



“From Silence To An Evolving Paradigm: Recognition Of Same Sex Marriage In National Legal Regime”

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Abstract:

A marriage is considered to be holy union regardless of their nature. The paper explores and examines the status of same sex marriage in India and International legal regime.

The recognition of same sex marriage in India is evolving and complex issue and raises host of legal and regulatory questions that sits at intersection of constitutional law, prevailing social values, human right issues and cultural norms. The research work situates India position within broader global context and comparing it with various jurisdiction that recognizes same sex union.

The study dwells on recent developments, future course of action and particularly examining the flexibility across Indian legal system alongside religious, cultural, and moral arguments. Same-sex marriage in India remains a complex and evolving socio-legal issue that highlights the country's ongoing struggle between traditional values and modern principles of equality, liberty, dignity and human rights.

KEYWORDS

Same sex marriage, LGBTQ+ Community, Civil union

Introduction

Marriage is universally regarded as sacred union viewed both as sacrament or contract under different religious beliefs. Same sex marriage denotes unions between two men or two women. The recognition aspect has drawn both acceptance and rejection from diverse sections of society across social and cultural and religious spheres.

In the *Shakti Vahini v. Union of India*¹(2018) case, the Supreme Court of India discussed liberty in a “concrete” sense. The Court underscored that individual liberty is not an abstract concept — it is “a concrete right” that guarantees every adult the freedom to make personal choices, especially regarding marriage and companionship.

On 6th September 2018, India’s LGBTQ+ community achieved a historic victory. Supreme Court in *Navtej Singh Johar v. Union of India*², one of its historic judgments, struck down Section 377 of the Indian Penal Code as unconstitutional but mere decriminalizing is worth nothing not sufficient. However, a question arises what would be best way out for its recognition. Chief Justice Misra swiftly expressed “when we say union, we do not mean the union of marriage, though marriage is a union. Supreme Court in above case confined itself only to the aspect of constitutionality of Section 377 and left the question of union remain untouched.

In earlier primitive society, institution of marriage extended only to heterosexual union, the main purpose is procreation of children and legitimise upbringing of children. Although society is progressive and become adaptable to societal change, despite these advancement in various jurisdiction institution of marriage is restricted to heterosexual relationships and homosexual couples still struggling for their rights and recognition of their civil union. Mere recognition of private intimate association is worth nothing it is equally important to recognize homosexual unions or same sex marriage. Providing legal recognition to same sex union or same sex marriage in India touches various aspects including social values, cultural norms and involves political questions.

Literature Review

i) **"Same-sex marriage legislation and implementation: Marital intention and barriers for marriage actualization among same-sex couples in Asia."** **Eliz Miu Yin Wong³**

The study focuses on complexities and highlights challenges associated with recognition of same sex marriage be it legal or cultural or societal perspective. However, study is subjected to certain limitations as it covers only two Countries leaving majority of other Asian Countries and covers only couples in committed same sex relationship and intended to covers barriers to marriage without due consideration of parenthood, adoption.

ii) **"Legal recognition of same sex marriage right in India"**—**Shivam Garg⁴** The research work explores the historical context, constitutional dimensions and social dimensions. The study dwells into comparative examination of various countries that legalized the same sex marriage. However, the research work does not placed reliance or prominence on empirical work mainly focuses on doctrinal study and work on

¹ *Shakti Vahini v. Union of India*: (2018) 7 SCC 192.

² *Navtej Singh Johar v. Union of India* is: (2018) 10 SCC 1.

