted legal safeguards such as maintenance, succession, and pension rights, which are only available to heterosexual married couples. Economic benefits from regulations such as the Employment Provident Fund Scheme of 1952 and the Workmen's Compensation Act of 1923 are only offered to blood or marriage relatives.

In the Naz Foundation case, the Supreme Court concluded that Article 15 of the Constitution guaranteed personal autonomy to all citizens and barred discrimination based on religion,

ethnicity, caste, sex, or place of birth. The Court saw a common thread running through all of them they are either immutable features or involve a fundamental choice. It further stated that identical grounds that could be used to limit personal autonomy must pass stringent judicial scrutiny. Because "discrimination on the basis of orientation is built on stereotyped judgments and generalisations about the conduct of either sex," the court concluded that sex as a ground encompasses sexual orientation. According to the petition, refusing to allow same-sex marriage would be a breach of Article 15 of the constitution. The petition further states that under Article 21 of the Indian Constitution, the right to marriage has been recognised as a vital aspect of the right to life, and that it must be available to all people, regardless of sexual orientation or gender identity. The petition emphasises the legality of homosexual marriage under the Hindu Marriage Act, 1955, and calls for the courts to give it a thoughtful interpretation. "A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely: — neither party has a spouse living at the time of the marriage; 1 [(ii) at the time of the marriage, neither party— (a) is incapable of giving a valid consent to it in consequence. As a result, the provision simply states that the statute permits a marriage between two Hindus without discrimination based on homosexuality or heterosexuality. Section 5 does not contemplate the requirement of a Hindu Man and a Hindu Woman, according to the plea. A similar petition under the Special Marriage Act has been filed at the Kerala High Court. While Section 5 does not explicitly state that a union between a Hindu man and a Hindu woman is the only union contemplated, the terms bride and bridegroom appear in Section 5(iii), as well as Section 7 of the act, which states that "(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding." Apart from that, the legislation is mainly gender agnostic, in Hindu law, there are numerous routes to legalising same-sex marriage. The first is a reinterpretation of current legislation to make it possible. Because the act is mainly gender neutral, it is easy to argue that homosexual couples that have one character as the bride and the other as the groom meet the criterion. Lesbian couples have tried this, with one identifying as a male and the other as a female. The same goes

against standard statutory interpretation principles, where the common definitions of bride and groom are gender neutral. While the Madras HC made some judicial inroads in terms of purposeful interpretation of 'bride' in Section 7 of the Hindu Marriage Act, allowing for a marriage between a man and a transwoman on the basis that transwomen fell under the meaning of the word bride, the same has not been applied to heterosexual cis-gendered couples. While there appears to be no statutory prohibition on homosexual marriage, the act does not appear to consider the validity of same sex marriage.

Another option is to get the LGBTQ community recognised as a distinct group with its own traditions and practises. In Tamil Nadu, the Arya Samaj and the anti-Brahmin Self-Respect movement developed their own wedding ceremonies and behaviours. While the Arya Samaj's marriage ceremony drew on Hindu scriptures, the Self Respect marriages did not. However, both of these types of marriages were recognised when the Tamil Nadu Act was changed to include Section 7-A, which recognised Self-Respect marriages. The LGBT community could come together and seek recognition under the Act if they agree on a common marriage practise. However, members of the LGBT community are subject to separate personal laws and adhere to diverse conventions and practises. Because the community's members come from many religious backgrounds, asking for protection based on customary customs and protections is unlikely to be accepted by the courts.

A third approach could be based on court interpretations of the spirit and character of the statute, such as the fact that same-sex couples were never excluded. The same might be done based on sexual orientation discrimination, as contemplated in the Naz Foundation decision, and bolstered by the fact that old Hindu holy texts are filled with gay partnerships. Sexual practises between women are depicted in ancient books like as the Rig Veda, which goes back to roughly 1500 BC, as well as sculptures other remnants, as discoveries of a feminine world where sexuality was based on pleasure and fertility<sup>16</sup>. In addition, different marriage systems have been observed in India as legitimately recognised cultural traditions. The Kutchi community in Gujarat is an example of this. When Ishaak, the bridegroom, and Ishakali, the bride, are both men, a ritualistic transgender marriage is celebrated during Holi. In addition,

the Nayar group in South India permits multiple males to have access to a lady through tali rituals and subsequent Sambandham unions. A male of proper ceremonial standing tied the Tali chain and locket around the woman's neck on behalf of his sub-caste collectively, which earned sexual rights over her. These privileges were offered to any member of a higher caste, generally a Nambudiri, who was attracted to the woman and deemed suitable for her. Men in Sambandham relationships did not have exclusive rights as husbands or fathers; if the woman so desired, she may revoke the sexual access granted to them at any moment.

