

**SAME-SEX MARRIAGES- WHETHER MODERN HINDU LAW IS SUFFICIENT IN THE CONTEXT OF THE NEEDS OF THE SOCIETY**

- Joyita Mukhopadhyay<sup>1</sup>, Puspita Pal & Raunak Chaturvedi<sup>2</sup>

**ABSTRACT-**

This paper deals with a very interesting question that has been raised in terms of the ModernHindu law of India in context with an important aspect of Hinduism, that is, same-sex relations. There are many texts in Hinduism which not only recognize same-sex relations but even celebrate them and openly discuss them. This paper is an attempt to analyse how the personal law of the religion which supported same-sex relations derogated the same. This paper firstly deals with the various sources in Hinduism like *Kama Sutra, Mahanirvana Tantra, Narada Purana, Kritivasa Ramayana, the birth story of Ayyappa, wall carvings of the Khajuraho Temple* and various other temples of India, *etc.*, which recognized same-sex relations and also endorsed them. The paper then moves on to discuss the jurisprudence in India, the various case laws of the Supreme Court, various High Courts *etc.* with regards to the topic of same-sex marriages in India and tries to determine the current legal status of the same in the country. The paper then shows a survey conducted by the researchers to ascertain the reaction of contemporary society to homosexuality in the context of Modern Hindu Law. The paper also contains an interview with an LGBTIQ+ activist and tries to determine the take of the community towards this issue. After analysing all of these aspects, the paper attempts to deduce the main reason behind the inconsistency and also tries to determine what might be the probable solution(s) for the problem(s), if any.

**INTRODUCTION**

This paper deals with a very interesting question that has been raised in terms of the ModernHindu law of India in context with an important aspect of Hinduism, that is, same-sex relations. There are many texts in Hinduism which not only recognize same-sex relations but even celebrate them and openly discuss them. This paper is an attempt to analyse how the

---

<sup>1</sup>Student at Amity University, Kolkata.

<sup>2</sup> Student at Jogesh Chandra Chaudhuri Law College, University of Calcutta.

personal law of the religion which supported same-sex relations derogated the same. This paper firstly deals with the various sources in Hinduism like *Kama Sutra*, *Mahanirvana Tantra*, *Narada Purana*, *Krittivasa Ramayana*, the birth story of *Ayyappa*, wall carvings of the *Khajuraho Temple* and various other temples of India, *etc.*, which recognized same-sex relations and also endorsed them. The paper then moves on to discuss the jurisprudence in India, the various case laws of the Supreme Court, various High Courts *etc.* with regards to the topic of same-sex marriages in India and tries to determine the current legal status of the same in the country. The paper then shows a survey conducted by the researchers to ascertain the reaction of contemporary society to homosexuality in the context of Modern Hindu Law. The paper also contains an interview with an LGBTIQ+ activist and tries to determine the take of the community towards this issue. After analysing all of these aspects, the paper attempts to deduce the main reason behind the inconsistency and also tries to determine what might be the probable solution(s) for the problem(s), if any.

## **OBJECTIVES**

1. To determine the attitude of various Hindu texts towards same-sex relationships.
2. To determine the legal status of same-sex marriages in India.
3. To determine the opinion of the students and faculty members of Amity University, Kolkata concerning same-sex marriages in India, in the context of modern Hindu law.
4. To determine whether the language of the Hindu Marriage Act, 1955 and Special Marriage Act, 1954 excludes same-sex marriage.

## **SCOPE**

The scope of the research is limited to the legal status of same-sex marriage in India. So far as the survey is concerned the target audience is limited to the students and the various faculty members of Amity University, Kolkata. As far as the various texts of Hinduism are concerned, research is limited to *Kama Sutra*, *Mahanirvana Tantra*, *Narada Purana*, *Krittivasa Ramayana*, the birth story of *Ayyappa*, wall carvings of the *Khajuraho Temple* and various other temples of India. In terms of legislation, we are focusing on the Hindu Marriage Act, of 1955 and the Special Marriage Act, of 1954.

## **RESEARCH QUESTIONS**

1. Whether the various texts in Hinduism endorse same-sex relations?

2. Whether modern Hindu law is inconsistent with the observation of the various Hindu texts about same-sex relations?
3. Whether the Hindu Marriage Act, of 1955 and the Special Marriage Act, of 1954 use gender-neutral and sexually neutral language in the context of marriage?
4. What is the opinion of the students and the faculty members of Amity University, Kolkata regarding same-sex marriages?
5. Whether same-sex marriage can be registered under the Special Marriage Act, of 1954?
6. Why the same-sex marriage is not acceptable in India?
7. What is the opinion of the LGBTIQ+ community concerning the current status of same-sex marriage in India?

## **RESEARCH METHODOLOGY**

This paper is based upon both the doctrinal and the research-based methodologies. The sources of the research are both primary as well as secondary sources. For our survey, the focus group involves the students and the faculty members of Amity University, Kolkata.

## **HYPOTHESIS**

1. Hindu texts endorse same-sex relations.
2. Same-sex marriage is not legally recognized in India.
3. The Hindu Marriage Act, of 1955 and the Special Marriage Act, of 1954 use gender-neutral language.
4. Students and faculty members of Amity University, Kolkata support same-sex marriages.

## **CHAPTERISATION**

### **Chapter 1: Same-Sex Relations in the context of Hinduism- Whether endorsed or rejected?**

This chapter deals with the question that whether same-sex relations are endorsed or rejected in Hinduism, after considering the various prominent texts on sexuality and sexual relations in Hinduism. The texts which are referred to particularly are *Kama Sutra*, *Mahanirvana Tantra*, *Narada Purana*, *Krittivasa Ramayana* and the birth story of *Ayyappa*.

