

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 1

2024

© 2024 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Through the Lens of Neutrality: A thoughtful Inquiry into LGBTQ+ Narratives Worldwide

SOHAM SANDEEP JOSHI¹ AND TANMAY AVINASH DESHMUKH²

ABSTRACT

This article undertakes a comprehensive study of LGBTQ+ history, spanning ancient to modern times, exploring backgrounds, struggles, and persecution. Addressing self-identity conundrums, it emphasizes historical instances of homosexual behavior in diverse cultures, noting the stark distinction in approaches during imperial and ancient eras. In the imperial era, the highest punishment for homosexuality was the 'death penalty,' whereas in ancient times, such acts were less severely punished, and societal openness prevailed. These developments ignited the LGBTQ+ community's struggle for societal acceptance.

Globally, as the LGBTQ+ movement gained momentum, India also joined the discourse. The article delves into pivotal moments in India's socio-political history, highlighting the Supreme Court's role in judicial activism. Landmark judgments, from Naz Foundation to Navtej Singh Johar, paved the way for progress. The recent Same-Sex verdict reignited discussions, placing the ongoing LGBTQ+ rights debate in the media spotlight.

Despite recent diversions within the LGBTQ+ movement, where some individuals have their focus shifted to unrelated issues, the core movement should remain resilient and unaffected by such elements.

Keywords: LGBTQ+, Homosexuality, Social, Gender.

I. INTRODUCTION

The annals of LGBTQ+ history exhibit a profound and meticulously documented trajectory dating back to Ancient India.³ Within the realm of Hinduism and its derivative religions, historical records indicate a notable absence of homophobia, and indeed, there exists compelling evidence attesting to the thriving existence of homosexuality in ancient India until the onset of the medieval period.⁴

The LGBTQ+ community within Islamic societies, however, endured heightened persecution,

¹ Author is a student at Adv. Balasaheb Apte College of Law, University of Mumbai, Maharashtra, India.

² Author is a student at Adv. Balasaheb Apte College of Law, University of Mumbai, Maharashtra, India.

³ Vātsyāyana (1929). *KāmaSutrā*. Benaras: Jai Krishna-das-Haridas Gupta. p. Verse 2.9.36. ISBN 0192802704.

⁴ India Today, "Homosexuality in ancient India: 10 instances" (India Today, Dec. 23, 2023), <https://www.indiatoday.com/homosexuality-ancient-india-10-instances>.

particularly during the Islamic rule of the expansive Mughal Empire, which held sway over extensive regions of India and much of Central Asia, its origins tracing back to the formidable Mongol Empire.

The advent of the early modern period witnessed the imposition of colonialism from Europe, ushering in more centralized legal codes that propagated Christian-European moral values characterized by an inherent homophobia. This imposition extended to the criminalization of same-gender relations and transsexuality, reflecting a stark departure from the more inclusive ethos that once prevailed.⁵

In the 21st century, subsequent to gaining independence, a noteworthy stride towards progress materialized in the form of substantial legal reforms aimed at liberalizing LGBTQ+ laws. This marked a deliberate effort to dismantle the remnants of homophobia and transphobia ingrained during the colonial era, ushering in a renewed era of inclusivity and equality.

Embarking on an exploration of homosexuality, this introduction delves into the struggles of the LGBTQ+ community. Navigating historical contours and evolving challenges, it unfolds against societal shifts, cultural changes, and legal progress. The focus extends globally, uncovering contemporary developments shaping perceptions and policies. Join us in understanding the nuanced terrain of the LGBTQ+ journey, unraveling the complexities of recognition, rights, and inclusivity. This comprehensive exploration aims to shed light on a movement echoing globally, a testament to resilience and societal change.

II. THE HISTORY OF HOMOSEXUALITY WORLDWIDE

The history of homosexual relationships can be traced back to ancient times, contrary to the popular belief that homosexuality is a concept limited to urban elites. Instances of individuals engaging in homosexual relationships can be found in both Western and Eastern societies. These practices not only existed in ancient times but persisted through the medieval age.

It is well documented fact that homosexuality was very prevalent in the ancient Roman Empire, the Greek states and even in the Eastern Civilizations such as the Chinese and the Japanese. In the ancient Roman Empire, Homo-sexual acts were seen as masculine traits, such sexual acts were linked with the man's dominance and it was humiliating for a man to be a passive partner. *“For example, a free Roman man would not be subject to any form of discrimination if he engaged in sexual activity with a male slave, former slave, prostitute, or actor, but coitus with another man of the same social class would be taboo, as the act of being penetrated as a male*

⁵Christensen, Kelly. "A Legacy of Homophobia: Effects of British Colonization on Queer Rights in India and Uganda". *Global Studies 445: Capstone Seminar* – via Capstone Projects (December 2023).

was seen to encroach on a man's integrity and compromised his status.”⁶ There are reports suggesting Roman Emperors engaging in sexual activities, for instance the most famous story of Emperor Hadrian and his Lover Antinous. Emperor Hadrian was the Roman Emperor from 117 to 138 during his time even though he was married to Sabina, he is remembered for his love towards Antinous towards whom the emperor was very affectionate. The legend goes as during a voyage to the River Nile, Antinous was drowned. He died in such circumstances which raised grapevine as he sacrificed his life for his lover. It is said that after his death In Egypt Hadrian founded a new city named after Antinous, and elsewhere in the empire the youth was commemorated by cult, festival, and statues.⁷

As mentioned earlier Homosexual relations have not only been common in the west but also in the east. The Zhou and Han Dynasties which ruled China had documented records of the elite class engaging into homo-sexual or bi-sexual activities. Some of the personalities included Mizi Xia, who offered his royal lover a half-eaten peach, and Long Yang, who compared the fickle lover to a fisherman who tosses back a small fish when he catches a larger one.⁸ Similarly the story of Pan Zhang and Wang Zhongxian too depict that homosexuality was prevalent in ancient China. Poets like Zhang hanbian wrote poems depicting homo-sexuality and male prostitution. Renowned Greek Conqueror ‘Alexander the Great’ too was subject to unbounded passions for beautiful boys (Athenaeus, Deipnosophists, XHI, 603a) it is a topic of debate between historians regarding the relationship which Alexander enjoyed with his ‘dearest’ and ‘closest’ friend Hephaistion. It is observed that the death of Hephaistion had a very deep devastating impact on Alexander. Homosexual, or homoerotic, love is a consistent theme in Greek mythology: Zeus and Ganymede, Apollo and Hyacinthus, Minos and Atymnius, Theseus and Pirithous.⁹

Once more, when directing our gaze towards the east, according to Noguchi Takenori and Paul Schalow, while "*Homosexuality surely existed in Japan before then . . . the traditional account of its origins helps explain why homosexuality became a preferred form of sexual expression among the Buddhist priesthood.*"¹⁰

Having delved into the historical context of same-sex relationships in both Eastern and Western cultures, let us now shift our focus to Middle Eastern culture. It may appear quite astonishing that despite the prevalent disapproval of homosexuality and the severe penalties, including

⁶ Abigail Hudson, "LGBTQIA+ History Month: Male Homosexuality in Ancient Rome," 8th February 2021.

