

The Non-Conventional Families In The Heteronormative Society In India: The Indifferent Existence

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Abstract

Theme: The social moralities of Indian society have never accepted non-conventional families and homosexuality as a normal phenomenon. The indifferent attitude of the society towards homosexuals and the non-conventional families is quite remarkable. Though the Constitutional morality aims for equality of all human beings under equal circumstances, but the social morality comes in its way as a hindrance leading to discrimination and violation of the fundamental rights of the queer citizens. Homosexuals are not the products of time; rather they are the products of nature and were in existence even from time immemorial having references in mythologies too. However, by efflux of time, the societal behavior towards the community has changed significantly, especially after the Apex Court recognized their rights giving effect to the Constitutional morality over social morality in *Navtej Singh Johar v. Union of India*, decriminalizing homosexuality under section 377 of the Indian Penal code. But the battle continues for legalization of same-sex marriages or civil unions as the government is adamant on its approach not to legalize it. This paper tries to elaborate the societal viewpoint on same-sex relations and the non-conventional families after the decriminalization of homosexuality and, to focus on their struggle to live with dignity in this modern world. The paper also refers to countries where homosexuality is no more a criminal offence and same-sex relationship and their right to marriage are legalized.

Research Methodology: The paper is doctrinal research. The data collected is based on the primary and secondary sources. The primary data are gathered from legal documents and judgments of the Supreme Court. The legal materials were collected through online sources. The secondary data are collected from books, articles and newspapers.

Objectives of Research: The Objectives of the research are to find out the position of the non-conventional families in India post decriminalization of homosexuality and post denial of same sex marriage rights and to find out the factors leading to recognition of same-sex marriage in some other countries.

Findings and Suggestions: Homosexuality is no different from that of Heterosexuality. The society needs to come out from hetero-normative thoughts. The Judiciary and the Legislature shall take steps towards proper implementation of the laws and guidelines for their acceptance in absolute sense in the society. Only decriminalizing doesn't lead to non-discriminations.

Keywords: Decriminalization, Family, Gender, Heteronormative, Homosexual, Non-conventional

INTRODUCTION

Non-conventional family and homosexuality is blazing issue now in India. These issues are against the morality of the society. The Indian society finds it trouble to accept people or family of these community. Discrimination against non-conventional family and homosexuality remain in the society and the prime reason for discrimination is lack of awareness on their existence from mythological and ancient era and the legislation and the judiciary have failed to provide them protection and equality. Doubtlessly, the Apex court in the year 2018 took first major step for the recognition of these people by decriminalizing homosexuality under Section 377 of the Indian Penal code. Nevertheless, decriminalization isn't sufficient to meet the rights guaranteed under the Indian Constitution neither leads to recognition in complete manner. Subsequently, in 2023 the denial of recognition of same sex marriage in the case of *Supriyo Chakrabarty* generate constraint to the rights that flow along with marriage i.e., right to adoption, inheritance, and surrogacy. The judiciary failed to meet the rights of homosexual partners in live-in relationship as well, as the homosexual partners are legally allowed to have relationship and can move into an arrangement of live-in relationship. There are many factors which needed to be touched and the role of judiciary and legislation does not end here. Both the society and Judiciary need to contemplate beyond the heteronormative existence. Homosexuality is not a choice, rather it is what is given to an individual. Hence, discrimination against an individual on the ground of one's sexual orientation and denial of their fundamental rights is the violation of constitutional moralities. Every individual has the rights and freedom to have family and choose for parenting irrespective of one's sexual orientation and gender identity.

1.1. The concept of non-conventional family

Non-conventional family means the non-traditional family which not under the tradition or beyond the tradition of the society. 'Non-conventional' refers to an uncommon/unnatural form of set up. In other word family that is uncommon/unnatural which doesn't exist in often or not found in as a (general) rule. So, homosexuals' person and formation of family among them is considered as an uncommon and unnatural. As the society views the existence of heterosexual and heterosexual family i.e., the formation of family by a male and female as husband and wife. The concept of female-female and male-male forming a family is quite indifferent and being marginalized by the society.