Apart from the abovementioned texts, the chapter also refers to the various concerned wall carvings of the *Khajuraho* Temple and other temples in India.

The chapter also seeks to ascertain how is modern Hindu law in conflict with the ideology of the religion on which it is based.

## **Chapter 2: Legal Status of Same-Sex Marriages in India- Jurisprudence, Precedents and Legislations.**

This chapter deals with the question of ascertaining the legal status of same-sex marriages in terms of the prevailing jurisprudence, case laws of various Courts and the current legislation of the nation. The chapter also seeks to find out whether the language of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 is gender-neutral and sexuality-neutral or not. The main focus in this chapter is on the famous *Section-377 verdict*, that is *Navtej Singh Johar and Ors. v. Union of India*<sup>3</sup>, given by the Honourable Supreme Court of India.

## **Chapter 3: Survey of the students and faculty members of Amity University, Kolkata about Same-Sex Marriages in India.**

This chapter analyses the findings of the survey conducted by the researchers concerning the attitude of the students and faculty members of Amity University, Kolkata towards same-sex marriages in India.

## **Chapter 4: Interview of Shri Devraj Naskar, an LGBTIQ+ Activist, who is also a student at Amity University, Kolkata.**

This chapter sports the interview conducted by the researchers of Shri Devraj Naskar, a student of B.A.-LL.B.(HONS.) at Amity University, Kolkata, the batch of 2018-2023, who is also an LGBTIQ+ activist. The interview tries to assess the opinion of the activist about the findings of the research paper about same-sex marriages in India and seeks his opinion about the probable solutions. The chapter then also tries to analyse the probable reasons for the findings of the research and tries to find out the solutions for the same, if any.

## **CHAPTER 1- SAME-SEX RELATIONS IN THE CONTEXT OF HINDUISM- WHETHER ENDORSED OR REJECTED?**

---

<sup>3</sup> AIR 2018 SC 4321.

Hinduism has inherently been a very strange religion. We have a religion that is highly gender-fluid in its attributes. Having numerous tales of men assuming the form of women or women making themselves transform into men; Gods who behave in an effeminate way, yet are the diamonds of the eyes of the women around them; where men give birth to various beings and even objects, we are awestruck to ponder that whether Hinduism is that stringent as we feel it to be?

It must be very clearly mentioned here that throughout the research, the materials and pieces of evidence that were retrieved innately proved it to be a queer-friendly religion and not merely a queer-friendly religion, but a religion which endorsed and celebrated homosexuality, as is evident from some of its texts and also the temple carvings of a few temples. Then the modern-day Hindu is forced to be in a dilemma concerning the queer-friendliness of the religion. Well, it must be stated very clearly that homophobic tendencies had come to India with the arrival of the Abrahamic religions, particularly with the advent of British rule, as it out rightly criminalised homosexuality and unnatural sexual acts, such as sodomy. However, on one hand, we have the Indian Penal Code and on the very other, we have the temple carvings of the famous *Khajuraho* Temple, the *Kama Sutra*, the *Krittivasa Ramayana* and other texts (they all shall be discussed in great detail further), discussing very openly and normally about homosexuality. Let us now discuss all these sources in detail.

### ***1. Kama Sutra***

The *Kama Sutra* is essentially an ancient Hindu text discussing eroticism, sexuality, love life and other related topics. The *Kama Sutra* is a text belonging to the *Kama Shastra* genre of Hindu texts and is a post-Vedic Sutra. It was compiled by a person called *Vatsyayana*. It is the most interesting and important authority on homosexuality in Hinduism. The *Kama Sutra* has described numerous gender variables in the text and has recognised same-sex relations and discussed them extensively.

For instance, there is a part in the text which is describing how masculine and feminine type homosexual men, as well as women, perform oral sex, or fellatio, as it is more formally called.<sup>4</sup> The book also alludes to two kinds of homosexual men- the masculine and the feminine type.<sup>5</sup> The text also mentioned how these two types of men used to appear, stating that the feminine types used to dress up as women, whereas the masculine types maintained

---

<sup>4</sup> Part Two, Alain Danielou, The Complete Kama Sutra, Chapter Nine, entitled "Superior Coition or Fellation[*Auparishtaka*], (1994).

<sup>5</sup>*Supra*.

musculature and had small beards, moustaches, *etc.* These masculine men practised the professions of a barber, a masseuse or a prostitute. The *Kama Sutra* also mentions these homosexual men getting married.<sup>6</sup>

The *Kama Sutra* also mentions sexually independent women, also known as 'svairini'. These women were known to refuse husbands and have sex with 'their kind', that is fellow 'svairinis', or lesbians, to be precise. *Jayamangala* in his commentary on the text has mentioned their sexual nature.<sup>7</sup> The eighth chapter of the second part of the *Kama Sutra* extensively describes the various lesbian practices.

## **2. Mahanirvana Tantra**

The Mahanirvana Tantra is essentially a text of the *Shaivism* school of Hinduism. In *Shaivism*, there is a sub-school called *Kashmir Shaivism*. Under *Kashmir Shaivism*, there is a sub-school called *Kaula* or *Kula*. Under this school falls the *Mahanirvana Tantra*. It is essentially a text following the Tantric genre of texts.

*Mahanirvana Tantra*, although it does not explicitly mention homosexuality, it is pertinent to mention it because there is a mention about transgender and how they should be treated. The text mentions that the transgender members of the family are also a part of the same, are not supposed to be thrown out and are to be taken care of.<sup>6</sup> Thus, the text has been mentioned to essentially show the 'compassionate feelings' that religion has towards queer identities.