⁷ Royston Lambert, *Beloved and God: The Story of Hadrian and Antinous* (New York: Viking, 1984).

⁸ Wayne R. Dynes, *Encyclopedia of Homosexuality* vol. 1, p. 215 (2017), ISBN 9781138946484.

⁹ Devdutt Pattnaik, *Olympus* (latest ed., October 17, 2016), p. 86, ISBN-10: 0143428292, ISBN-13: 978-0-143-42829-9.

¹⁰ Wayne R. Dynes, *Encyclopedia of Homosexuality* vol. 1, p. 169 (2017), ISBN 9781138946484.

capital punishment, imposed on individuals engaging in same-sex relationships in many Islamic countries, there exist documented records of numerous Muslim rulers and members of the elite class participating in homosexual activities. Particular instances include the 10th-century sultan of the Ghaznavi empire, Mahmud Ghaznavi and his male lover 'Ayaz' was probably a Turkoman slave of Aimaq tribe and was possibly born at Khutan¹¹. Another very famous story from the Islamic world is of the relationship shared by the Sultan of Khalji Dynasty 'Alauddin Khalji' (1296-1316) and his lover Malik Kafur, a Hindu convert from Gujarat with whom the emperor was said to have a homosexual relationship.¹² Kafur also leads many military expeditions for Khalji. After the death of Alauddin, Kafur was assassinated by his own soldiers. The story of Sodom and Gomorrah where God destroyed these cities as the people there desired to engage in sexual relations with men, aptly showcase that homosexuality is condemned in the Abrahamic faiths.

"In a similar way, Sodom and Gomorrah and the surrounding towns gave themselves up to sexual immorality and perversion. They serve an example of those who suffer the Punishment of eternal fire."¹³

Even the Holy Qur'an states, "And We had sent Lot when he said to his people, "Do you commit such immorality as no one has preceded you with from among the worlds? Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people."¹⁴ The Holy Bible asserts, "Thou shalt not lie with mankind, as with womankind: it is abomination."¹⁵

By examining the aforementioned instances of individuals engaging in same-sex relationships, it becomes evident that homosexuality is not a recent phenomenon. Rather, these emotions and relationships have been a part of human existence throughout history. However, in the present day, the majority of countries do not officially recognize homosexuality and, in many instances, it is subject to legal penalties. Let us now examine the countries that both acknowledge and do not acknowledge same-sex relationships.

III. INTERNATIONAL POSITION OF HOMO-SEXUAL RELATIONSHIPS

In the preceding sections, we delved into the historical context of same-sex relationships. Now, let us explore the contemporary landscape, examining the current state of such relationships in various countries and assessing their legal and societal status.

¹¹S. Jabir Raza, " Proceedings of the Indian History Congress 72 (2011): 286-293 (Indian History Congress, 2011).

¹² Judith E. Walsh . *A Brief History of India.*(Infobase Publishing 2006). p. 71. ISBN 1438108257.

¹³ The Bible, Jude 1:7.

¹⁴ The Qur'an, Surat Al-'A`raf 7:80-81.

¹⁵ The Bible, Leviticus 18:22.

To begin from the East, during the era of Meiji dynasty the westernization of Japanese society was gaining momentum, it was during this time the anti-same sex sentiment started growing and in the year 1873, the Ministry of justice passed the '*keikan*' code, which criminalized the homosexual practices. In the present day, the recognition of same-sex relationships in Japan remains elusive. A divergence in judicial perspectives is evident in the varied rulings across Japanese courts on this matter.

The Renaissance period witnessed a rise of opposing sentiments against homosexual relationships and was even punishable with death penalty in most European states.¹⁶ brutal forms of punishments were awarded to the offenders, in France the offenders would have to lose their reproductive organs and the women caught indulging in such acts would be mutilated and executed or even get burned.¹⁷ Thomas Aquinas argued that sodomy was considered second to murder in the ranking of the sins.¹⁸ The church vehemently opposed same-sex relations, deeming them as corrupt practices that warranted severe punishments for those who engaged in such relationships. During the Spanish Inquisition, sodomites were stoned, castrated, and even burned. Between 1540 and 1700, more than 1,600 people were prosecuted for sodomy. In the year 1532, the Holy Roman Empire made sodomy punishable by death.¹⁹

In the year 1533, King Henry VIII passed the *Buggery Act, 1533* which made all the same sex activities punishable by death.²⁰ After the codification of such laws the homosexual relationships were heavily looked down and were prosecuted. Nevertheless, a more lenient approach emerged with the abolition of capital punishment for homosexuality following the enactment of the 'Offences Against the Person Act, 1861'. Section 61 of the Act eliminated the death penalty for engaging in homosexual activities. However, despite this alteration, such activities remained punishable, carrying a minimum sentence of ten years' imprisonment. Section 61 reads as, 'Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.'²¹

Homosexuality was finally decriminalized in England and in Wales after the passing of the Sexual Offences Act 1967²² the legislation came into effect in Scotland in the year 1981 after

¹⁶ John Boswell, *Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, 1980), p. 293, ISBN 978-0226067117 (1st ed., Jan. 1, 2005).

¹⁷ Byrne R. S. Fone, *Homophobia: A History* (Metropolitan Books, 2000), ISBN 0-8050-4559-7 (Aug. 15, 2000).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Historic England, "Law and Oppression," LGBTQ Heritage Project, <https://historicengland.org.uk/research/inclusive-heritage/lgbtq-heritage-project/law-and-oppression/>

²¹ Offences Against the Person Act 1861, c 100, § 61 (UK).