³ <https://onlinelibrary.wiley.com/doi/abs/10.1111/jomf.13095>

highlighting legal framework not implementation with limited geographical scope of Countries that have legalized the same sex marriage.

iii) Unfolding the Legal Landscape of Same- Sex Marriages in India-Anshika Singh and Kriti Shankar⁵

The research works cover historical and cultural background and comparative analysis of various jurisdiction, suggesting possible reforms and recommendations. The work mainly deals with aspect of recognition of marriage without due consideration of ancillary rights such as adoption, taxation.

iv) The future of Same-sex marriage in India – An analysis with other countries Seethal Kuttappan, Dalliandeep Kaur Tiwana

The above research work highlights the Legal status of same sex marriage in India including how various law can adapt or applies to same sex couple. The study also employs comparative legal analysis with various jurisdiction that recognizes same sex union. However, there are certain limitations to the work. The work fails to give due regards to social and cultural acceptance among section of society focuses mainly on legal challenges.

v) Scope Of Same-Sex Marriages in India Pragati Dwivedi Dr Jyoti Yadav

The above research work focuses mainly on legal framework without due consideration of other social, cultural factors. The research study is limited to university students as a result the findings of research work cannot be generalized to large extent. The targeted population does not include voices from LGBTQ communities. The work fails to provide an answer to challenges which may arise if same sex marriage gets recognition.

Methodology

The study uses doctrinal, qualitative and comparative legal research design grounded in socio-legal methodology.

The study also employs non doctrinal or empirical research design aiming to understand societal attitude and practical challenges associated with the recognition of same sex marriage.

Research Objective

1. To examine and investigate the current legal status of same sex marriage in India and selected nationals' jurisdiction.
2. To evaluate and examines legal, social, cultural and institutional barriers.
3. To investigate what lead to recognition of same sex marriage in selected national jurisdiction.
4. To analyze and evaluate legal arguments underpinning recognition of same sex marriage.
5. To research the impact of recognition on diverse legal fields such as family law, social security law. 6. To look into key international documents and propose reforms and suggestions.



⁴ <https://oldwebsitedata.cnlu.ac.in/storage/2022/08/Volume-9-2020-21.pdf#page=180>

⁵ <https://ijlsi.com/wp-content/uploads/Unfolding-the-Legal-Landscape-of-Same-Sex-Marriages-in-India.pdf>

RESEARCH HYPOTHESIS

1. The recognition of same-sex marriage in India is significantly constrained and influenced by prevailing societal attitude and religious beliefs, with higher levels of religiosity and adherence to traditional gender roles negatively correlating with public support for legal recognition.
2. Urban residents are significantly more inclined and supportive of same-sex marriage than rural residents, due to lower influence of religious institutions and greater exposure to liberal social values.
3. Judicial rulings (constitutional or supreme courts) and key international documents on same sex marriage play a more decisive positive role than legislative action in recognizing same-sex marriage in countries with divided political majorities.

RESEARCH QUESTION

1. What is the current legal status of same-sex marriage in the selected national legal system(s)?
2. How have international human rights instruments and bodies addressed the issue of same-sex marriage and LGBTQ+ rights?
3. What are the key differences in legal approaches to same-sex marriage across various jurisdictions?
4. How do cultural, religious, and political factors influence the recognition or rejection of same-sex marriage in national laws?
5. Are national laws prohibiting same-sex marriage in conflict with international legal obligations related to equality and non-discrimination?
6. What legal and policy reforms are necessary to bridge the gap between national legislation and international human rights standards on same-sex marriage?

HISTORY OF SAME SEX MARRIAGE IN INDIA

It can be discussed in various phases which are as follows:

1. PRE COLONIAL PERIOD

Certain texts and mythology discussed and mentions same sex desire however no substantial Evidence to support in that era same sex union were formally recognized. Epic like Ramayana, Mahabharata and temple of khajuraho provide sneak peek into same sex desire.

- A) Khajuraho temple carving embraces women in an intimate position with other women or men displaying their's genital to another men.
- B) Arthashastra of Kautilya -- a treatise on politics -- also provide insights about homosexuality.
- C) The ninth chapter of the Kamasutra of Vatsyayana -- composed in around 4th century BC, also find mentions of oral sexual acts (Auparistaka), homosexuality.
- D) Manusmriti says that sexual union between with two men brings loss of caste. If a man has sex with non-human females or with another man or indulges in anal or oral sex with women he is liable for punishment⁴ as per the "Painful Heating Vow". E) Ancient Indian text Mahabhatta provide concrete evidence of presence of homosexual relationships. The character like Shikhandi, Brihannala represents fluid gender and existence of various sexual desire.