## **3. Sushruta Samhita**

The *Sushruta Samhita* is a celebrated ancient Hindu text on medicine. It roughly dates back to 600 B.C.E. The text belongs to the *Samhita* class of literature and is not to be confused with the Vedic texts. It is a post-Vedic *Samhita*. The *Sushruta Samhita* gives a detailed discussion about the identification of homosexuality at the very time when the child is conceived in the womb.<sup>8</sup> The text also discusses two types of homosexual men- the '*kumbhika*' men, who are the sleeping partners during anal sex and the '*asekya*' men, who ingest the semen of other men. Thus, this text approaches homosexuality from a medical perspective and does not scorn it away.

---

<sup>6</sup> KS 2.9.36.

<sup>7</sup> Jayamangala on Kama Sutra, 2.8.13. <sup>6</sup>  
Mahanirvana Tantra 12:104.

<sup>8</sup> SS 3.2.42–43.

The text also says that if two women have sex, they can give birth to a child, but it shall be boneless. A famous story concerning this concept is to be found in the *Krittivasa Ramayana* which shall be discussed subsequently.

#### **4. *Krittivasa Ramayana***

The *Krittivasa Ramayana* is the Bengali version of the *Ramayana* and as mentioned earlier, contains the iconic story demonstrating the process with which two women who have sexual intercourse, give birth to a child. The story relates to the birth of King *Bhagirath*, who was responsible for bringing the river *Ganga* down to Earth from *Swarga*. The excerpt of the same goes as follows-

*"All the gods consulted together and decided to send the three-eyed god, Shiva, to Ayodhya. Riding his bull, Shiva went to Dilipa's two queens and said to them: "By my blessings, one of you will have a son." Hearing Shiva's words, the two women said: "We are widows, how can we have a child?" Shankara replied: "You two have intercourse with one another. By my blessings, one of you will have a lovely child." Having bestowed this boon, the god who destroys the three worlds went his way. The two wives of Dilip took a bath. They lived together in extreme love. After some days, one of them menstruated. Both of them knew one another's intentions and enjoyed love play, and one of them conceived."*<sup>9</sup>

Thus, from this very story, we see that the *Krittivasa Ramayana* written by a 14<sup>th</sup>-century poet, that is to say, quite a recent one, recognises homosexual acts and also depicts them to be 'partially fruitful'. The text also shows that homosexual acts are being endorsed by God (*Shankar* in this case).

#### **5. *Narada Smriti***

The *Narada Smriti* is a text belonging to the *Smriti* genre of literature. It mentions the 14 different types of homosexual/impotent men, in its 12<sup>th</sup> chapter.<sup>10</sup> They are as follows-

- a. *Nisarga*—he is born without proper genitals.
- b. *Vadhri*—his testicles have been cut out.

---

<sup>9</sup> Vanita R. (2000) *Krittivasa Ramayana: The Birth of Bhagiratha (Bengali)*. In: Vanita R., Kidwai S. (eds) *Same-Sex Love in India*. Palgrave Macmillan, New York. [https://doi.org/10.1007/978-1-349-62183-5\\_12](https://doi.org/10.1007/978-1-349-62183-5_12)

<sup>10</sup> *Narada Smriti* (12.14-18).

- c. *Paksha*—he is periodically impotent with women (every other fortnight, month, *etc.*).
- d. *Abhisapad-guroh*—he is impotent due to the guru’s curse.
- e. *Rogat*—he is diseased (which may pass).
- f. *Deva-krodhat*—he is impotent due to a god’s anger.
- g. *Irshyaka*—he is aroused only by the jealous feelings of seeing other men in the act of sexual union.
- h. *Sevyaka*—he is sexually enjoyed by other men.
- i. *Vataretas*—he has no discharge of semen.
- j. *Mukhebhaga*—he performs oral sex on men.
- k. *Aksipta*—his semen is deficient or does not discharge properly.
- l. *Moghabija*—his attempts to unite with the woman are fruitless.
- m. *Salina*—he is too shy or inhibited to even approach women.
- n. *Anyapati*—he copulates with things or beings other than women.

There is also a list of various kinds of women impotent with men spread throughout the Sanskrit texts. This list is provided on the official website<sup>11</sup> of the Gay and Lesbian Vaishnava Association (G.A.L.V.A.). It is as follows-

- a. *Svairini*—she engages in lovemaking with other women.
- b. *Kamini*—she engages in lovemaking with both men and women.
- c. *Stripumsa*—she is masculine in behaviour and form.
- d. *Shandhi*—she is averse to men and has no menstruation or breasts.
- e. *Narishandha*—her womanhood is destroyed.
- f. *Varta*—her female “seed” is afflicted in utero.
- g. *Sucivaktra* or *Sucimukhi*—she has an extremely small, undeveloped vagina.
- h. *Vandhya*—her menstruation is absent or suppressed.
- i. *Moghapuspa*—her attempts to unite with the man are fruitless.
- j. *Putraghni*—she has repeated miscarriages.

## 6. *Birth Story of Ayyappa*

The story about the birth of *Ayyappa*, the famous South-Indian deity, can be found in the *Sri Bhutanatha Purana*. This text is a regional *Purana*, or *Sthala Purana* and belongs to the

---

<sup>11</sup>Vedic Third-Gender Types and Terms, GALVA-108 (07 November 2021, 10:24 P.M.), <https://www.galva108.org/single-post/2014/05/11/vedic-third-gender-types-and-terms>

Puranic Genre of literature. The story goes like when *Vishnu* assumes the form of *Mohini*, *Shiva* is smitten by her beauty and embraces her tightly, to make both their bodies one. Through this *Harihar* form, they give birth to *Ayyappa*. Thus, this story depicts the birth of a child between two men. The *Krittivasa Ramayana* shows the birth of a child between two women.