1.2. The historical background

History speaks volume on the existence of homosexuality and homosexual forming families and leading a life according to own conduct as normal as heterosexual. The research says that male having intimate relation with another male and so as female, is considered quite natural during the Vedic period. Homosexuality is not new concept which has emerged with time rather the presence has been discover during the Vedic period. The Vedic literatures like *Manusmriti*, *Dharma shastra*, *Kamasutra*, homosexuality and its existence is mentioned. The concept of this "third sex" is not new; it has developed over time, as documented in the book "Tritiya Prakriti", which dates back to the Vedic period. Lesbian, gay, and bisexual are abbreviated as "LGB," with lesbians referred to as "Svairini", gays as "Kliba", and bisexuals as "Kami". These three entities i.e., the *svairini*, *kliba*, and *kami*, have existed since the Vedic era, when society recognized them completely and permitted them to live according to their own rules of behaviour (Amara Das Wilhelm,2003). The concepts of homosexuality and gay activity are covered in a few Vedic texts, including the *Kamasutra* and the *Vats Ayana*. Although homosexuality was uncommon in medieval society, there are documented instances of it. According to the findings, even though it was forbidden by Islam at the time, several Muslim empires had romantic connections with men (Dr. Sushma Singh, 2023). Furthermore, it is emphasized in Hindu literature and texts that homosexuality is neither a disability nor anything that goes against societal standards. Indeed, Ruth Vanitha the famous academician, writer, and activist in her book "Love's Rite Same-Sex marriages in Modern India" and "Same-sex wedding, Hindu Tradition and Modern India" detailed on the acknowledgment from ancient periods and described the how the society have evolved from then. Vanitha says love has no bounds. It's not what we choose, it's what we are given.

The word "non-conventional" came into use after homosexuality was criminalized and referred as against the order of nature post-colonial era and made it a punishable offence. Eventually, Indian society started adapting the rules made by the British and made it a practice.

1.3. The society with heteronormative view

Gay rights are a topic of conversation in India. Indian society and homosexuality continue to be at opposing poles. One of the main challenges for gays in Indian society is their initial complete acceptance. As homosexuality is now viewed as abnormal, unusual, or beyond societal ethics, it is not fully accepted. It is thought that Indian society's understanding of homosexuality is culturally oriented and originated in the west. However, the reality is that homosexuality has been in India since ancient times (Ibid). We live in a heteronormative society which has its own view towards proper and improper sexual orientation and gender identity. Some corner of the society feels that non-conventional family and homosexuality is against the social moralities. This system falls out the cultural norms and social ethics. People also believe that homosexuality is a mental disease or physical disorder that can be taken care or curable by some medical treatment or counselling or therapies. Due to such views and preconceive notion of the society, homosexual persons face discrimination socially. Lack of awareness and legal provisions constraint the society from acceptance, considering it as beyond the "order of nature". And this "order of nature" had been approved and defined during the British period and was punishable under the Indian Penal Code.

Later, the "order of nature" was criminalised by the British. The Indian Penal Code, 1860, section 377 referred to it. After the verdict in the case of *Navtej Singh Johar vs. Union of India* (2018 INSC 790) Section 377 was decriminalised. In 2023, same-sex marriage recognition is denied by the Supreme Court in the case of *Supriyo Chakrabarthy v. Union of India* (W.P. (C) No.1011/2022) Homosexuality in India is still a controversial topic to discuss and the battle remains on.

2. METHODOLOGY

The author has used mix method for the research that is both empirical and doctrinal research. The data collected is based on the primary and secondary sources. The primary data are gathered from legal documents and judgments of the Supreme Court and data collected through questionnaire from various groups. The

legal materials were collected through online sources. The secondary data are collected from books, articles and newspapers.