²² Sexual Offences Act 1967, c 60 (UK), Sexual Offences Act 1956, c 69 (UK).

the passing of 1980 Criminal Justice (Scotland) Act. Further a more progressive step was taken in this matter when the Marriage (Same Sex Couples) Act, 2013²³ was passed which introduced and legalized the same-sex marriages in England and Wales.²⁴ The Act came into force on 13th March 2014. Further the Marriage and Civil Partnership (Scotland) Act, 2014 introduced homosexual marriages in Scotland. The concept of same-sex unions was officially recognized in Ireland recently in the year 2020.

The author, Hilton Dresden, states that the “legalization of homosexual acts between two consenting adults came as part of the French Penal Code of 1791, during the French Revolution.²⁵ Thus it is said that France became the first West European nation to decriminalize homosexuality. However, this is a topic for debate between scholars and historians that whether this decriminalization was result of a social change or it was just a change brought by the legislature without taking into consideration relevant opinions.²⁶

In the year 1917 the Russian Revolution had begun to uproot the rule of Tsar. After the revolution the Soviet Government of the Russian Soviet Republic decriminalized homosexuality in December 1917 discarding the Legal Code of Tsarist Russia.²⁷ The legalization was further confirmed under the RSFSR Penal Code of 1922²⁸ however homosexuality was re-criminalized when Stalin assumed the power.²⁹ And it is still illegal in modern day Russia, recently in the year 2022 President Vladimir Putin signed a legislation which bans people from changing their genders officially or by medical procedures, it also prohibits transgenders from becoming foster parents.³⁰

The US too had a fascinating history and it was only in the year 2003 the Anti-sodomy laws were declared as un-constitutional. The US Supreme Court in the Landmark case of *Lawrance v. Texas* held “A Texas law criminalizing consensual, sexual conduct between individuals of the same sex violates the Due Process Clause of the Fourteenth Amendment. homosexuals had a fundamental right in engaging in private sexual activity and that the state did not have the

²³ Marriage (Same Sex Couples) Act 2013, c 30 (UK).

²⁴ Marriage (Same Sex Couples) Act 2013, c 30, <https://www.legislation.gov.uk/ukpga/2013/30/contents/enacted>.

²⁵ Hilton Dresden, "Today in Gay History: France Becomes First West European Country to Decriminalize Homosexuality," out.com (Out, October 6, 2016), <https://www.out.com/today-gay-history/2016/10/06/today-gay-history-france-becomes-first-west-european-country>.

²⁶ Serena Johnson, "Sodomy Laws in France: How The 1791 French Penal Code Decriminalized Sodomy Without The Will of The People," Young Historians Journal, pg 3, <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1203&context=younghistorians>.

²⁷ E.H. Carr, *Russia Under the Bolshevik Regime* (1994) (ASIN: B004EBT6HO) (May 4, 2011).

²⁸ Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) (1922).

²⁹ Fred Weston, "Bolshevik Decriminalisation of Homosexuality – Intentional or Oversight?" (April 18, 2018), <https://www.marxist.com/bolshevik-decriminalisation-of-homosexuality-intentional-or-oversight.htm>.

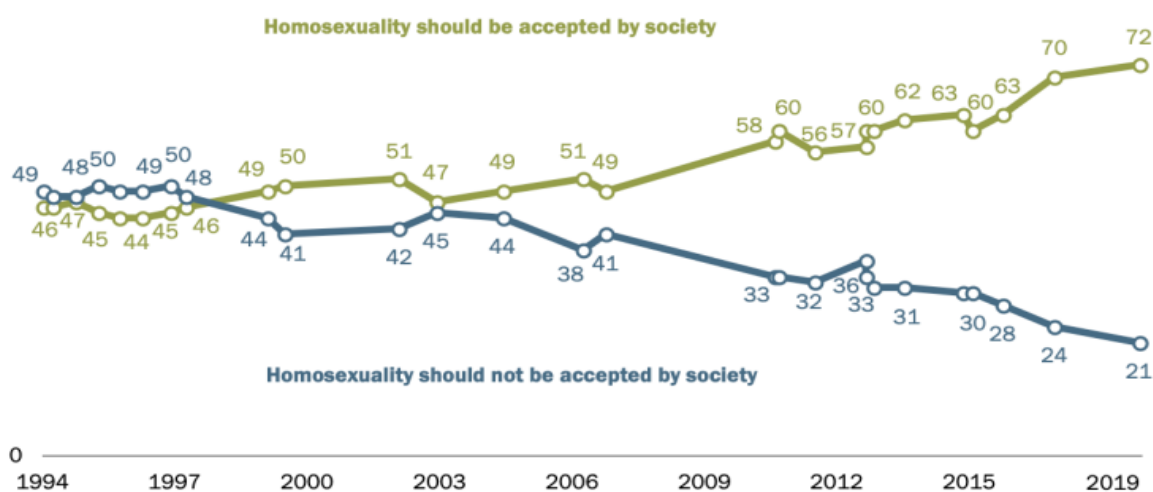
³⁰ John Crace, "Vladimir Putin Signs Law Banning Gender Changes in Russia," *The Guardian* (July 24, 2023), <https://www.theguardian.com/world/2023/jul/24/vladimir-putin-signs-law-banning-gender-changes-in-russia>.

right to impose its own moral perspective on individuals. This right was similar to the right of privacy in issues related to marriage, procreation, and other family relationships.”³¹ Further in the year 2015 the US Supreme Court in the Landmark judgement of ‘*Obergefell v. Hodges*’³² held that marriage is a Fundamental Right which even extends to the same sex couples. And this Right is guaranteed by the ‘Due Process’ and the ‘Equal Protection Clause’ of the fourteenth amendment.³³

Americans are increasingly accepting of homosexuality in society

% of Americans who say ...

100%



Note: From 1994 to 2000 and 2003 to 2006, response options for this question were “homosexuality is a way of life that should be accepted by society,” and “homosexuality is a way of life that should be discouraged by society.” Those who did not answer are not shown. Source: Spring 2019 Global Attitudes Survey. Q31. Additional data from a Pew Research Center survey conducted June 8-18 and June 27-July 9, 2017.