### 7. Temple carvings of Khajuraho Temple

The temple carvings of the *Khajuraho* Temple are a very important source to analyse that Hinduism is essentially a queer-friendly religion. Let us have a look at some of the carvings depicting homosexual erotic acts.



In this image, we may see that one man is fellating, that is, performing oral sex on another man. This is a carving of the *Lakshmana* Temple at *Khajuraho*.



In this scene, we may see that one man is reaching out to the erect phallus of another man, probably to stroke it and give him pleasure. This is another carving at *Khajuraho*.



This is another carving at *Khajuraho*, where there is one man and three women and they are in an orgy. Thus, the women are enjoying each other as well.



In this statue, we may see that *Kama Deva*, the God of lust, is shooting his flower arrows at a couple of women, who are in an arousing embrace. This is currently stored in the Seattle Art Museum and originally hails from Bhubaneswar.



Another orgy from the *Khajuraho* Temple.

Temples were considered to be extremely important places when it came to Hinduism. They still do. The fact that such scenes were openly depicted on the temple walls is proof that civilisation in those days was very comfortable with homosexual relations and in fact, openly celebrated them as well.

In this way, we may see that ancient Indian culture was comfortable with homosexuality, but somewhere in the past there was a drastic drift in their mentality and they became narrower, although the texts were not. In this context, we may see that the modern Hindu law, by not recognising homosexuality, is erring in the sense that it contradicts the very religion on which it is premised. Hence, it may be proved that the modern Hindu law is in sheer contradiction with the various Hindu texts and thus, requires to be made queer-friendly, just like the religion on which it is premised.

## **CHAPTER 2- LEGAL STATUS OF SAME-SEX MARRIAGES IN INDIA- JURISPRUDENCE, PRECEDENTS AND LEGISLATION**

This chapter is going to deal with certain aspects specifically. Firstly, it deals with the question of ascertaining the legal status of same-sex marriages in terms of the prevailing

jurisprudence. Now when we talk about same-sex relationships first and foremost section 377 of IPC comes into the purview. To a certain extent of time section, 377 was a completely criminal offence. In the year 2018 on 6<sup>th</sup> September the Supreme Court partially decriminalised section 377 where it is clearly stated that consensual sexual relationships between two adult homosexuals, heterosexuals or lesbians are no more an offence through the verdict of *Navtej sing Johar V. Union of India*.<sup>12</sup>

### **Facts of the case:**

On April 26, 2016, Navtej Singh Johar, an L.G.B.T. dancer, and four others filed a writ suit challenging the constitutional validity of Section 377 of the IPC, which criminalises consensual sexual intercourse between same-sex adults in private. The petitioners pleaded that the "right to sexuality," "right to sexual autonomy," and "right to choose a sexual partner" be declared to be part of the right to life provided by Article 21 of the Indian Constitution. The petitioners also asked for Section 377 of the Indian Penal Code to be declared illegal.

In this case, the issues raised were-

- (1) Whether Section 377 of the IPC infringes on the Right to Equality under Article 14 of the Indian Constitution?
- (2) Whether Section 377 of IPC infringes on Freedom of Speech and Expression under Article 19 of the Constitution?
- (3) Does Section 377 of the IPC contradict Article 21 of the Constitution's Right to Life with Dignity?
- (4) Does discrimination based on sexual orientation, as defined by Section 377 of the Indian Penal Code, violate Article 15 of the Constitution?

### **Arguments from both sides:**

#### Respondent-

1. Section 377 of the Indian Penal Code does not violate Article 14 of the Constitution because it merely identifies a specific offence and its punishment, and it is entirely within the State's competence to choose who should be considered a class for the legislation.

---

<sup>12</sup> (2018) 10 SCC 1.

2. Section 377 of the IPC does not contradict Article 15 of the Constitution because it forbids discrimination based on religion, race, sex, place of birth, caste, and not sexual orientation.
3. People who engage in unnatural sexual actions, as defined by Section 377 of the IPC, are more susceptible to HIV/AIDS, and the right to privacy cannot be extended to allow people to engage in unnatural acts and thus catch HIV/AIDS.
4. The offence under Section 377 of the IPC implies sexual perversity and entails offensive, hurtful, and against the natural order of things carnal intercourse between two people; it is fully within the state's jurisdiction to impose reasonable restrictions on it.
5. Section 377 of the IPC has been incorporated after taking note of the legal systems and principles which prevailed in ancient India and the said section is more relevant legally, medically, morally, and constitutionally in the present situation.
6. Decriminalization of Section 377 of the IPC will shamble the family system and detrimentally affect the institution of marriage, open a floodgate of social issues which the legislative domain is not capable of accommodating and would also have a cascading effect on existing laws.

Petitioner-

1. The petitioners argue that retaining Section 377 in its current form would violate not one, but multiple basic LGBT rights, including the right to privacy, dignity, equality, liberty, and freedom of expression. The petitioners have also used *K.S. Puttaswamy*<sup>13</sup> (supra) to support their claim that sexual orientation is likewise an important aspect of privacy. As a result, protecting an individual's sexual orientation and right to privacy is critical, because, without these basic and essential rights, an individual's identity may fade, a sense of dread may take hold, and their existence may be reduced to simple survival. It is further argued that, in light of the Puttaswamy judgement, sexual orientation and privacy are at the heart of the fundamental rights provided by Articles 14, 19, and 21 of the Constitution. petitioners argue that sexual orientation, which is an innate logical consequence of gender identity, is secured under Article 21 of the Constitution, so any discrimination against the L.G.B.T. community's sexual

---

<sup>13</sup> (2017) 10 SCC 1. <sup>13</sup>  
(2014) 1 SCC 1.

orientation and gender identity would be in violation of the Constitution's mandate, as this Court agreed in the NALSA case.