Despite the existence of alternative marriage systems and rituals, a family is traditionally defined as a man and a woman, as well as their offspring. This definition is founded on the concepts of forced heterosexuality and homophobia, and it must be viewed as incompatible with the concepts of equality and sexual autonomy. Finally, the best option appears to be a clear change to the legislation itself. However, certain elements of society would be offended by such a change, which they would see as interfering with religious organisations' traditions and customs. Solicitor General Tushar Mehta, representing the union government, declared in court that "our legal system, society, and morals do not recognise marriage between same-sex couples." . While any inclusion of homosexual marriage in the Hindu Marriage Act of 1955 will undoubtedly be met with opposition from some sections of the community, proponents of same-sex marriage have made tremendous progress toward mainstream acceptance. Several lesbian marriages have occurred in the last decade, including religious ceremonies, temple garlands exchanges, and quasi-legal friendship contracts (maitrikarar) Two policewomen married in a Hindu ceremony in 1988. Their marriage was welcomed and supported by their families and community, despite the fact that it could not be recorded and they were fired from their employment. It's worth noting that the majority of lesbian marriages documented so far have been between small-town, lower-middle-class, non-English-speaking women who are unaffiliated with the LGBT movement. Furthermore, this discussion highlights the necessity for marriage equality for the LGBTQIA community, not just under Hindu law, but also under other personal laws. It is apparent that the Naz Foundation's anti-discrimination project must be expanded in order to achieve legal and societal recognition for long-term same-sex

marriages. While Hindus make up a significant section of the community, other religious groups should not be denied marital equality. In India, society is constantly changing, and initiatives for caste, religious, and gender equality have gained universal acceptance. While the PIL is a vital step forward for same-sex marriage, the likelihood of its success in court is unknown, and legislative solutions would give a surer path forward.

In last Information, education, and a desire to change the prevalent culture are all necessary for changing attitudes. In schools, tolerance of differences should be promoted, and pupils should be taught about the importance of human rights. The media may help by reporting on LGBT matters responsibly and creating a culture of tolerance and freedom for minorities. The government must ensure that activists can work without fear of being harassed by the police and that they have equal access to resources as NGOs working in other sectors. NGOs working in rural regions, where homophobia is more ingrained, and those working with hard-to-reach people, such as the impoverished, convicts, and the young, should receive special attention. Every government should enact legislation to protect gays as well as couples who are married to the same gender. Each provision of law should be reviewed for constitutional legitimacy so that a person can exercise his or her ultimate freedom and right in society. After all, a person maintains his or her place in society by exercising his or her rights and dignity.

Let us now look at the numerous options available to the government to make same-sex marriages lawful in India.

## **8.5. Marriage laws inclusive of LGBTQIA+ community**

### **Alternatives available**

- The **first option** is to make the language of the act gender-neutral, which would allow same-sex marriages under the current statutes as written.
- **Second Option:** The LGBT+ community should be treated as a distinct group and same-sex weddings should be legalised following the writing of a new Act.
- Since India is not yet progressive enough to accept LGBT marriages, a **third option** is to give same-sex couples a different legal status, such as a civil partnership, which may

not have all the rights of marriage but does allow them to share insurance and file joint tax returns, among other benefits. In other words, it's easy to see how their mutual emotional and financial needs make them inseparable.

<b>IDEAL:REALITY</b>
IDEAL: The best method to guarantee marriage equality seems to be the second alternative, which is to write a brand-new law for same-sex weddings with the needs and vulnerabilities of LGBT+ individuals in mind.
REALITY: Drafting a separate law governing LGBT marriages is still quite distant in India because of the country's complex social and cultural terrain, where ideas of morality and customs are strongly ingrained in society.

## **Solution??**

Now, the most workable options are to either change the current laws so that they explicitly permit LGBT+ marriage or to make the language of the laws neutral enough such that they effectively do permit such marriages.

or

An alternate type of marriage could be made legal.

Now let us understand the consequences of adopting first viable solution.