PEW RESEARCH CENTER

(pew research center: *The Global Divide on Homosexuality persists but increasing acceptance in many countries over past two decades*)³⁴

When it comes to Germany, before the Nazi rule, Germany was very open about the same-sex relationships it also had witnessed the most active LGBTQ+ rights movements in the world at the time. Jewish doctor Magnus Hirschfeld had established the ‘Scientific-Humanitarian Committee in Berlin in the year 1897 to raise a voice against the ‘*Paragraph 175*’ of the Penal Code which during the Nazi regime read as, “A man who commits sexual acts (*Unzucht*) with another man, or allows himself to be misused for sexual acts by a man, will be punished with

³¹ Lawrence v. Texas, 539 U.S. 558 (2003).

³² Obergefell v. Hodges, 576 U.S. 644 (2015).

³³ 14th Amendment U.S. Const.

³⁴ Jacob Poushter & Nicholas O. Kent, "The Global Divide on Homosexuality Persists But Increasing Acceptance in Many Countries Over Past Two Decades," Pew Research Center.

prison.”³⁵ Nazis used to claim that, “sexual relations between men were a destructive vice that would lead to the ruin of the German people.” The Nazis further amended the Paragraph 175 and prescribed severe punishments for people engaged in these activities, estimates are that approximately 1,00,000 arrests were made under this section and over half of these arrests resulted in convictions.³⁶ A significant number of homosexual offenders were sent to the concentration camps and were required to wear a pink triangle on their uniforms as a part of the classification system.³⁷ It was in the year 1993 that the parts criminalizing homo-sexuality were removed.

The status of homosexual relations in India was that these types of relations were not recognized and were punished under section 377 of the Indian Penal Code, 1860 which prescribed a maximum sentence of life imprisonment. It was in the year 2018 when the Supreme Court of India was to decide on the constitutionality of the Section 377 of the Indian Penal Code in the case of *Navtej Singh Johar v. Union of India*³⁸ the Apex court On September 6th 2018 a five-judge bench unanimously struck down Section 377 of the Indian Penal Code, to the extent that it criminalized same-sex relations between consenting adults. Thus, decriminalizing homosexuality in India. However, the Supreme Court of India declined to recognize the Same-sex Marriage in the recent judgement of *Supriyo @ Supriya Chakraborty & Anr. v Union of India*³⁹ thus even though the homosexual acts have been decriminalized in India, the marriage between same-sex couples is not yet legalized.

Upon a comprehensive examination of the global landscape regarding homosexual relations, it becomes evident that, generally, affluent nations tend to exhibit a significantly higher acceptance rate towards the LGBTQ+ community compared to their developing or underdeveloped counterparts. It is crucial to acknowledge the influential role of religion in shaping these statistics, underscoring the intricate interplay of socio-economic factors and cultural beliefs in influencing attitudes towards homosexuality. Leveraging the data meticulously compiled by the Pew Research Center will undoubtedly enrich our comprehension of the global landscape on this subject. The insights derived from Pew's extensive research will serve as a valuable lens, offering a nuanced perspective on the worldwide standing of attitudes

³⁵ United States Holocaust Memorial Museum, Washington, DC, "Paragraph 175 and the Nazi Campaign Against Homosexuality," May 4, 2021, <https://encyclopedia.ushmm.org/content/en/article/paragraph-175-and-the-nazi-campaign-against-homosexuality>.

³⁶ United States Holocaust Memorial Museum, Washington, DC, "Gay Men Under the Nazi Regime," May 28, 2021, <https://encyclopedia.ushmm.org/content/en/article/gay-men-under-the-nazi-regime>.

³⁷ Ibid.

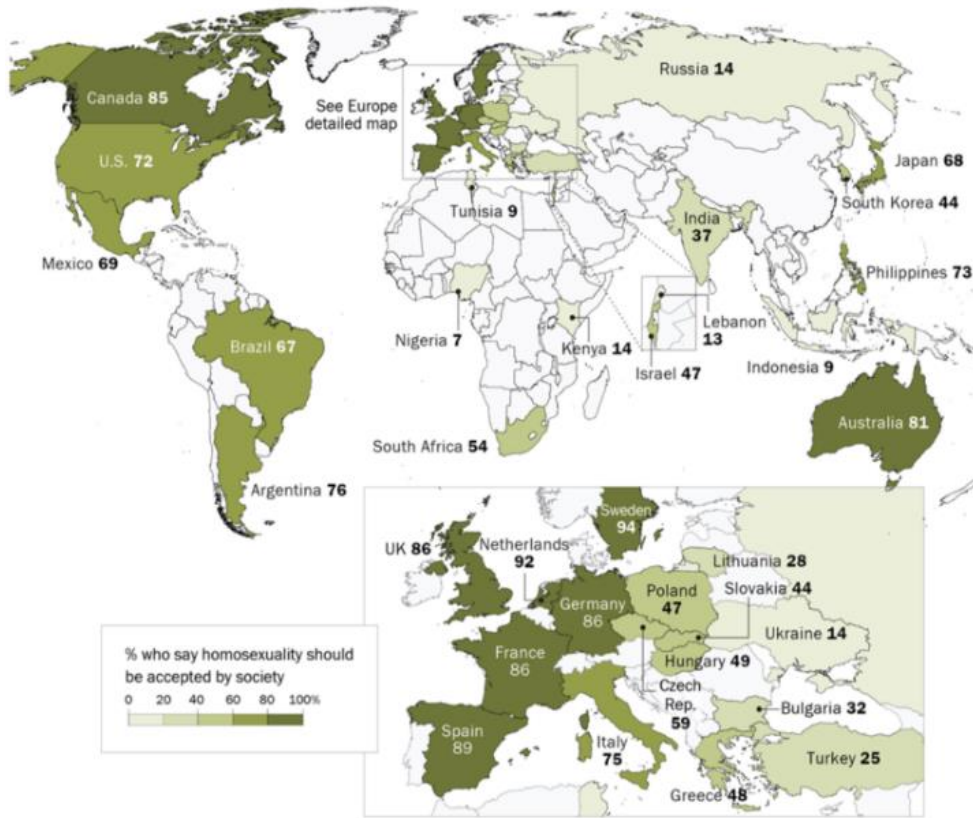
³⁸ *Navtej Singh Johar v. Union of India*, 2018 INSC 790 (India).

³⁹ *Supriyo @ Supriya Chakraborty v. Union Of India*, 2023 INSC 920 (India).

towards homosexuality, thus enhancing our ability to navigate this complex and multifaceted issue.