### **Judgment:**

The court issued a unanimous decision on September 6, 2018, ruling elements of the statute dealing with consensual sexual conduct between adults to be unconstitutional. This judgement overturns the court's decision in *Suresh Kumar Koushal V. Naz Foundation*<sup>13</sup> in 2013, in which the law was upheld. Other parts of Section 377, such as those dealing with sex with minors, non-consensual sexual activities, and bestiality, are still in effect. The court determined that criminalising sexual conduct between consenting adults violated the Indian Constitution's right to equality. The court deemed "criminalising carnal intercourse" to be "irrational, capricious, and unconstitutional," said then-Chairman of the Supreme Court of India, Dipak Misra, when reading the ruling. The court found that LGBT individuals in India have the same fundamental rights as everyone else, including the freedoms guaranteed by the Indian Constitution. "The opportunity to find fulfilment in sexual intimacies, the right not to be exposed to discriminatory behaviour, and the option of whom to partner are inherent to the constitutional safeguards of sexual identity," it said. "Society makes an apology to the members of this group and their relatives for the long delay in offering reparation for the humiliation and exclusion they have endured over the centuries." Members of this society were forced to live in constant fear of retaliation and punishment. This was due to the general public's inability to recognize that homophobia is a perfectly natural state that occurs in a broad variety of human sexual identities." Hon'ble Justice Indu Malhotra stated. The ruling also said that the LGBT population is entitled to equal citizenship and legal protection, free of discrimination.

### **Now our main focus is to analyse the legal recognition of same-sex marriages in India**

Same-sex marriages are not legally recognised in India till this time. It does not possess a unified marriage law. Every Indian citizen has the right to choose their life partners according to their own choice which law will apply to them based on their community or religion. In India's laws books, there is no clear mention of homosexuality or haemophilia. It is illegal to prosecute someone for being homosexual or homophilic. Sodomy, on the other hand, is a criminal offence. Section 377 of the Indian Penal Code (IPC) of 1860 contains the main provisions for criminalising same-sex conduct.

Whoever wilfully engages in sexual intercourse against the natural order with any man, woman, or animal must be punished by imprisonment of either kind for a duration of up to ten years, as well as a fine. The crime of homosexuality is classified as an Unnatural Offense in this section. In this section, the term "carnal intercourse" refers to homosexual partnerships or sexual intercourse between men. The Indian Penal Code, Section 377, was enacted in 1860. The Indian law prohibiting homosexuality appears to be very strict. The Delhi High Court ruled that section 377 of the IPC was unconstitutional because it infringed on fundamental rights provided by the Indian Constitution. It should be emphasised that physical violence or coercion is an essential feature of virtually all offences against the human body specified in the Indian Penal Code. The only exception is Section 377, which makes it illegal to engage in sexual conduct that does not result in a victim. Only 30 cases have been heard in the High Courts and Supreme Court since the Act was enacted in 1860. The tiny number of cases filed under this section demonstrates that it is obsolete and superfluous, therefore it should be repealed.

The Central Government has notified the Delhi High Court that homosexuality/lesbianism cannot be allowed in India since Indian society is intolerant of the practice. Two things can be said regarding the government's position, to paraphrase:

- i. The state has a responsibility, not simply a function, to prevent unnatural sex, or otherwise, the social order will collapse and the law will lose its legitimacy.
- ii. It states that our society does not tolerate homosexuality, and thus its criminalization is justified, notwithstanding the universality of human rights or the universal applicability of our fundamental rights and freedoms.

### **Now let's move on to the discussions on the language of the Hindu Marriage Act, 1955 and The Special Marriage Act, 1954**

Section 5 of the Hindu Marriage Act, 1955 and Section 4 of The Special Marriage Act, 1954 are very pertinent to be noted in the context of our paper. These two Sections use gender-neutral and sexuality-neutral terms, such as 'spouse', 'person', 'party', *etc.* It is very interesting to see that nowhere is the mention of gender-specific terms like 'bride' and 'bridegroom'. Thus, we may infer that the legislature intended to keep these provisions very broad, as per its wisdom, for the coming times.

The three petitions filed by Dr Kavita Arora and Ors; Abhijit Iyer Mitra, Vaibhav Jain, an Overseas Citizen of India cardholder Joydeep Sengupta and his partner Russell Blaine Stephens in the Delhi High Court is a very important case to be mentioned. The matter is currently subjudice, but the arguments pointed out by the petitioner in the instant case agree with our deductions from the research.

The petitioners in the instant case have pointed out the very fact that the Special Marriage Act and the Hindu Marriage Act use gender-neutral and sexuality-neutral language. They want statutes like the Hindu Marriage Act, the Special Marriages Act, and the Foreign Marriage Act to recognise same-sex marriage.

Mitra argued in his petition that the Hindu Marriage Act's text is gender-neutral and does not specifically prohibit same-sex marriage.

Arora has requested that her marriage be solemnised under the Special Marriage Act by the Marriage Officer of Southeast Delhi. She contended that Article 21 of the Constitution provided the freedom to choose one's spouse also applied to same-sex marriage.

The Citizenship Act, according to Sengupta and Stephens, makes no distinction between heterosexual and same-sex spouses to an Overseas Citizen of India.

In the Delhi High Court, the Centre has continuously opposed the petitions. It has previously contended that same-sex marriage is not part of "Indian culture or law" and that such partnerships cannot be likened to an "Indian family unit" during prior hearings on the applications.

### ***Dr Kavita Arora and Ors. V. Union of India*<sup>14</sup>**

#### **Facts:**

The petitioners are a same-sex couple who have been in a serious relationship and have lived together since falling in love in 2012. They then chose to marry and establish their marital and legal rights. They realise that their relationship is in jeopardy starting in 2020 because same-sex marriage is not legally recognised because the petitioners wished to nominate each other for any official or financial position. As a result, they wish to secure their marital rights and recognise their partnership for all of the benefits that married couples are entitled to automatically.