### ***Amending, modifying, or changing the language of the laws***

The following are some of the potential issues that may come from using this approach:

Together as "husband" and "wife"

- i) Since it's often accepted that husbands are male, and wives are female. Since both parties in an LGBT marriage are the same gender, this concept does not apply to their union.

In addition, there will be legal uncertainty if the terms "husband" and "wife" are not construed consistently. For instance, the Special Marriage Act, 1954, Section 27(1-A), lays out the

reasons on which a wife can accept divorce; however, in the context of LGBT marriages, the term "wife" is ambiguous. The ambiguity surrounding same-gender-loving weddings can thus be clarified by reinterpreting Section 3 of the Act, the defining clause.

### *ii) Prohibited degree*

Certain degrees of relatedness are explicitly forbidden for marriage under the Special Marriage Act (and similarly under the Hindu Marriage Act). In both men and women, however, the depth of such connections differs. However, these phrases will have to be revised because gay, lesbian, bisexual, and transgender marriages do not involve a heterosexual male and a heterosexual female.

### *iii) Sodomy*

Sodomy constitutes grounds for dissolution of marriage under the Special Marriage Act, as it does under Hindu marriage law and Parsi law. Section 377's repeal necessitates a new definition for these terms.

### *iv) Grounds for divorce*

Despite the fact that grounds such as adultery, desertion, and cruelty apply to both sexes, their interpretation differs in the case of men and women. Therefore, in the case of same-sex marriages, this power imbalance must be explicitly established.

### **Conjugal bond**

The requirement of consummation must be rethought in the context of homosexual weddings because its absence can declare a marriage null and void, as in the case of impotence. Since this idea of completion is predicated on a relationship between a cisgender male and cisgender female, it has the potential to invalidate every LGBT marriage.

### **Implications of changing one's gender identity**

After the NALSA judgement, since each individual has the right to identify himself/ herself as the third gender and also can undergo sex reassignment, therefore, the gender assigned at birth is not permanent and can change afterwards in some cases. So, while making changes in the law, legal rights and obligations of people undergoing such transition also need to be defined.

### **8.6. Civil Partnership: A Valid Substitute for Marriage**

Since heteronormative ideas are so ingrained in the institution of marriage, some have proposed rethinking our definition of family to include families of choice with greater levels of flexibility so those who opt out of traditional family structure may not be at a disadvantage.

In the context of LGBT marriage, this means that non-conjugal caregiving relationships, in which partners share both financial and emotional responsibilities, should be recognised as valid forms of sexual intimacy.

A civil union or civil partnership, such as those recognised in Tasmania under the Relationship Act, 2003 (Relationship Act, 2003), or in the United Kingdom under the Civil Partnership Act, 2004 (*Civil Partnership Act 2004*), can be used to achieve the same ends as marriage but allowing for greater flexibility. Like the legalisation of same-sex marriage in South Africa in 2006 and Canada in 2005, such unions are legally recognised in those countries as well.

These partnerships are essentially legal marriages centred on caregiving, without the other requisites of a traditional marriage such as living together. *Pacte civil de solidarite*, a similar French legal framework, allows two people to engage into a contractually binding and mutually dependent relationship on terms mutually agreed upon by the parties involved.

### **8.7. Effects on-Adoption, Guardianship and Surrogacy**

## Adoption

Adoption in India is controlled by both secular and religious law. The Hindu Adoption and Maintenance Act of 1956 governs the process for Hindu families, but no such rules exist for Muslims, Christians, Parsis, etc.

In addition, the Central Adoption Resource Agency's adoption regulations from 2017 and the Juvenile Justice care and protection of children act from 2015 (JJ Act) are both relevant (CARA). All faiths are welcome to adopt under this statute because of its secular nature.

### Adoption Policies and Laws

#### The Hindu Adoption and maintenance Act, 1956

Under HAMA, a married Hindu man or woman with their spouse's permission may adopt a kid. However, in the event that one of the partners is mentally incapacitated, has abandoned the world, or has had his or her offspring altered, this consent will not be necessary. This law also makes it possible for unmarried men and women who are of legal age and mental health to adopt a kid.

### Controlling Adoptions

If you're looking for strict laws, look no farther than the Adoption Regulation Act. The same criteria as in HAMA apply here: the prospective adoptive parents must be single adults without dependent children and in a solid mental, emotional, and financial position. The act also prohibits any individual male from adopting a female kid, although females are not subject to the same prohibition and may adopt male children. In contrast to HAMA, which only requires a twenty-year age difference between the prospective adoptive parent and the child, all adoptive parents must be married.