2. COLONIAL ERA

Criminalization of homosexuality by virtue of Section 377 of Indian Penal Code. The legislative intent behind incorporation of Section 377 was to criminalize unnatural offence. Section 377 of Indian Penal Code read as " Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine"

Before Decriminalization of section 377 of Indian Penal code, as per national crime records bureau that shows that between 2014 - 2016 total of 4690 cases were registered under section 377 and Kerela top the list.

LEGAL BATTLE ON SAME SEX UNION — INDIAN PERSPECTIVE

Naz Foundation case

This judgment sets in motion prolonged legal battle that culminated into recognition of same sex relationship in the historic judgment of Navtej sing Johar case.

The Delhi High Court noted and observed that "Section 377 IPC, insofar as it criminalizes private consensual sexual act between two adults in private, is violative of and inconsistent with rights guaranteed under Articles 21, 14 and 15 of the Constitution."

⁴ <https://timesofindia.indiatimes.com/readersblog/dopamineffable/same-sex-marriages-in-india-a-complete-overview-53507/>

Suresh Koushal vs Naz Foundation

Court reinstates the earlier position in effect it criminalizes homosexuality again declares previous ruling legally unsustainable and overturned the decision of two judges' bench and noted that section 377 of IPC does not suffer from any kind of constitutional infirmity.

Court noted that Section 377 does not target any particular group or sexual orientation or identity it merely specifies that certain acts performed or committed will constitute an offence under section 377.

Court noted that High Court was justified and empowered to entertain challenge but petitioner fails to highlight any particular instances of discrimination by public agencies and violations of human rights.

⁷ Naz Foundation v. Government of NCT of Delhi & Ors.: (2009) 6 SCALE 627

⁸ Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors. (Civil Appeal No. 10972 of 2013) (2014) 1 SCC 1,

3. National Legal Services Authority v. Union of India⁹

One of the historic judgment by Supreme Court of India in which court recognizes transgender as third gender and would be entitled to same fundamental rights which people of India are entitled under Constitution of India.

Court further held that individuals have right to identify himself either as male or female or transgender. On issue of gender identity Radhakrishnan, J., lucently stated that gender identity is what each individuals feels deeply internally which may or may not corresponds to sex assigned at the time of birth which may result into male or female or transgender.

On issue of discrimination Radhakrishnan, J., lucently stated that discrimination on ground of sex under Article 15 is wide enough includes within it ambits discrimination on ground of gender identity.

Sikri, J., while giving his concurring opinion observed that there seems no reason why not to recognize third gender as third gender and extends constitutional protection to them

He further ruled that basic human rights which includes right to life, right to property, right to education and right to privacy must extend to third gender and laid emphasis that gender identity is essential component which guaranteed enjoyment of certain rights.