---

<sup>14</sup> W.P. (C) 7657/2020; W.P. (C) 7692 /2020; High Court of Delhi.

<sup>15</sup>*Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

The Covid-19 outbreak shocked the partnership into realising how unpredictable life can be and it underlined the need of safeguarding each other's financial and psychological well-being. They went to the local Sub-Divisional Magistrate's office in September to have their marriage registered under the Special Marriage Act of 1954. However, because the legislation does not recognise same-sex couples, the marriage could not be solemnised. The Supreme Court has declared the right to choose one's partner to be a fundamental component of the right to life.<sup>15</sup>**The argument of the Centre in the Delhi High Court:**

Here we analyse the arguments of the three petitions together as the Court hears the pleas together.

The Delhi High Court has stated that by decriminalising homosexuality under Section 377 of the Indian Penal Code, the Court was just recognising a specific human behaviour and not questioning human conduct.

In response to the Government's request for legislation to recognise homosexual marriages, the Government stated that the Court can only examine existing rights in this regard; it cannot create new rights, and it is not permissible for the Court to override the legislative intent in limiting the legal recognition of marriage to heterosexual couples. Same-sex marriage is not recognised or approved in any personal or statutory legislation, according to the Centre, which has stated unequivocally that same-sex marriage is not legal. Despite statutory recognition of marriage between a biological man and a biological woman, the Centre argued that in our society, marriage is inevitably dependent on ancient and venerable customs, sacraments, traditions, cultural philosophy, and community values.

### **Understanding:**

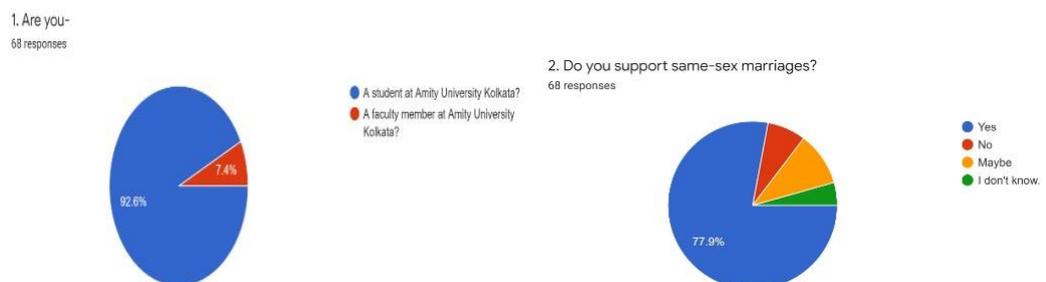
The problem here is that if there is no way for queers to marry, what was the point of decriminalising Section 377 in the first place? Was acknowledgement of human behaviour the main goal? There is a clear breach of rights and discrimination against queers if homosexual weddings are not protected under the Hindu Marriage Act and the Special Marriage Act. The State is accountable for the protection of its citizens; failing to do so simply because homosexuality is against the cultural ideal of marriage and marriage is not between a biological man and a biological woman raises questions about the goal of homosexuality decriminalisation.

It has also been argued that if homosexual marriage is against public morals and many personal laws, then why is adultery not? Is it more moral to have an extramarital affair with other women or men out of wedlock than to marry someone of the same sex? Adultery may be compromised, but not same-sex marriage; cheating on a legitimate partner when they are both "officially" married with all the conventions and cultures is probably more moral than the union of two individuals who have no intention of harming society or the cultural idea of marriage. Isn't the point of marriage to be together, or is it to be together with someone of the opposite gender? Why not same-sex weddings if infidelity is moral? Furthermore, the Government stated that any interference with existing marriage rules would throw the delicate balance of personal laws in the country into disarray, potentially leading to additional anomalies with laws governing weddings between Christians and Muslims. Another concern is if adultery is legal under all other personal laws, and if so, whether it has caused any problems in other marriage laws.

However final judgement is still waiting for 30<sup>th</sup> November 2021.

### **CHAPTER 3- SURVEY OF THE STUDENTS AND FACULTY MEMBERS OF AMITY UNIVERSITY, KOLKATA ABOUT SAME-SEX MARRIAGES IN INDIA.**

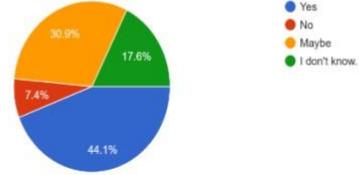
The instant survey contained twelve questions. The survey population consisted of the students and faculty members of Amity University, Kolkata. First, let us have a look at the various questions and their responses.



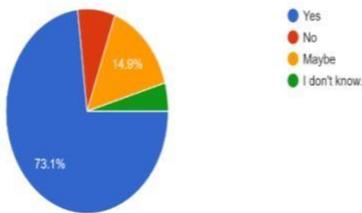
3. Do you feel that same-sex marriages should be legally recognised in India?  
67 responses



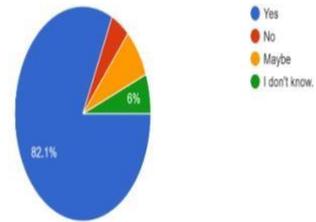
4. The temple carvings of the Khajuraho temple depict various homoerotic acts. Do you feel that Hinduism is a queer-friendly religion?  
68 responses



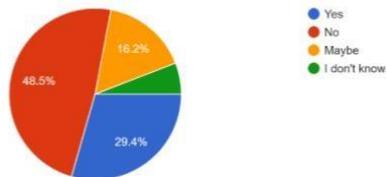
5. The Kama Sutra openly endorses and accepts same-sex acts and marriages. Similarly, many other texts of Hinduism do so. Do you feel that the Hindu personal laws in India should do so as well?  
67 responses