People who identify as neither sexes might also include transgender individuals.

Although Section 377 of the Indian Penal Code has been decriminalised, members of the LGBTQIA+ community are still prohibited by law from adopting children. This shows that the law does not treat homosexual couples equally.

Why gay and lesbian couples face obstacles when trying to adopt.

To adopt a child, a couple must have been together for at least two years, as required by regulation 5(3) of the Adoption Regulation Act of 2017. In addition, the usage of the term's "husband" and "wife" in this section suggests that same-sex couples do not have the legal right to adopt.

Second, the applicability of such regulations with regards to trans-couples will be unclear because adoption rules are implemented differently in the case of males and women.

Thirdly, considering the NALSA decision, given that persons have the freedom to select the gender they identify with and to undertake sex reassignment surgery. Thus, there is very little clarity concerning the legal ramifications if a woman adopts a child and then undergoes sex transition to become a man.

Legal guardianship is a no-win situation.

An adult who takes on the role of guardian over a juvenile assumes legal responsibility for the kid's well-being and possessions. Custody and guardianship go hand in hand. The Hindu Minority Guardianship Act of 1956 (HMGA) and the Guardianship and wards Act of 1956 (GWA) are two separates but equally important pieces of Indian law.

### Background

When it comes to a child's welfare, only the father is recognised as a natural guardian in Indian law. In addition, according to Section 6 of the Hindu Marriage Act, the mother is second in line for guardianship rights after the father.

However, in *Geeta Hariharan v. Reserve Bank of India (Ms. Githa Hariharan & Anr vs Reserve Bank Of India & Anr on 17 February, 1999)*, the court ruled that the phrase "after the father" should be read to suggest that a mother can exercise guardianship rights even in the absence of a father, rather than just after his death. This includes situations where the father is not involved in the child's life in any significant way (emotionally, financially, etc.).

### **Surrogacy**

People who are unmarried or who are members of the LGBTQIA+ community are barred from using surrogacy to have biological children under the new surrogacy Act (Surrogacy (Regulation) Act, 2021, 2021) passed in parliament.

The bill's original intent was to prevent the commercialization of surrogacy and protect both the mother and the child from exploitation, but instead it has become an "inflexible" piece of legislation that reinforces outdated ideas about the "archaic family system."

### **Restrictions and Regulations**

There is no easy way for a heterosexual couple to meet the standards of the law and qualify for surrogacy under the new legislation. The law includes provisions such as requiring the surrogate mother to be a "near relative," without defining the term, or requiring the intended parents to have been married for at least five years, without taking into account the couples' ages or the timing of their weddings. In addition, the law prohibits any unmarried individual or LGBTQIA+ couple from having children via surrogacy.

Legislators say the Act's only purpose is to outlaw commercial surrogacy in India and protect the rights of surrogate mothers. However, there appears to be no logical connection between the provisions and the purpose of the bill, since if this were the primary objective of the legislature, greater attention would have been given to rehabilitating and integrating the surrogate mothers into our societal framework.

### **Criticism**

It's fair to oppose the Act because it makes it impossible for a large population to use surrogacy to start a family. The measure outlaw's surrogacy solely on the basis of an individual's marital or sexual status and imposes stringent limitations even in the case of heterosexual couples. The current law is discriminatory towards many groups, and there are many gaps in it that need to be filled.

There is a heightened risk to LGBTQIA+ relationships.

Thus, after considering these factors, the idea of providing the LGBTQIA+ population the access to surrogacy appears even more of a pipe dream. Another crucial consideration is that non-

LGBTQIA+ individuals and couples can adopt and become legal guardians, however the LGBTQIA+ community is not. This includes single women and men.

## **8.8. Inheritance**

The laws of inheritance and succession in India are based on both religious and civil principles. The Hindu community is governed by the Hindu Succession Act, 1956; the Muslim community and the Parsi community are governed by their own customary laws; and all Indians who are married under the Special Marriage Act, 1954 are now subject to the Indian Succession Act, 1925, which has been amended several times.