3. THE INDIFFERENT BEHAVIOUR TOWARDS NON-CONVENTIONAL FAMILY

The very discrimination of homosexual or non-conventional families or the LGBTQA+ youth start from their family itself which leads to homelessness in some cases. Family rejection becomes the root for non-acceptance by the society at large. Homosexual person face discrimination, violence, and violations of their rights to speech and expression, expression based on their orientation and identity and denial of rights to have family life such as marriage, partnership, parenting etc. It becomes easy to abuse children who all fall under the categories of LGBTQAI+ as there are easily accessible. LGBTQAI+ children frequently experience family exclusion, verbal or physical abuse, corporal punishment, name-calling bullying, and physical assault. For the purpose of shaping the children in the heterosexual categories or in the make them fit in binary gender, their parents often pressure their children to undergo therapies or treatment that might alter their orientation and gender identity. Unfortunately, the stereotypical heteronormative society believes homosexuality as a sin. The LGBTQAI+ youth's physical and mental health is severely impacted by all these violent acts and discriminatory policies. Despite the seriousness of the problem, this significant issue has not received much attention. The denial of basic rights, such as the right to social security, privacy, and family life, among others, also contributes to the stigmatization of the community and, as a result, to additional violations of their human rights.

Points to be taken a note: -

- *Family rejection and Homelessness:* As mentioned above that the first and foremost discrimination starts from family itself which pressure the children and youth and people of these community to undergo therapies, counselling or any kind of treatment that would fit them into the so called "normal" societal norms and culture. Some family reject their children or member to continue to be the part of the family and some feels and believe it as a sin or a curse. People who struggle to discover their identity or sexuality and struggle to convince their family or parents, generally proceed to the conclusion of leaving the family or home and get settled where they find their comforts or where they are being recognised for what they are actually.
- *Violence against them:* Violence against these community are very common. Even after decriminalization of homosexuality, persons or children of these community are stigmatized. Mostly, harassment and abuse come from the family, relatives, and friends. Children are bullied by their school mates and in some cases by the teachers as well. The research says, there are cases of physical violence as well. Ultimately, all these violence led them to quite their life or leave the society.
- *Social exclusion and Marginalisation:* Normally exclusion, non-acceptance, and marginalisation the prime issue faced by the homosexual. Societal behaviour towards these people remains indifferent time and again. Society excludes from involvement of these people from many cultural rituals. The preconceived believe of the society marginalized from being the part of the so-called society's made rules. Difficulty in coming out of heteronormative creates a boundary and constraint for these people to be the part of the society in absolute manner.
- *Incapability and Disability:* The homosexual persons are acknowledged as a disability who are incapable to fit into the so-called social norms. As homosexuality is seen as a disease, people think it to be treated and can be cured. Incapability in the sense that these community are unfit to have family or be a parent through adoption, foster or surrogacy. Specially with reference to parenting, the question is can they be a good parent? Are they capable to be a good parent in any way possible? What will be the impact on the child's psychology? All these unanswered questions lead to think that homosexual are unfit/ incapable to have family or have children through any process available unlike heterosexuals.

3.1. Non-conventional family and Human rights

Non-conventional or non-traditional family are the family categorised under the family which is not natural or normal. This can be well explained by examples i.e., if a female/male (homosexual) having a relation with a female/male, living together or if two female/male partners are married (provided in the countries where marriage is legalised). If the female/male partner think of parenting through any process i.e., adoption, foster or surrogacy. The primary question that raise is how this can be possible. This system is completely out of the ethics. How can there be two fathers/ mothers of a child? These examples set into the system of non-conventional or non-traditional family as they do not shape into the principle and ethics of the binary society. Total of 38 countries have legalized same-sex marriage and those countries have enacted laws relating to their protection and have provision that protect them from the issues that arises after marriage like heterosexual. The basic human rights of an individual has been taken care of irrespective of one's sexual orientation and gender identity. India is lacking

to reach to fulfil the protection of their rights. Marriage, Parenting, Surrogacy, Foster also the basic human rights of a homosexual individual that has been denied. Undoubtedly, the recent judgement in case of *Supriyo Chakrabarty v. Union of India* (W.P. (C) No.1011/2022) allowed them to have relationship and give a recognition and also can adoption child only as single parent not as partners, nevertheless denied the marriage rights or civil union.