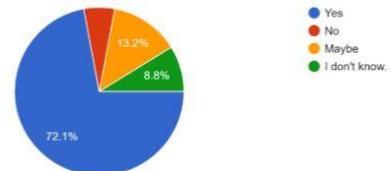
6. If your child belongs to the L.G.B.T.I.Q.A.+ community, are you going to support your child?  
67 responses



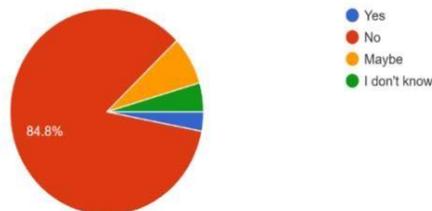
7. Do you feel that same-sex marriages are legally recognised in India?  
68 responses



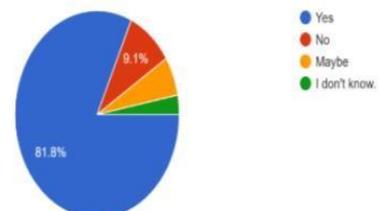
8. Are you comfortable with people openly portraying homosexual traits?  
68 responses



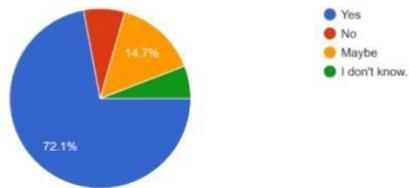
9. Are you a homophobic person?  
66 responses



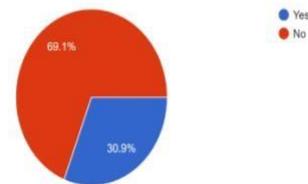
10. Are you certain about your sexuality?  
66 responses



11. Are you openly willing to support someone who portrays homosexual attributes?  
68 responses



12. Have you ever addressed someone using homophobic terms? For example, 'chakka'?  
68 responses



### ***Inferences drawn***

1. The majority of the people who gave the survey were students of Amity University, Kolkata. However, a few faculty members also gave the survey.
2. Although more than 70% of the survey population agreed to support same-sex marriages, almost a quarter of the same was either against it, unsure whether it would support it or not or inclined to support it, but not sure.
3. Almost 80% of the survey population agrees with the proposal that same-sex marriages should be legally recognised in India. However yet again, there was a minority of 20%, which was either against it, unsure or inclined to support but not certain.
4. However, when it came to ascertaining the opinion of the survey population about whether Hinduism is queer-friendly, there were mixed responses. Only about 44% of the survey population was completely agreeing with this statement, whereas the remaining 66% were either denying, unsure or inclined to agree but not certain. However, it must be mentioned here that the research that we conducted, which has depicted earlier in the paper, extensively showed how Hinduism endorsed homosexual acts and identities. Thus, we may make an inference that many people are unaware of their religion! And since the majority of the survey population consists of students, we may say that the upcoming generation has very sparse knowledge about religion.
5. For the fifth question, almost 73% of the population said that Hindu personal laws should recognise same-sex marriages as well, just like the texts and carvings. This however shows a very big paradox in the survey population's thinking. On one hand, the population is saying that it is unclear as to whether the religion is queer-friendly or not and on another hand, it is using the information provided by the surveyors to endorse same-sex relations in the name of the religion.

6. For the sixth question, almost 82% of the survey population has agreed to support their child if it turns out to be queer. In reality, we do not know how far is this going to be true. Because the current scenario of India, where people are still conservative, shows something else.
7. When the population was asked whether they thought that same-sex marriages are legally recognised in India, almost half of the population did not respond 'No'. Either they said a 'Yes', or a 'Maybe' or an 'I don't know'. Thus, it may be inferred that the survey population has very poor knowledge when it came to know the law of the nation. It must be noted that all the people who gave the survey are quite educated.
8. Again, mixed responses for the eighth question, although the majority was a yes.
9. The majority said no. The majority was quite overwhelming for the ninth question.
10. In this question, the main point to be noted is not the majority but the minority. There was still a minority in the survey unclear or completely unclear about their sexuality or sexual orientation. Nobody is aware of his or her sexual orientation completely, until the person experiments, a concept farfetched in contemporary India.
11. Again, a majority is willing to support people openly portraying homosexual traits.
12. This question's answers are a bit interesting. Although in the earlier questions majority of the people are saying that they are pro-L.G.B.T.I.Q.A.+ marriages and relations, here, we may see that a respectable amount of the minority, that is, almost 30%, admitted that they have indulged in using derogatory language for the queer people. This is another paradox in itself. On one hand, we may see that some people are unclear about their sexuality, then the majority are saying that they are pro-queer and then a respectable minority says that they have used condescending terms for the queer.

However, one thing which is clear from the survey is that people are changing and they too are recognising same-sex marriages. Considering this fact, we may say that the law is to serve society. And when society is accepting something, then the Legislature must make appropriate changes. Even classical Hindu philosophers like *Katyayana* had mentioned that custom prevails over the sacred law, as customs are essentially developed through societal developments, that is, the needs of the society, unlike the sacred law which remains static. In much the same way, analogically speaking, the law should be developed and the modern Hindu law, which is inadequate in this aspect, should include same-sex marriages within its purview.