### **Gender-of-the-Intestate**

When compared to other personal laws, the Indian Succession Act of 1925 differs most notably in its protection of women's inheritance rights. While personal laws have a gendered inheritance plan, the Indian Succession Act of 1925 does not. According to the Indian Succession Act of 1925, the closest living relative to the deceased is given priority over the heir's gender. What this means is that the surviving spouse and their direct descendants become the major heirs, regardless of their gender.

### **Creating Legislation Indifferent to Gender**

Inheritance laws, like most others, implicitly limit the definition of "marriage" to cisgender unions. Thus, it is crucial that the law recognise same-sex marriages before it can be applied to the case of LGBT+ couples. Also, while it's true that inheritance occurs regardless of gender and instead depends only on how close a person is to the person passing it on, it's important to ensure that transgender people and others who have undergone sex change are not stigmatised in any way by making the language completely gender neutral.

## **8.9. Seeking an alternative under the Special Marriage Act??**

Even if the concept of marital equality cannot be found within the context of current personal law, the Special Marriage Act, 1954 nonetheless allows for same-sex marriages to be solemnised. There is nothing inherently religious about the Special Marriage Act, and it continues to protect the right of individuals to marry the person of their choice even in jurisdictions where doing so would be contrary to religious law.

Additional advantages are available to couples who are married under the Special Marriage Act. The Special Marriage Act allows for the registration of weddings that have been "celebrated" or "solemnised" through any means, including conventional religious rituals. Those who choose to tie the knot under the Special Marriage Act are not prevented from participating in a religious ceremony. Those who opt to solemnise their marriage under the Special Marriage Act are protected from losing any advantages they would have had under the personal law applicable to their faith, including the right to inherit, the protection of vested interests, and the protection of succession.

Like the Hindu Marriage Act, the Special Marriage Act broadly defines "any two persons" as those who may enter marriage. The text of the Special Marriage Act, which refers to "the male" and "the female" and "living together as husband and wife," suggests that it was not meant to allow same-sex marriage, as was the case with the Hindu Marriage Act. Nonetheless, such phrases can be understood to indicate either "a male" or "a female," and "living together as husband and wife" can be read to mean "living in the manner of a husband and wife," i.e. as spouses, with the associated social and legal obligations, such as cohabitation, mutual support, etc. This means that the Special Marriage Act may allow for the legalisation of same-sex marriages.

There is more evidence to back up this understanding. In *Danial Latifi v. Union of India* (*Danial Latifi & Anr vs Union Of India on 28 September, 2001*) ('Danial Latifi'), the Supreme Court of India ruled that Muslim women are entitled to the favourable provision of maintenance under Section 125 of the CrPC because Muslim personal law does not cover a circumstance where the divorced woman is unable to maintain herself. Similar to how two Muslims (or Christians) should be able to take use of the Special Marriage Act despite the fact that Islamic law generally

does not recognise same-sex marriage, this law allows people to marry who may not be allowed to marry under their personal laws.

### **8.10. Conclusion & Suggestions**

- First, recognising same-sex marriage isn't enough; more legislative reform is needed to make same-sex and opposite-sex partnerships legally equivalent.
- Since casteism, untouchability, the dowry system, and other antiquated forms of oppression are still being actively combated in India today. Where women's rights are still not fully recognised in the majority of the country. Regarding homosexuality, we cannot afford to be nave. It's not going to alter overnight, or even in a few years. Correct education through many generations is necessary to bring about this shift in viewpoint. We risk endangering the community's very existence if we try to impose acceptance. Therefore, a law that shields them from the anger of ignorance must precede a law that grants them their rights.
- Thirdly, the LGBTQ community is completely typical and ordinary. For this reason, they need to be afforded the same protections enjoyed by straight couples. Anxiety and despair result from leading a hidden existence in which one does not express one's opinions. When everyone else can do it, why can't the LGBTQ community? To ensure everyone can work together effectively under the same roof, everyone should be afforded the same rights and privileges in society. In addition, as the population rises, the adoption rate rises when two men and two women wed, giving new hope to the orphans and aiding in population control.
- It is necessary to alter the current marriage and adoption rules in order to fight for same sex marriage. It would take a long time for the Indian legislature to change its mind on the issue of same-sex marriages, therefore I propose that, in the meantime, tiny adjustments in work culture, acceptance in society, and an amendment towards civil partnership can be imposed.