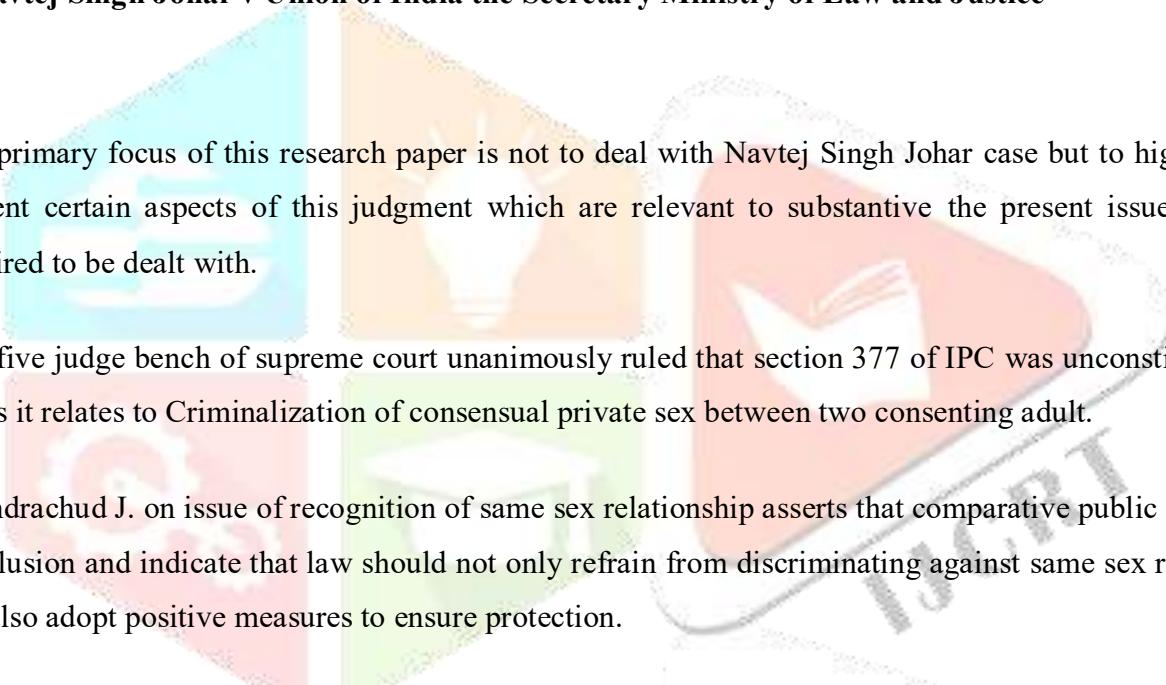
4. Justice K. S. Puttaswamy (Retd.) v Union Of India¹⁰

The historic decision of supreme courts in which court held that right to privacy is a fundamental right flowed from Article 21 of Indian constitution.

Although court does not explore the concept of Section 377 and its constitutionality but had profound influence on later judgment and paved way for constitutional ground works and reasoning which eventually lead decriminalization.

Court observed that privacy include bodily autonomy, personal choices free from interference of state.

5. Navtej Singh Johar v Union of India the Secretary Ministry of Law and Justice



The primary focus of this research paper is not to deal with Navtej Singh Johar case but to highlight and present certain aspects of this judgment which are relevant to substantive the present issue, therefore required to be dealt with.

The five judge bench of supreme court unanimously ruled that section 377 of IPC was unconstitutional so far as it relates to Criminalization of consensual private sex between two consenting adult.

Chandrachud J. on issue of recognition of same sex relationship asserts that comparative public law lead to conclusion and indicate that law should not only refrain from discriminating against same sex relationship but also adopt positive measures to ensure protection.

As Justice D.Y. Chandrachud noted, "...this case involves much more than merely decriminalising certain conduct which has been proscribed by a colonial law. The case is about an aspiration to realise constitutional rights. It is about a right which every human being has, to live with dignity. It is about enabling these citizens to realise the worth of equal citizenship.

⁹ National Legal Services Authority v. Union of India AIR 2014 SC 1863.

¹⁰ Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors AIR 2017 SC 4161.

6. Supriyo @ Supriya Chakraborty & Anr. v Union of India

The significant issue involved in this case was Whether homosexual couple has right to statutory marriage under current Indian law?

The court noted that in context of same sex couple the right to marry a person of one's choice is not a fundamental right enforceable under existing marriage laws.

However, the right to intimate association, dignity, and choice of partner is protected under Article 21.

The court distinguishes between:

1. Right To choose partner and have intimate association protected under Article 21;
2. Right to statutory marriage under existing legal law as fundamental right.

GLOBAL PERSPECTIVE

The research work will provide deep and detailed insights about various jurisdiction which have legalized the same sex marriage or union merely decriminalizing the same-sex relationships is considered not sufficient or worth nothing, legal recognition of same-sex relationships as civil unions is equally necessary.

In this regard the observation of Justice Kennedy of U.S. Supreme Court in Obergefell v. Hodges⁵ is worth noting. He observed that though Lawrence invalidated or struck down laws that made same-sex intimacy a criminal act but it has only confirmed a dimension of freedom and does not achieve the full promise of liberty and the full promise will only be achieved by legalizing theirs union as that of heterosexual unions.

It can only be ensured when the homosexual couples will be provided equal rights as that of heterosexual couples.