The global divide on acceptance of homosexuality

% who say homosexuality should be accepted by society

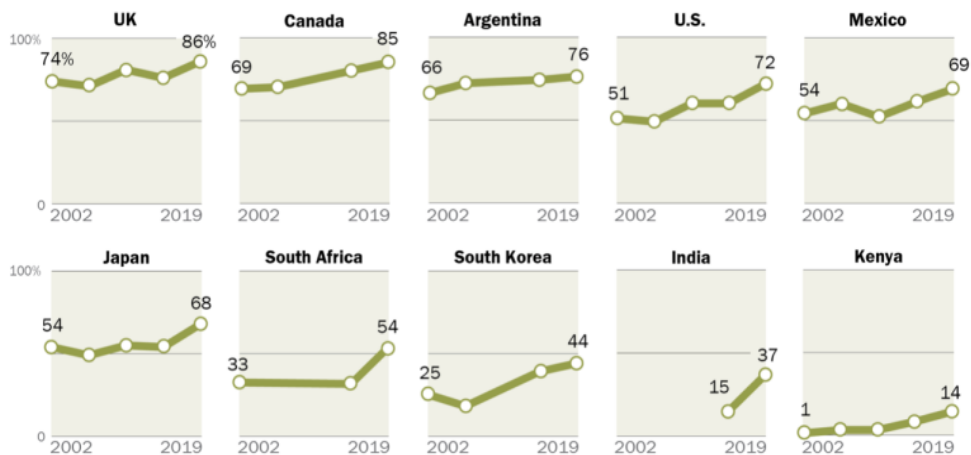


Source: Spring 2019 Global Attitudes Survey, Q31.

PEW RESEARCH CENTER

Rising acceptance of homosexuality by people in many countries around the world over the past two decades

% who say homosexuality should be accepted by society



Note: Only countries with double-digit increases from first survey year to 2019 shown. For more details, see Appendix A.

Source: Spring 2019 Global Attitudes Survey, Q31.

PEW RESEARCH CENTER

The above data is compiled by Human Rights Campaign's report titled "Marriage Equality Around the World."⁴⁰

IV. THE COUNTRIES WHERE SAME-SEX MARRIAGES ARE PERMITTED

Sr. No.	Country	Year of Legalisation
1	Netherlands	2001
2	Belgium	2003
3	Canada	2005
4	Spain	2005
5	South Africa	2006
6	Norway	2009
7	Sweden	2009
8	Iceland	2010
9	Portugal	2010
10	Argentina	2010
11	Denmark	2012
12	Uruguay	2013
13	New Zealand	2013
14	France	2013
15	Brazil	2013
16	England and Wales and Scotland	2014
17	Luxembourg	2015
18	Ireland	2015
19	United States	2015
20	Greenland	2016
21	Colombia	2016
22	Finland	2017
23	Germany	2017

⁴⁰List of Countries Where Same-Sex Marriage Is Legalized," NDTV, October 17, 2023, <https://www.ndtv.com/world-news/list-of-countries-where-same-sex-marriage-is-legalised-4487885>.

24	Malta	2017
25	Australia	2017
26	Austria	2019
27	Taiwan	2019
28	Ecuador	2019
29	Ireland	2020
30	Costa Rica	2020
31	Switzerland	2022
32	Mexico	2022
33	Chile	2022
34	Slovenia	2022
35	Cuba	2022
36	Andorra	2023

V. ANCIENT PERIOD IN INDIA

Hinduism unfolds an expansive tapestry of literary and artistic expressions that illuminate the existence of LGBTQ+ life in Ancient India, a facet richly documented and celebrated. Importantly, Hinduism refrains from articulating explicit moral condemnations against homosexuality or transsexuality, adopting instead a spectrum of perspectives ranging from positive depictions of LGBTQ+ characters, actions, and themes to neutrality or occasional antagonism.⁴¹ The prevalence of sexual minorities within the context of Hindu culture predates the establishment of Gautama Buddha's philosophical doctrines, and notably, Buddhism also acknowledges a positive disposition towards homosexuality.⁴²

The Rigveda, a cornerstone among the four canonical sacred texts of Hinduism, articulates the concept of Vikriti Evam Prakriti, suggesting that what may appear unnatural is, in essence, a part of the natural order.⁴³

Within the realm of Sanskrit literature, the Kama Sutra stands as a venerable testament to the exploration of desire, one of the four normative and spiritual pursuits in Hindu philosophy. Compiled by the erudite philosopher Vatsyayana around the 4th century, this magnum opus delves into the intricate tapestry of human relationships, unabashedly addressing homosexual

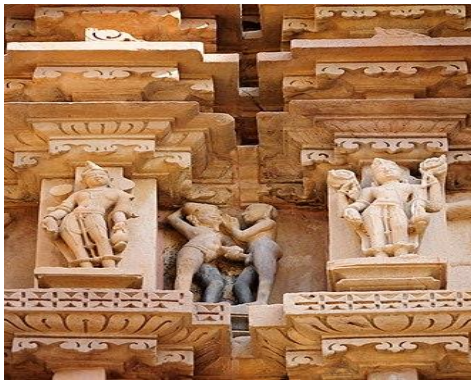
⁴¹ Bhanot, Anil (2009-07-02). "Hinduism does not condemn gay people". *The Guardian*. ISSN 0261-3077. Retrieved 2023-03-01

⁴² "The Origins of Buddhism". *Asia Society*. Retrieved 2023-03-01.

⁴³ Stephen Hunt; Andrew K. T. Yip (1 December 2012). *The Ashgate Research Companion to Contemporary Religion and Sexuality*. Ashgate Publishing, Ltd. p. 368. ISBN 978-1-4094-7225-4.

practices and delineating a spectrum of sex and gender identities. The author underscores that such relations are imbued with love and a profound bond of trust.

In detailing the techniques employed by the third sex (*tritiya-prakriti*) and women, the *Kama Sutra* elucidates the diverse manifestations of sexual expression, including fellatio. The Second Part, Ninth Chapter meticulously describes what contemporary understanding would categorize as masculine- and feminine-type homosexuals, known in Victorian British translations as "eunuchs." The chapter provides insight into their appearances, professions, and even marriages, affirming, "There are also third-sex citizens... who get married together." (KS 2.9.36). The twelfth-century commentary by Yashodhara further expounds on the marital unions of those with a homosexual inclination, bound by deep and trusting friendship.⁴⁴



Erotic sculptures of two men (center) at the at the Khajuraho temple.