- Marriage is a personal and domestic matter that poses no threat to public safety or public order. All marriage-related statutes and regulations must be updated to refer to "person" rather than "male" or "female" in order to reflect this acceptance. Students of the law will benefit from this reminder that marriage is between a man and a woman, not between sexes.
- When reviewing applications to adopt children, same-sex couples must be given the same consideration as couples of the opposite sex. There is no proof that a same-sex couple can't provide as good of an environment for their child as a couple of the opposing sex can.
- 7) The Maintenance Support Act and the Protection of Women from Domestic Violence Act of 2005 (the "DV Act") should apply equally to same-sex spouses. Despite the legalisation of gay conduct, the prejudice against same-sex partnerships keeps many people in harmful situations where they feel unsafe leaving. To be considered domestic violence under the DV Act, the perpetrator must be a male. For this reason, the DV Act does not recognise males as "aggrieved persons." A woman in a same-sex relationship 'may' be a "aggrieved person" due to her gender, but her partner cannot be a "respondent." Moreover, her relationship would not be regarded one "in the character of marriage" until and unless same-sex marriage is recognised as equal to opposite-sex marriage. Only a "wife," that is, a woman legally married to a man, is entitled to support under section 125 of the CrPC.

*To...Conclude.....*

*Quote by Justice Indu Malhotra- “History owes an apology to the members of this community and their families, for the delay in providing redressal for the embarrassment and rejection/exclusion that they have suffered through the centuries”. - Navtej Singh Johar Judgment (2018 SC)*

# Appendix-1-Position statement of Indian Psychiatric Society-

## “Homosexuality is not a disease”



[Estd: 1948]

## INDIAN PSYCHIATRIC SOCIETY

**Headquarters** : Plot 43, Sector 22, Gurgaon, Haryana - 122 002, India  
**Phone** : 91-124 - 4006750. **Email** : ipssocietyofficial@gmail.com  
**Secretariat** : Department of Psychiatry, Room No 1111, 1st Floor, 1st Block,  
 JSS Academy of Higher Education and Research  
 JSS Medical College and Hospital, M.G. Road, Mysore - 570001  
**Mob** : 91 9842282359. **E-Mail** : ipssoc19@gmail.com  
**Websites** : www.indianpsychiatricsociety.org • www.indianpsychiatry.org

<b>Dr. P.K. Dalal</b> <i>President</i> Professor & HOD, Psychiatry, K.G Medical University, Shah Mitra Road, Chowk, Lucknow-226005, Uttar Pradesh T : +91 552 2758805 M : +91 9415025665 E : docpkd19@gmail.com	<b>Dr. Gautam Saha</b> <i>Vice President</i> “Clinic Train” JPC, Pioneer Park, Bansari, Kolkata - 700124 West Bengal T : +91 35 25426836 M : +91 9840055232 E : gautam@vubho.co.in	<b>Dr. T.S. Sathyanarayana Rao</b> <i>Hon. General Secretary</i> Professor, Department of Psychiatry, JSS Medical College and Hospital, M.G. Road, Mysore - 570004, Karnataka T : +91 821-2355125 M : +91 9845282359 E : tssoc19@gmail.com	<b>Dr. (Surg Cdr) K.K. Mishra</b> <i>Hon. Treasurer</i> Professor & HOD, Psychiatry, Mahatma Gandhi Institute of Medical Sciences, Sevagram, Warha - 442102 Maharashtra M : +91 3435515820 M : +91 8902489025 E : drkkmishra2003@yahoo.co.in	<b>Dr. Om Prakash Singh</b> <i>Hon. Editor</i> AA304 Ashabari Apartments UCI, Dandabaghair, Patna, Tezgaon, Koderma - 701094 West Bengal M : +91 9836348865 M : +91 9434015231 E : oosinh.am@gmail.com
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Ref: IPS/HGS/20-22/0311 (LGBT)

Dated: June 11<sup>th</sup>, 2020

### EXECUTIVE COUNCIL (2020 - 2021)

*Exec. Part President*  
**Dr. Mrugesh Vaidyanav**  
 M : +91 9822767565  
*Exec. Part Hon. Gen. Secretary*  
**Dr. Vinay Kumar**  
 M : +91 9651144236  
*Exec. Part Hon. Treasurer*  
**Dr. Mukesh P. Jagtivala**  
 M : +91 9679521795