In the year 2003 US Apex Court in a case titled “ Lawrence v. Texas (539 U.S. 558 (2003)” noted and established the rule that statutes that make same-sex sexual behaviour illegal would be declared as unconstitutional and ultra vires to the constitutional principle. The decision made it clear that all couple be it heterosexual and homosexual holds equal basic rights to private sexual intimacy or sexual activity.

Later in 2015 in a case tilted “ Obergefell v. Hodges (576 US 644 (2015)”, the U.S. Supreme Court in its historic decision affirmed that homosexual couple has constitutional right to marriage or to be precise constitution guaranteed right to marry. This historic case altered the way that same-sex marriage is seen globally.

⁵ James Obergefell et al. v. Richard Hodges, Director, Ohio Department of Health, et al. 576 U.S. 644 (2015)

In the case of Saurabh Chaudri and others v. Union of India and others,

It was observed that Constitution is organic living document and breathing document must adapt to change.

In case titled State of West Bengal vs Keshoram industries the Court observed that constitution is living organic document the outlook and expression must be dynamic.

SAME SEX MARRIAGE RECOGNITION IN DIFFERENT COUNTRIES

NETHERLANDS

The first nation in the world to guarantee constitutional right to marriage to same sex couple or heterosexual couple.

The government took major step toward recognition of union of same sex couple by enacting **Dutch Marriage Act 2000**.

BELGIUM

Next nation in the world to provide constitutional guarantee to union of homosexual couple.

CANADA

Canada become 4th country in the world after Netherlands, Belgium to give legal recognition to same sex couple in 2005.

The legislation which granted equality was **Civil Marriage Act (Bill C-38)**.

DENMARK

In 1989, Denmark was the world's first nation in the world to recognize homosexual unions via registered partnerships.

A new same-sex marriage legislation was enacted on June 7, 2012, and it became operative or came into force on June 15, 2012.

Furthermore, the key features of legislation is that it allows homosexual couples in legally recognized unions to adopt children. Fertility treatments are also available for same-sex couples.

SPAIN

Spain implemented the policy in 2005. Following a deeply divided parliamentary vote, it became the third country in Europe to allow union between individuals of the same sex.

The measure that legalized same-sex unions was sponsored by the social government of Jose Luis Rodriguez Zapatero and passed with a vote of 187 in favour to 147 against.

PORUGAL

Portugal, also a European country, is the ninth nation in which same-sex marriage is now permitted.

Portugal's Constitutional Court upheld a measure that the legislature had enacted legalizing same-sex marriage.

Married couples possess identical inheritance rights to those of married heterosexual couples.

NEW ZEALAND

New Zealand made history by being the first Asia-Pacific country to legalize same-sex marriage. Since 2005, legislation has allowed same-sex couples to enter into civil unions.

In 2013, legislation recognized both same-sex marriage and the right for lesbian and gay couples to adopt children.

ANDORRA

Andorra smallest landlocked mountainous nation that situated comfortably or snugly or nestled within France and Spain. Andorra general council voted to legalise same sex union and make necessary amendment in civil union law. The general council of Andorra in November 2014 makes historic move to legalise same sex union and also grants adoption rights to homosexual couples which was earlier limited to heterosexual couple. The law is officially known as **Llei 30/2022, del 21 de juliol, qualificada de la persona i de la família**. It is pertinent to mention that the historic move to legalise same sex union was result of judicial act and not of judicial pronouncement.

ICELAND

In 2010 Iceland make historic move by legalizing same sex marriage. The first couple to be married under this law was then Prime Minister of Iceland. Earlier protection was extend only to recognition of same sex union but now homosexual couples can adopts children and both parties have same right and obligations.

The legislative enactment which provides recognition officially titled as **Registered Partnership Act (Lög um staðfesta samvist)**, passed in the year 1996.

Later in year 2010 Iceland passed neutral gender marriage law officially titled as **“One Marriage Act” (Act no. 65/2010)** bringing both homosexual and heterosexual union under one umbrella law.

URUGUAY

The Latin American Country that situated comfortably between or nestled between Brazil and Argentina made historic decision by providing recognition to same sex union in year 2013 though permitted since 2008. The homosexual couples has right to adopt children and choose order of their surnames.