At the Lakshmana temple in Khajuraho (954 CE), a man receives fellatio from a seated male as part of an orgiastic scene.

The *Kama Sutra* extends its narrative to embrace the concept of *Svairini* – independent women who forge relations on their terms, transcending societal norms. In the eloquent words of the 12th-century commentator Jayamangala, a *Svairini* is a woman of unbridled independence, rejecting conventional marital bonds to express her love freely.⁴⁵

⁴⁴ Alain Danielou, *The Complete Kama Sutra* (Park Street Press, 1994) (ISBN-13 978-0892816804) (Jan. 1, 1994).

⁴⁵ The *Kama Sutra* of Vatsyayana, "About Women Acting the Part of a Man; and of the Work of a Man," Sir Richard Burton trans (1883), https://web.archive.org/web/20100115074235/http://kamasutra.telugu.ws/VatsyayanaKamaSutra_P2C8.html.

Turning to the Artha Shastra, a monumental treatise on statecraft from the 2nd century BCE, a nuanced perspective on sexual practices emerges. Although homosexual intercourse is not endorsed, it is remarkably treated as a minor transgression, attracting a comparatively lenient penalty. The prescribed punishments for heterosexual misconduct are often more severe than those for homosexual indiscretions, with the latter, interestingly, allowing for redemption through a bath with clothes on and a penance of specific rituals. This intricate legal delineation underscores the diverse societal attitudes towards sexuality during that historical epoch.

(A) Early modern period

During the reign of the early Mughal emperors, a spirit of tolerance towards Hindu society prevailed, affording them the freedom to adhere to their chosen way of life.⁴⁶ However, under the Fatawa-e-Alamgiri of the Mughal Empire, a uniform code of punishments for homosexuality was instituted. These penalties included 50 lashes for a slave, 100 for a free infidel, and, notably, death by stoning for a Muslim, signaling a departure from prior leniency and the implementation of stringent measures within the Mughal dominion.

1600

1607 - Alberto Homemo's Execution:

Alberto Homemo, a German soldier in the Portuguese army, faced a dire fate in 1607. Accused of committing the 'horrible and abominable vice of sodomy' since the age of 16, Alberto habitually engaged in such acts, even during his service in the North (Portuguese Bombay) and various cities. The inquisition, branding him as notoriously evil, confiscated his belongings and handed him over to secular justice, leading to his execution by burning alive. This harsh sentence was pronounced by Inquisitor Jorge Ferreira, dated 09-12-1607.⁴⁷

1667 or 1675 - Fatawa-e-Alamgiri and Punishments:

In the late 1600s, the Fatawa-e-Alamgiri of the Mughal Empire prescribed standardized punishments for homosexuality. These penalties included 50 lashes for a slave, 100 for a free infidel, or even death by stoning for a Muslim.⁴⁸ Notably, while pederasty found acceptance as "pure love" in Central Asia, it remained relatively unheard of in India. An illustrative instance reveals the governor of Burhanpur meeting a tragic end, murdered by a boy servant with whom

⁴⁶ Walter Penrose, "Colliding Cultures: Masculinity and Homoeroticism in Mughal and Early Colonial South Asia," in Katherine O'Donnell & Michael O'Rourke (eds.), (2006), https://link.springer.com/chapter/10.1057/9780230524156_9.

⁴⁷ .M.J Marshal, "Homosexuality in the Early Modern Goa," National Council of Churches of India, CXLII (9), 39 (Oct. 2022), <https://outreach.faith/wp-content/uploads/2022/12/NCCI-October-2022.pdf>.

⁴⁸ Neil B. E. Baillier, "A Digest of the Moohummudan Law," 1875, pp. 1–3, <https://archive.org/details/digestmoohummud00bailgoog/page/n57/mode/2up?view=theater>.

he attempted intimacy. Additionally, the Muslim Urdu poetry of the era occasionally expressed homoerotic viewpoints reminiscent of bromances, although these expressions were not explicitly homosexual in nature.

1800

1861 - Impact of British Rule on Anti-Sodomy Laws:

The British Raj, governing directly in British territories, replaced Mughal Fatawa 'Alamgiri's criminal offenses with the 1862 Indian Penal Code, introducing Section 377 to address homosexuality. Drafted by Thomas Babington Macaulay, the law criminalized carnal intercourse "against the order of nature" with penalties ranging from imprisonment to fines. The term "order of nature" remained undefined, allowing broad interpretation by the British Judiciary, encompassing most penetrative acts except vaginal penetration by a man. The law had limited trials, with only five recorded cases by 1920, yet significantly impacted societal values, influenced by the British 'purity campaign' that sought to control sexual conduct.⁴⁹

1871 - Criminalization of Hijras under the Criminal Tribes Act:

In 1871, the Criminal Tribes Act labeled hijras as a "criminal tribe," subjecting them to compulsory registration, surveillance, and stigmatization. British Lieutenant-Governor Edmund Drummond framed this as a necessary effort for the "extinguishment" and "extinction" of hijra communities, deploying surveillance methods in hopes of their eradication.

1884 - Khairati vs Queen Empress Case:

A pivotal sodomy-related case under British rule was Khairati vs Queen Empress in 1884. Khairati, initially approached by the police for cross-dressing and singing with women in Moradabad, faced prosecution in the Allahabad high court. Forced to undergo a medical examination, Khairati's 'extended anal orifice' was deemed a sign of a 'habitual catamite.' Despite the use of cross-dressing as evidence, a practice normal in indigenous Indian culture, Khairati was arrested under the ambiguity of Section 377. However, he was later acquitted on appeal in the Allahabad high court.

(B) 20TH century

1990 - Pioneering Initiatives:

In 1990, Naz Foundation International was established in London with the objective of spreading awareness about the AIDS/HIV epidemic. Concurrently, Ashok Row Kavi founded

⁴⁹"Constructing Native Homosexuality in British India," Maneto Undergraduate Research Journal, 1 (1), doi:10.15367/m:urj.v1i1.80, hdl:20.500.12613/474, ISSN 2639-7617

Bombay Dost, India's inaugural magazine catering to queer men.