### DIRECT COUNCIL MEMBERS

**Dr. Abhay Mathur**  
 M : +91 9448450565  
**Dr. Anurag Upadhyay**  
 M : +91 9851870700  
**Dr. Amit Patnigoshi**  
 M : +91 9438145100  
**Dr. Anish M. Parmar**  
 M : +91 9425492652  
**Dr. Kaushik Chatterjee**  
 M : +91 9819419114  
**Dr. Laxmikant Rathi**  
 M : +91 9856077550  
**Dr. M. Akshay Shrivastav**  
 M : +91 7947335897  
**Dr. Savita Mishra**  
 M : +91 9820008834  
**Dr. Shashi Rai**  
 M : +91 9415009076

### ZONAL REPRESENTATIVES

*Central Zone*  
**Dr. Rajeev Jain**  
 M : +91 9826997055  
**Dr. Sanjay Gupta**  
 M : +91 9415012454  
*Eastern Zone*  
**Dr. Sumrat Kar**  
 M : +91 9437163486  
**Dr. Sujit Sarkhel**  
 M : +91 9836074700  
*Northern Zone*  
**Dr. B.S. Shekharat**  
 M : +91 9419689055  
**Dr. Parshom Das Garg**  
 M : +91 9872892580  
*Southern Zone*  
**Dr. Abhay Mathur**  
 M : +91 9448450565  
**Dr. G. Suresh Kumar**  
 M : +91 9848508204  
*Western Zone*  
**Dr. Arun V. Marwade**  
 M : +91 7887487542  
**Dr. Vivek C. Karpelav**  
 M : +91 9822200289

### Position statement of Indian Psychiatric Society regarding LGBTQ

The Indian Psychiatric Society has in 2018 categorically stated that homosexuality is not a disease and must not be regarded as such. All forms of 'treatment/therapy' (including individual psychotherapies, behaviour therapies like aversive conditioning etc., hypnotherapy, group therapies, pharmacotherapy, physical treatment methods like ECT etc. or milieu treatments) to reverse sexual orientation are based on a premise that is erroneous : that such orientations are diseases. Moreover there is no scientific evidence at all that attempts to convert a person's orientation succeed in any manner.

The Indian Psychiatric Society totally disapproves of any such treatments and urges that such therapies must cease forthwith.

**(Dr. P.K. Dalal)**  
 President  
 Indian Psychiatric Society

**(Dr. Ajit Bhide)**  
 Chairperson,  
 LGBT – Task Force, IPS

**(Dr. T.S.S. Rao)**  
 Hon. General Secretary,  
 Indian Psychiatric Society

## **Appendix-2 Questionnaire used for conducting research.**

### **Questionnaire on Feasibility of same-sex marriages in India**

Hello, Dear friends!

I hope you all are doing great.

I am doing my Ph.D. on the area of Same-sex marriages in India at the School of Law, University of Petroleum and Energy Studies, Dehradun. To conduct my research, I have prepared this questionnaire. Please spare 5 minutes of your valuable time to answer the questions. This would help me conduct my research in a better and more effective manner. All the information received through this questionnaire shall be used for my research work, and information regarding the participants shall remain confidential.

Thanks in advance.

\* Indicates required question

1. Email \*

.....

2. Which category below includes your age? \*

- a. 17 or younger
- b. 18-30
- c. 31-45
- d. 46-60
- e. 61 or above.

3. What is your highest level of Education \*

- a. Illiterate
- b. 10th passed 12th passed Graduate.
- c. Post-Graduate Doctorate
- d. Post Doctorate

4. How do you classify yourself as? \*

- a. Male
- b. Female
- c. Prefer not to say.
- d. Other

5. Do you consider yourself to be heterosexual, homosexual, bisexual or something else\*?

- a. Heterosexual
- b. Homosexual
- c. Bisexual
- d. Transgender
- e. Asexual
- f. None of the above
- g. Prefer not to say.

6. Area of Residence\*?

- a. Urban
- b. Rural

7. Religion \*

- a. Hinduism
- b. Islam
- c. Sikhism
- d. Jainism
- e. Christianity

8. Marital Status\*

- a. Married
- b. Unmarried
- c. Widow/Widower
- d. Divorced
- e. Separated/deserted.

9. Occupation \*

- a. Govt. Employee
- b. Private Employee
- c. Professional
- d. Self-Employed
- e. Homemaker
- f. Student
- g. Other

10. Monthly Income\*

- a. No-income Below 5000
- b. 5001-15000
- c. 15001-25000
- d. 25001-35000
- e. 35001-45000
- f. Above 45000

11. Do you Favor special laws and privileges on same-sex marriages in India? \*

- a. Yes
- b. No
- c. May be.