The enactment which provides recognition officially titled as **Law No. 19.075 – Equal Marriage Law**.

RESEARCH FINDINGS

1. Legal recognition of same-sex union is currently absent in India. Court laid emphasis on parliament regulations as to the recognition of same sex union under statutory law.
2. Recognition of same sex relationship is just symbolic and worth nothing without recognition of same sex union.
3. Social acceptance among section of society as to acceptance of same sex relationship is rising but there exist strong opposition.
4. There is need for systematic and detailed regulations as to various dimensions including inheritance, adoption, taxation, surrogacy.

What various data shows on social acceptance of same sex relationship in India.

A. According to Pew Research centre survey (June 20, 2023):

The data suggests that 53% Indian Adults supports recognition of same sex marriage while 43% Indian Adults were against legalizing same sex union.

B. According to survey by Centre for the Study of Developing Societies (2018-2019):

The data shows that only 19% supports homosexual relationships. The religious differences shows Hinduism more likely to support same-sex relationships in comparison to other religions.

C. According to survey conducted by NIRMAN A YOUTH INTIATIVE (July August 2023)

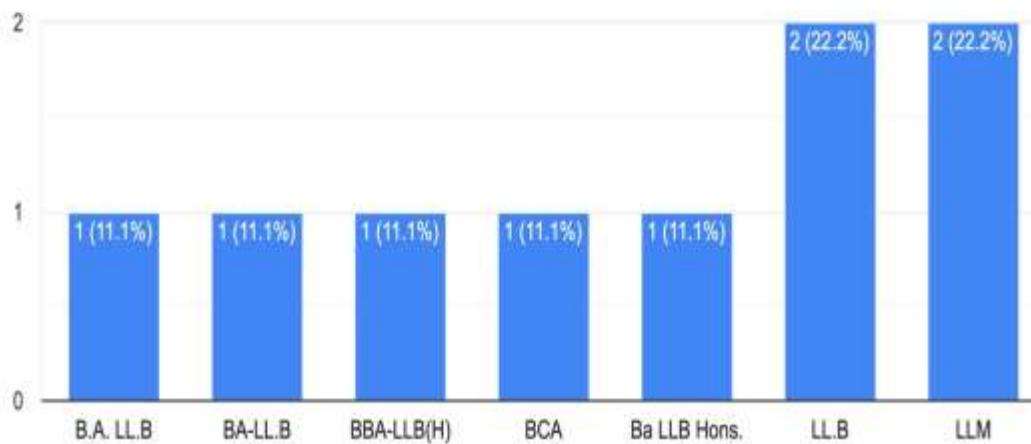
The data shows that 73.5 % youths supports same-sex relationships and recognition of same sex marriage.

A survey was conducted by researcher himself by employing non doctrinal research.

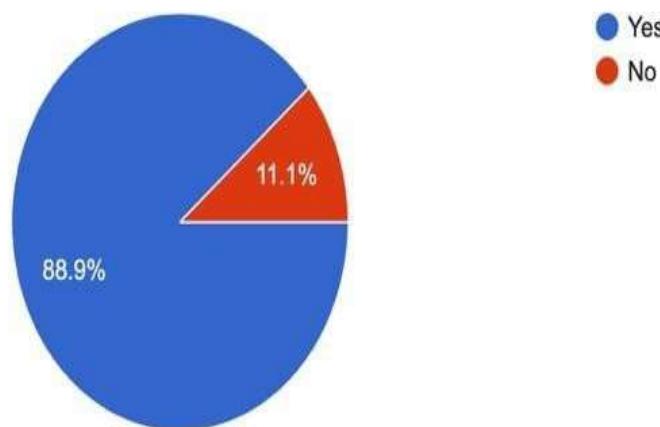
Survey Titled: Survey on social acceptance of same sex union in India