1991 - Landmark Report and Protest:

The year 1991 witnessed a groundbreaking development with the publication of the ABVA Report, titled "Less Than Gay: A Citizens' Report on the Status of Homosexuality in India." This report, authored by seven ABVA members, marked the first comprehensive acknowledgment of the status of queer individuals in India. The report demanded the repeal of Section 377 and the Army, Navy, and Air Force Act of 1950. Subsequently, a public protest was organized in New Delhi, becoming the first-ever demonstration against anti-sodomy laws in the country. Over 500 participants, including various democratic and civil rights groups, joined the protest, triggered by an incident of police brutality in Connaught Place.

1992 - ABVA's Anti-Discrimination Movement:

In August 1992, the AIDS Bhedbhav Virodhi Andolan (ABVA) orchestrated the inaugural public protest against anti-sodomy laws in India. The ABVA, initially formed to raise awareness about AIDS in India, expanded its activism to oppose discriminatory practices against HIV-positive individuals. The protest aimed at challenging a government policy requiring doctors to disclose the names of HIV-positive patients, leading to their isolation.

1994 - Legal Challenge:

In 1994, the ABVA took a significant step by filing the first Public Interest Litigation (PIL) challenging Section 377. This PIL was a response to the authorities' denial of a request by ABVA to distribute condoms in Tihar Jail. The denial, as explained by Kiran Bedi, the then Inspector General of Prisons in India, was rooted in the acknowledgment and acceptance of homosexual practices in the jail, highlighting the persistent struggle against discriminatory laws.

(C) 21ST century

2001-2003 - Legal Challenges and Setbacks:

In 2001, the Naz Foundation (India) Trust, a non-governmental organization, initiated a groundbreaking legal battle by filing a lawsuit in the Delhi High Court. The objective was to seek the legalization of homosexual intercourse between consenting adults.

In the subsequent year, in 2002, the Naz Foundation furthered its legal efforts by filing a Public Interest Litigation (PIL) specifically challenging IPC Section 377 in the Delhi High Court. This marked a crucial step in the ongoing struggle for LGBTQ+ rights.

However, the year 2003 witnessed a setback when the Delhi High Court, in a disappointing turn

of events, refused to consider a petition regarding the legality of Section 377. The court asserted that the petitioners lacked locus standi in the matter, creating a hurdle in the pursuit of legal recognition for the rights of the LGBTQ+ community.

VI. INDIAN JURISPRUDENCE

India acknowledges certain legal aspects of same-sex partnerships, particularly in the context of live-in relationships. However, the legal framework does not extend to formal marriages, common law unions, guardianship, civil unions, or the issuance of partnership certificates.

Despite the absence of legal provisions, some same-sex couples have chosen to partake in traditional Hindu ceremonies. Unfortunately, these unions face the challenge of non-registration, resulting in couples being deprived of the full array of rights and benefits enjoyed by their heterosexual counterparts.⁵⁰ In a noteworthy development in 2022, the Supreme Court granted partial equal rights to individuals in live-in relationships, recognizing homosexual couples in such unions as integral family units.⁵¹ Companies have emerged to offer specific services tailored for individuals in homosexual live-in relationships, spanning financial and healthcare services.

However, in October 2023, the Supreme Court declined to legalize same-sex marriage or civil unions, deferring the decision to the Parliament or state legislatures. Despite the legal obligation to register marriages with the government, a majority of Hindu marriages remain unregistered, conducted through unwritten common law practices.

Since the 2010s, various state courts, including those in Gujarat, Himachal Pradesh, Kerala, Odisha, Punjab, Uttar Pradesh, and Uttarakhand, have independently ruled that cohabitation, termed "live-in relationships," among same-sex couples is not unlawful and deserves legal protection. However, such protection often extends only to limited inheritance benefits or police protection from familial disputes.

When considering federal marriage laws in India, different acts govern specific religious or community-based regulations:

- **Indian Christian Marriage Act, 1872 (ICMA):** Regulates marriage and divorce for Indian Christians, allowing ordained ministers or marriage registrars to conduct marriages.
- **Special Marriage Act, 1954 (SMA):** Provides a unique form of marriage applicable to

⁵⁰ Jharkhand: Same Sex Couple Ties Knot at Koderma Temple, Says They Plan to Legalize Marriage," *The Times of India*, December 7, 2020. Jharkhand: Same sex couple ties knot at Koderma temple, says they plan to legalise marriage | Ranchi News - Times of India ([indiatimes.com](https://www.indiatimes.com))

⁵¹ Livemint (28 August 2022). "Supreme Court on unmarried partnerships, queer relationships: 'Family unit..'"

all Indian citizens, irrespective of religion, and registers such marriages as civil contracts. It is particularly relevant to interfaith couples.

- Hindu Marriage Act, 1955 (HMA): Governs marriage, separation, and divorce for Hindus, Sikhs, Jains, and Buddhists based on respective customs and rites.
- Parsi Marriage and Divorce Act, 1936: Regulates marriage and divorce for Parsis following Zoroastrian rites.
- Anand Marriage Act, 1909: Governs marriage for Sikhs.
- Muslim Personal Law (Shariat) Application Act, 1937: Regulates marriage, succession, and inheritance for Muslims.

On 1 April 2022, MP Supriya Sule introduced a bill to the Lok Sabha seeking to legalize same-sex marriage under the Special Marriage Act. The proposed amendments aimed to grant same-sex couples equal legal rights, with specified marriageable ages for gay and lesbian couples.⁵² The bill, however, awaits further action.

VII. RECENT DEVELOPMENTS

(A) *Supriyo v. Union of India*⁵³: Unraveling Jurisprudential Dimensions

In a landmark case on 25 November 2022, the Supreme Court of India embarked on a judicial odyssey, hearing *Supriyo v. Union of India*. This case, spearheaded by Supriyo Chakraborty and Abhay Dang, residents of Hyderabad, challenged the government's stance of non-recognition of same-sex marriages under the Special Marriage Act. The legal journey unfolded with notable developments.

Opposition arose swiftly, with politicians like Sushil Modi contending that such profound societal matters demanded parliamentary debate rather than adjudication by a few judges. On 6 January 2023, Chief Justice Dhananjaya Y. Chandrachud's three-judge bench consolidated lawsuits from Delhi and Kerala high courts, setting the stage for oral arguments on 13 March 2023. Recognizing the case's gravity, the Supreme Court, invoking Article 145(3) of the Constitution, referred it to a five-judge constitution bench on 13 March, scheduling the initial oral arguments for 18 April 2023.