**CHAPTER 4- Interview of Mr Devraj Naskar, L.G.B.T.I.Q.A.+ Activist, a student at Amity University, Kolkata**

- 1. Below is a picture showing a man fellating another man, a temple carving from the famous Khajuraho temple. Does the L.G.B.T.I.Q.A.+ community (hereinafter referred to as ‘the community’) feel that Hinduism is a queer-friendly religion?**



Hinduism as a religion always focused on individuals and their spiritual upliftment and equality. The sacred texts of Hinduism have never really distinguished between heterosexual and homosexual intimacy. The Vedas have also mentioned the prevalence of a "third sex". Indian myths have had a mention of androgyny, transvestism, transsexuality, homosexuality, and homoerotic servitude for example if we see the concept of *Ardhanarishwar* where Lord *Shiva* has been depicted as a bisexual- half man half woman, in *Mahabharata* where *Arjuna* cross-dressed to become *Brihannala*. We have ample examples of how the L.G.B.T.Q. community was accepted in ancient India. The community wasn't ostracized or marginalised. The shift of considering homosexuality as a sin, crime and pathology came with the ideologies of the western world. Pre-British India was more liberal and queer-friendly.

- 2. There are numerous texts in Hinduism discussing and celebrating queer identities, primarily the Kama Sutra, the Krittivasa Ramayana, etc. What is the opinion of the community about the reason for the subsequent development of homophobia in the nation?**

As I stated earlier that Indian myths have had a strong representation of queer identities. It's stated in the *Kama Sutra* that same-sex experience is to be engaged in and enjoyed for its own sake as one of the arts. With the onset of Western ideologies in India, society was brainwashed into thinking of homosexual relationships as a sin. Indian society forgot its very rooted culture of acceptance. The Buggery Act of 1553 in England made homosexuality a punishable offence and the Labouchere Amendment of 1885 allowed the prosecution of gay

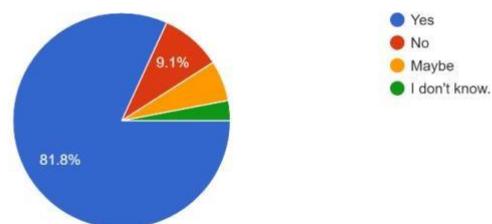
men. Inspired by these barbaric laws, Section 377 of the IPC was introduced in India. By being backed by such laws anti-homosexual attitudes developed in many religions and among community leaders which reflected the existence of widespread prejudice against homosexuals in India.

**3. Our research showed that the language used in both the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 is gender-neutral and sexuality-neutral. Two matters are also subjudice in two different High Courts of India, with regards to this question of law. Does the community also feel that the legislations use gender and sexuality-neutral language? Please state 2-3 reasons for your answer.**

Gender and sexuality-neutral language is the need of the hour. We tend to associate gender and sexuality as rigid terminology but in actuality, it's a fluid construct. Some people do not associate with gender and sexuality they fall under the category of intersex, or non-binary, respectively. If legislations incorporate gender and sexuality-neutral terminology, then the spectrum of inclusion of people from the community expands and becomes universal. The community is a minority and is marginalized, all it seeks is inclusion. With the inclusion of gender and sexuality-neutral language in the legislation, the scope of acceptance also rises.

**4. In the opinion of the community, are people in India aware of their sexuality? For instance, in a survey conducted by the researchers, one of the questions received the following responses-**

10. Are you certain about you sexuality?  
66 responses



As you can see in the survey itself majority of Indians are aware of their sexuality. Human sexuality is complex. The acceptance of the distinction between desire, behaviour and identity acknowledges the multidimensional nature of sexuality. The fact that these dimensions may not always be congruent in individuals suggests the complexity of the issues. So, for some people may be the awareness of their sexuality is unknown. Sexuality is ever-evolving. Hence the acknowledgement of a person's sexuality may be influenced by their environment also. Living in a predominantly heterosexual world identifying as something different from the ordinary is not acknowledged in the stereotypical Indian society.

**5. In the opinion of the community, are the modern Hindu Laws inadequate when it comes to same-sex relations, particularly marriages? Please give 2-3 reasons for your answer.**

The Hindu Marriage Act of 1955 and the Special Marriage Act of 1956 have no statutory matters against gay marriage. But the ignorance of the fact that most statutory provisions do not include same-sex marriages and on the contrary just deal with the marriage between a man and a woman highlights the inadequacy of the laws and the discrimination against same-sex couples. Laws are supposed to represent socially acceptable do's and don'ts, then ignoring the existence of same-sex relations goes beyond discrimination to point of infringing the Right to Equality of citizens. If new laws are not introduced, then normal human beings will continue to suffer inhuman exploitation just because nature has nourished them with the need to be different.

**6. As an L.G.B.T.I.Q.A.+ activist and also a law student, what do you think about the chances of same-sex marriages attaining legal recognition in India?**

The legal recognition of homosexual unions would mean not only approval of homosexual behaviour with the consequence of making it a model in present-day society but may also obscure the basic values (of family, marriage, procreation and continuity of species) which belong to the common inheritance of humanity. But at the same time, Indians should realize that sexual orientation is biological and is a natural process. It's not a disease. Indeed, the acceptance of the demand for social and legal recognition of homosexuality has not been approved today but in any case, the homosexual community should not be exploited and mistreated. It is high time for the Legislature, Executive, Judiciary and society at large they cannot to demean the existence of people with same-sex desires. They also need to acknowledge that by legalising homosexual relations they will not permit mere sexual activity but will also decriminalize the lives of citizens who are connected to such sexual acts.

## **CONCLUSION**

The paper thoroughly analysed the status of same-sex marriages (relations) in India vis-à-vis the Hindu texts and also in the context of Modern Hindu Law, the various Case Laws and the prevailing jurisprudence. The paper also analysed the opinion of the students and the faculty members of Amity University, Kolkata to ascertain their opinion concerning same-sex marriages in India also an interview with Shri Devraj Naskar was conducted to ascertain the opinion of the LGBTIQ+ community with regard to the same.