Targeted Group: Students of ICFAI LAW SCHOOL, ICFAI UNIVERSITY DEHRADUN

COURSE

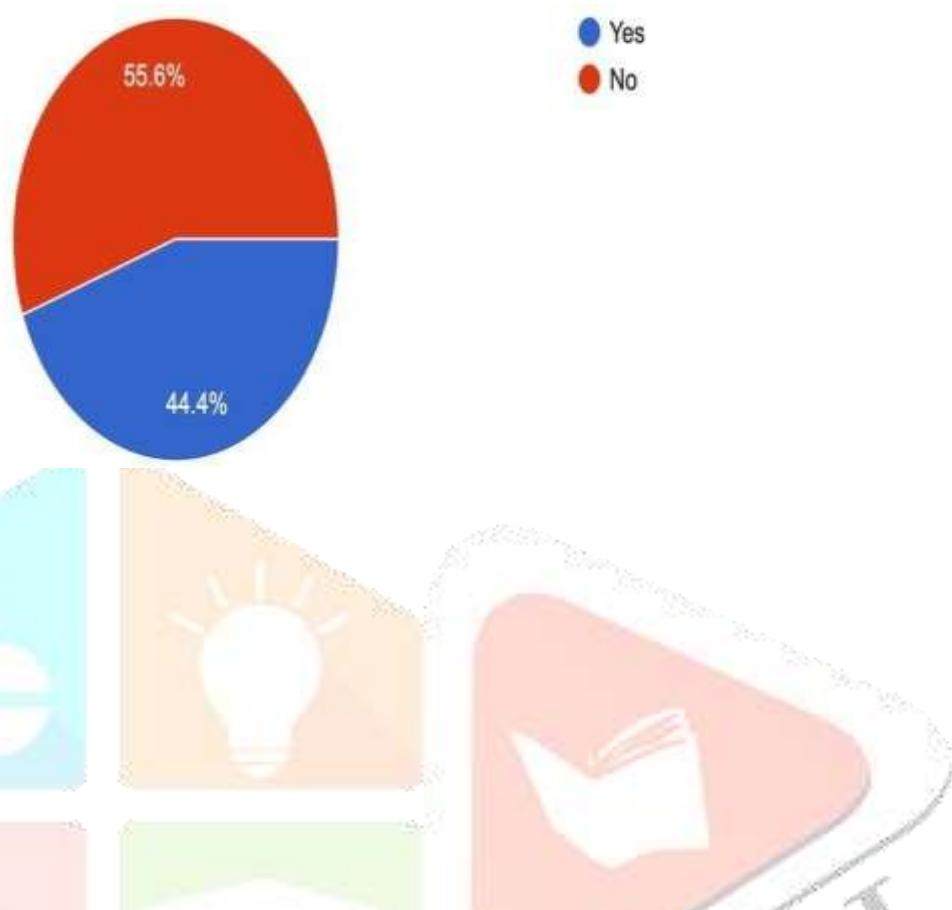


Are you aware of the legal status of same-sex marriage in India?

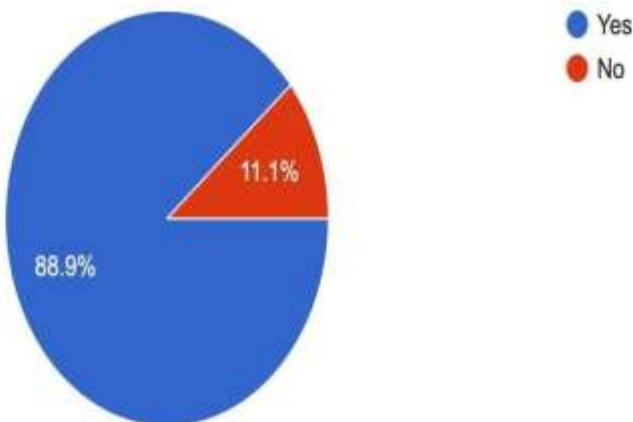


Do you personally support the legalization of same-sex marriage in India?

1000 responses



Have you heard about same-sex marriage being legally recognized in other countries?