As the case unfolded, voices both in favor and against echoed through press conferences and open letters. Dattatreya Hosabale of Rashtriya Swayamsevak Sangh voiced opposition,

⁵² "NCP's Supriya Sule brings Bill to legalise same-sex marriage". *The Indian Express*. 2 April 2022.

⁵³ *Supriyo v. Union of India*, INSC 2023 920 (India).

emphasizing marriage as a societal institution. On 24 March 2023, 21 retired judges issued an open letter, cautioning against hasty judicial interventions, asserting the parliament's supremacy in societal matters.

Amidst the legal deliberations, religious organizations, including Jamiat Ulema-e-Hind, opposed same-sex marriage. The Bar Council of India, without substantiated evidence, claimed widespread public opposition, contrasting with a Pew Research Center poll indicating 53% support. Oral arguments ensued on 18 April 2023, with Solicitor General Tushar Mehta advocating legislative avenues over judicial directives. Chief Justice Chandrachud staunchly defended the court's role and rejected absolute gender norms.

On 21 April 2023, Bhupender Yadav, Minister of Labour and Employment and General Secretary of Bharatiya Janata Party, underscored the societal dimension, asserting Parliament's role in reflecting societal views. State governments of Andhra Pradesh, Assam, and Rajasthan opposed same-sex marriage. Solicitor General Mehta proposed a parliamentary committee, prompting a positive response from the court. The constitution bench concluded oral arguments on 11 May 2023.

The judgment, delivered on 17 October 2023, underscored the court's restraint in altering the constitutional validity of the Special Marriage Act, deferring to the legislative domain. The court unanimously dismissed the plea for civil unions but embraced the government's suggestion for a committee to examine discrimination faced by the LGBT community. Chief Justice Chandrachud highlighted the transformative nature of marriage and affirmed Parliament's authority to legalize same-sex unions. Justice Sanjay Kishan Kaul echoed these sentiments, recognizing same-sex relationships' historical roots.

The ruling also extended marriage rights to transgender individuals, emphasizing the dynamic nature of societal institutions. A petitioner sought a review on 1 November, citing self-contradictory conclusions and manifest injustice. The Supreme Court heard the review petition on 28 November, marking a continued chapter in India's evolving jurisprudential landscape.

(B) Legislative intent

Legislative intent can be defined as the ends which are sought to be achieved by a legislature through an enactment, in the recent same-sex marriage verdict⁵⁴ the legislative intent to grant recognition for same-sex marriages was vehemently argued. Senior Counsel Arvind Datar argued, *“This Court while interpreting provisions of a statute can “iron out the creases but not*

⁵⁴ Supriyo @ Supriya Chakraborty & Anr. v Union of India ,2023 INSC 920 (India).

*alter the fabric.” The exercise of reading up can only be undertaken by the Courts when it would be consistent with legislative intention, when it would not alter the nature of the enactment, and when the new state of affairs would be of the same kind as the earlier state of affairs to which the enactment applies; This Court while interpreting provisions of a statute can “iron out the creases but not alter the fabric.” The exercise of reading up can only be undertaken by the Courts when it would be consistent with legislative intention, when it would not alter the nature of the enactment, and when the new state of affairs would be of the same kind as the earlier state of affairs to which the enactment applies;”⁵⁵ the demand of the petitioners in this case was to declare section 4 (c) of the Special Marriage Act, 1954⁵⁶ as unconstitutional as it recognizes the marriage only between a male and a female and thus is discriminatory towards the same-sex couples as their marriage isn’t legally recognized. The court unanimously decided that there is no fundamental right to marry and the court cannot read into the provisions of the SMA,1954⁵⁷ so as to recognized the marriage between same-sex couples and that this essentially a legislative function to legislate thus to grant such a recognition is outside the purview of the courts. The Ld. Solicitor General of India Mr. Tushar Mehta made the following observations, “*The State is not under an obligation to grant legal recognition to every type of relationship. The State only recognizes relationships when there exists a legitimate state interest. The State has a legitimate State interest in legally recognizing heterosexual relationships for the sustenance of society*” he also argued that under schedule seven⁵⁸ List 3 of the Constitution of India the state can regulate the marriage and thus the courts have no power to decide if a legal recognition can be granted to same-sex marriages. The government also argued that even though homosexuality under section 377 of the IPC⁵⁹ has been decriminalized and the members of the LGBTQIA+ community have the freedom to choose their partners however this does not mean that the state too is under an obligation to provide legal recognition to such unions. The aforementioned observations unequivocally indicate a lack of governmental or judicial intent to bestow 'legal recognition' upon same-sex unions.*

VIII. CONCLUSION

In summary, the LGBTQ+ community faces complex challenges with roots in both history and the present. Addressing these issues requires open discussions and thoughtful deliberations. By fostering understanding and inclusivity through collective efforts, we can move towards a more

⁵⁵ Ibid.

⁵⁶ The Special Marriage Act, 1954, Act of Parliament No. 43 of 1954 (India).

⁵⁷ The Special Marriage Act, 1954, Act of Parliament No. 43 of 1954 (India).

⁵⁸ Schedule 7, Indian Const.

⁵⁹ The Indian Penal Code, 1860, Act of Parliament No. 45 of 1860 (India).

equitable future for everyone. However, one more issue which may be encountered is that no straight jacket formula can be applied to everyone belonging to this community in order to solve their issues. However, just for this reason that no uniform formula can be devised fruitful discussions shouldn't stop. While we address the issues of homosexuals, the community shall also not fail to understand the concerns of the heterosexual community. If they fail to do so this is going to make them un-approachable and it will be difficult for heterosexual people to accept them and give them the equal treatment for which the whole community is striving, both the parties shall understand that it's a two-way street and coercive actions won't reap any fruits. As also observed by the Supreme Court of India that providing a legislative framework in order to resolve the same-sex marriage issue, this is essentially a legislative function and the Parliament is the appropriate body which is empowered to do provide a redress in this matter. Not only this but also as mentioned earlier that discussions and debates shall be encouraged and while doing so Expert opinions shall be taken into consideration and should be given paramount importance as this is not something which is going to get solved by just revolving a wand. Last but not the least the community shall strive to spread awareness and try to erase the enigma surrounding them. In countries like India where this is considered as a taboo topic, spreading awareness and avoiding coercive actions are the only best possible ways to get the rights. Coercive actions are just going to make matters worse. So let us focus and try to amicably resolve the disputes and address the concerns of the LGBTQ+ community.