The concept of human rights assumes that all humans are equal and hence entitled to equal rights. Human rights are the fundamental rights that all people acquire, regardless of their gender, caste, colour, or religion. These are the rights that each citizen of the nation is granted by virtue of the rights being enshrined in the constitution, laws, or other legal documents (2018 INSC 790).

4. THE LAW AND LOOPHOLE

4.1. Legal Status and role of Judiciary

Marriage: Marriage is both a private transaction and an important social institution for the public. Marriage is a fundamental aspect of family life. The concept of marriage is governed by personal laws pertaining to marriage validation, which include certain conditions for validity. It is based on the union of men and women as soul mates and contains certain societal functions. Furthermore, we can state that marriage provides unique spousal obligations and mutual rights for the parties to the marriage, as well as the status of husband and wife for the children of the marriage. Indeed, Professor Ruth Vanitha says in marriage in last 200 is now a state of monopoly. Prior to this, it was a mutual consent, community custom and religious ritual. If we interpret the existing laws on marriage for its validation, the essential conditions required is consent, and age. Marriage doesn't have different meaning for same-sex partners that differ from opposite sex partner. It's the government and Judiciary, who have constraint it for the same-sex partners taking into consideration such marriage is opposed to social moralities. Vanitha also explained that the basic features of marriage are mutual consent and community consensus, besides this another feature is procreation which is no longer essential in most of the countries now.

A person shall not be denied or refused to the formation of family via a legal validation of relationship i.e., marriage irrespective of a person's sexuality and gender expression. The personal laws as well the Special Marriage Act governing the right to marriage doesn't includes the non-binary individuals. The provisions under the existing law and personal laws have mentioned the word "man" and "woman", "husband" and "wife". 38 countries all over the globe have recognized same sex marriage with a proper reasoning and it is not only the recognition of marriage but all the rights and consequences that flows after marriage is protected. It shall be noted that "marriage is a union of two spirits, and the spirit in not male or female".

In *Arun Kumar* (WP(MD) NO. 4125 OF 2019) case The Madras High Court's Madurai bench takes on tremendous significance when it comes to the definition of "bride" and transgender women who fall under its purview. The Supreme Court's explanation of the presence of transgender people in the Hindu epics was recounted by the Madurai Bench Court in the NALSA case. The Supreme Court decided in the same case that everyone has the right to self-identification and that discrimination based on gender violates Article 15. The Madras High Court declared that the second petitioner in this case has chosen to represent her gender as a female, even though it is held that a state cannot object to the gender that an individual has selected for themselves. The Hon'ble Supreme Court states that this relates to her right to dignity and privacy, which is a component of her right to personal autonomy. It is not the place of the State authorities to cast doubt on the right to self-determination of the second petitioner. Further, in *Supriyo Chakrabarty* case in 2023, the Supreme Court while denying the recognition of same-sex marriage passed the judgement with a detailing that the transgender person (whether trans-man or trans-female), if they are heterosexual then they are under the provision protection under the existing laws for marriage. This statement in the judgment gives a clarity and indirectly invalidate the same-sex marriage or right to homosexual marriage.

Adoption: Unfortunately, like other personal law homosexual partners and the transgender persons cannot adopt a child under the adoption laws in India. But the provision allows a single unmarried person (heterosexual or homosexual) can adopt conditioning certain clauses under the existing Act. The major concern is when a partner in homosexual relation or homosexual live-in relation are not permitted for joint adoption of a child. Raising a child shall not be question in case of homosexual partners. The concept of two fathers and two mothers is fall out of the social moralities. Nonetheless, the Constitutional moralities and Humans Rights of a person has been violated because of one's orientation or sexuality. Howsoever, adoption leads to inheritance. This cleavage on validating adoption indirectly constraint one's inheritance right, specifically in case when a homosexual person is in live-in relationship with her/her partner adopts a child individually (as homosexual partner joint adoption is not permitted) then the child inheritance only flows from his/her adoptive father but not from the other partner

as the he/she doesn't have the legality towards the adoptive child. Gender should not be the dividing factor. In a nutshell, these rights will offer names for countless children who are without parents.