CONCLUSION

1. The recognition of same-sex union in India imposes a host of legal and regulatory questions that sits at intersection of various public law and private law including constitutional law, taxation law, personal law.
2. Full liberty is yet to be achieved giving recognition to private intimate association between homosexual couples is worth nothing.
3. Recognition of same sex union in India is complex and evolving issue that sits at intersection of social values and social acceptance.
4. Constitutional morality though spoken in constituent assembly debate but remain dormant and has to be given precedents over popular opinion or above societal morality.
5. The ultimate way out is both legislative enactment and judicial recognition in order to achieve full liberty and positive freedom, equality and non discrimination.
6. Social acceptance is rising among section of society but there exist a strong opposition from vast section of society.

RECOMMENDATIONS

1. Judiciary must maintain delicate balance and steps into shoes of legislature to provide recognition to same sex union, atleast to civil partnership initially.
2. Provide secular route for same sex couples by amendment of various legislative enactment.
3. Encourage collection of data on LGBTG+ community for informed decision making and policy decisions.
4. We should learn from experience avoid borrowing any western framework focus on drafting framework that balances both equality and social justice.

Reference

1. **Supreme Court Observer. (n.d.).** *Adjudicating marriage equality: An opportunity lost or a bullet dodged?* Retrieved October 14, 2024, from <https://www.scobserver.in/journal/adjudicating-marriage-equality-an-opportunity- lost-or-a-bullet-dodged/>
2. **Baraily, N. (2022).** *The need for legalizing same-sex marriage in India: A future possibility or a possible apprehension?* Indian Journal of Law and Legal Research. Retrieved from <https://ssrn.com/abstract=3953994>
3. **Advocate, J. K. D. S., & Law, L. (2023).** *Same-sex marriage and the American Supreme Court judgment—Obergefell v. Hodges: Philosophical foundations.* LiveLaw. Retrieved from

<https://www.livelaw.in/articles/same-sex-marriage-hodges-philosophical-foundations- 228469>

[american-supreme-court-judgment-obergefell-v-](american-supreme-court-judgment-obergefell-v-american-supreme-court-judgment-obergefell-v-)

4. **Bloomberg, S. M. (2023).** *How same-sex marriage could become legal in India.* TIME. Retrieved from <https://time.com/6247937/india-same-sex-marriage-supreme-court/>

5. **Caulfield, S. (2011).** *The recent Supreme Court ruling on same-sex unions in Brazil: A historical perspective.* International Institute Journal, 1(1). Retrieved from <http://hdl.handle.net/2027/spo.11645653.0001.103>

6. **Bloomberg, P. T. (2024).** *Greece extends marriage and adoption rights to same-sex couples.* TIME. Retrieved from <https://time.com/6695758/greece-same-sex-marriage- adoption-christian-orthodox-lgbtq/>

7. **Chuchra, J. (2021).** *Same-sex marriage laws: Judicial evolution and cultural acceptance.* Journal of Legal Research and Juridical Sciences, 356–358. Retrieved from <https://jlrjs.com/wp-content/uploads/2022/12/46.-Jannat-Chuchra.pdf>

8. **Costa Rica first in Central America to legalize same-sex marriage. (2020).** *Human Rights Watch.* Retrieved from <https://www.hrw.org/news/2020/05/26/costa-rica-first- central-america-legalize-same-sex-marriage>.

BIBLIOGRAPHY

BOOKS:-

- 1) Love's Rite: Same-Sex Marriage in India and the West (2005) by Ruth Vanita. Penguin Books India. A pioneering work exploring same-sex unions in India and their relation to marriage norms in the West.
- 2) **Badgett, M. V. L. (2009).** When gay people get married: What happens when societies legalize same-sex marriage. New York University Press.
- 3) **Eskridge, W. N., Jr. (2001).** Gaylaw: Challenging the apartheid of the closet. Harvard University Press.
- 4) **Sullivan, A. (1996).** Virtually normal: An argument about homosexuality. Vintage.X

REPORTS

- 1) **Human Rights Watch. (2008).** This alien legacy: The origins of “sodomy” laws in British colonialism. Human Rights Watch.
- 2) **International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA). (2020).** State-sponsored homophobia: A world survey of laws—Criminalisation, protection and recognition of same-sex love. ILGA.