12. All things being equal, would you live in a state that makes it legal for gay and lesbian couples to marry\*?

- a. Yes
- b. No
- c. It really does not matter.

13. Do you Favor or oppose allowing gay or lesbian couples to adopt a child? \*

- a. Favor
- b. Oppose
- c. Neutral

14. Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages\*?

- a. Should
- b. Should not
- c. Prefer not to answer.

15. Isn't it discriminatory for it to be illegal for two men or two women to marry\*?

- a. Discriminatory
- b. Non-discriminatory
- c. May be.
- d. Prefer not to say.

16. Doesn't all opposition to same-sex marriages boil down to homophobia\* \*

- a. Yes
- b. No
- c. Same-sex marriage is against the order of the nature.
- d. Prefer not to say.

17. Couldn't same-sex marriage lead to a strengthening of marriage as an institution \*

- a. Strongly disagree.
- b. Disagree
- c. Neutral
- d. Agree
- e. Strongly agree.

18. If we oppose same-sex marriages, should we support civil partnerships? \*

- a. Yes
- b. No
- c. Maybe.

19. Some opponents of same-sex marriage claim that it will tend to weaken the value of lifelong monogamy. Isn't such a claim merely homophobic, denying that same-sex couples can be as

committed to each other as male and female couples\*?

- a. Monogamy is possible in same sex couples.
- b. Monogamy not possible in same-sex couples
- c. May be possible.
- d. Prefer not to answer.

20. Allowing gays and lesbians to legally marry would undermine the traditional family values\*?

- a. Strongly agree.
- b. Agree
- c. Neutral
- d. Disagree
- e. Strongly Disagree

21. same-sex couples can be as good parents as heterosexual couples \*

- a. Strongly agree.
- b. Agree.
- c. Neutral
- d. Disagree
- e. Strongly disagree.

22. Same-sex marriage would go against my religious beliefs \*

- a. Strongly disagree.
- b. Disagree
- c. Neutral
- d. Agree
- e. Strongly agree.

23. Marriage is a sacred religious institution and hence should be permissible between male and female only\*

- a. Strongly disagree.
- b. Disagrees
- c. Neutral
- d. Agree
- e. Strongly agree.

24. same-sex couples should have the same legal rights as heterosexual couples (Like Marital rights, adoption rights, property rights, maintenance/ alimony rights, etc.) \*

- a. Strongly disagree.
- b. Disagree
- c. Neutral
- d. Agree
- e. Strongly agree.

25. Do you strongly Favor, Favor, oppose, or strongly oppose allowing gays and lesbians to marry legally\*?

- a. Favor
- b. Oppose
- c. May be.
- d. Prefer not to say.

26. Would you accept a family member if they are gay, lesbian, transgender? \*

- a. Yes
- b. No
- c. Maybe

27. To what extent do you support a kind of law like anti same-sex law in India \*

- a. Favor
- b. Oppose
- c. neutral
- d. Prefer not to say.

28. There is a gradual change in attitudes and perceptions towards sexual minority rights in

India; Indians are gradually becoming more open to accepting family members who are sexual minorities\*?

- a. Strongly disagree.
- b. Disagree
- c. Neutral
- d. Agree
- e. Strongly agree.

29. While most Indians still view LGBT rights negatively, the needle seems to be moving towards a higher level of acceptance and tolerance\*?

- a. True
- b. False
- c. May be.

30. I don't mind homosexuals, if I don't have to see them \*?

- a. Strongly disagree.
- b. Disagree
- c. Neutral
- d. Agree
- e. Strongly agree.

31. Those who oppose same-sex marriage frequently cite societal opinion and underlying values as the basis for their views. \*

- a. Strongly disagree.
- b. Disagree.
- c. Neutral
- d. Agree
- e. Strongly Agree.

32. One of the driving forces behind opposition to legalizing same-sex marriage is traditional religious belief. \*

- a. True

- b. False
- c. May be.
- d. Prefer not to say.

33. Do you think that granting equal marital rights to homosexual couples will change the discriminatory attitude of the society towards the LGBTQ+ community\*?

- a. Yes
- b. No
- c. Maybe.

34. What kind of suggestions would you like to give in order to recognize the acceptance of same-sex marriages in an Indian society\*?

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