Surrogacy: Parenthood is one's personal choice regardless of sexual orientation and gender identity. Although there are no laws in the country allowing homosexual marriage, gay men nevertheless want to parent and raise children, just like heterosexual couples do. This is especially true for committed gay couples and gay live-in couples. The basic right to choose the form of parenting, so long as it complies with the rights of others, must be supreme and unalienable. Even if it agrees that adoption is a preferable alternative that should be encouraged due to its inherent benefits, the restriction shouldn't be carried out by forbidding various kinds of assisted reproductive technology. In India, the law permits single male and single female (heterosexual/homosexual) to become parents through adoption or foster care. However, surrogacy regulations do not apply to single parents or homosexuals. The Act prohibits surrogacy rights for the homosexual person. The matter of concern in this case is minuscule difference which is, raising the child/ upbringing of the child with two fathers or two mothers than the custody of child in question. As in India, homosexuality is still a controversial matter and a whispering gossip. Nevertheless, the society believes it to be 'not normal' people and something beyond Indian culture, even after in the year 2018, the Apex Court of the nation declared section 377 of IPC as unconstitutional and infringement of fundamental right under Article 21 of the Constitution of India. Hence, acceptance of homosexual people is still a bigger task in Indian society.

Live-in Relationship among homosexual partners: As we known that, there is no provision under any law which define the concept of live-in relationship. The concept of live-in relationship is guided by the time and again judgment of the supreme court. The first case recognizing live-in concept is in the case of *Badri Prasad v. Dy Director of Consolidation*. The Supreme Court acknowledged the concept of a live-in relationship since the parties in this case had been living together without marriage for fifty years and granted legal validity to their partnership. In the landmark case *Indra Sharma v. V.K.V Sharma*, the Supreme Court considered and validated the notion of live-in relationships and granted women in such relationships the status of wife, raising the issue of domestic abuse that may arise among the partners in such relationships. Considering this, the Supreme Court requested that Parliament make the necessary adjustments to the Protection of Women from Domestic Violence Act, 2005, to ensure the safety of women in relationships.

In *Supriyo Chakrabarty v. Union of India*, The Supreme Court refused recognition of same-sex marriage, permitting homosexual people to have relationships of their own choice. Regardless, the most important aspect to consider is whether homosexual partners may have the same legal protections as heterosexual partners when living together? The reason for concern is that the judiciary has approved their partnership (apart from same-sex marriage), leading to a rise in cases involving live-in relationships between homosexual partners and the consequences that follow. The judiciary, by approving their connection, fails to address the difficulties raised by homosexual partners in live-in relationships. The judiciary of several states has contributed to the approval of such matters through sound reasoning.

Hence, from the above discussion it is derived that the homosexual and non-conventional families are discriminated from their rights to marriage, adoption, surrogacy, and the rights the flows along with eth intimate partner relationship i.e., in live-in relationship. Not only social discrimination but also these people are legally discrimination.

4.2. The Yogyakarta Principle

The Yogyakarta Principles cover a wide range of human rights principles and how they apply to sexual orientation and gender identity issues. The essential duty of nations to protect human rights is upheld by the principles. Comprehensive counsel tailored to each state follows each Principle. However, the experts also emphasize that everyone has a responsibility to promote and protect human rights. Further guidance is also supplied to other parties, including the media, non-governmental organizations, national human rights groups, the UN human rights system, and financiers. The Yogyakarta Principle states that every human being is born free, with equal rights to dignity and protection. Human rights are attributes that are indivisible, universal, interconnected, and interdependent. Sexual orientation and gender identity impact every individual's humanity and dignity, but they are not appropriate as the foundation for discrimination or violence (The Yogyakarta Principles).

The Yogyakarta Principle + 10 established ten new principles, including Principle 32, which ensures "the right to bodily and mental integrity", Principle 31 concerns "the right to legal recognition", while Principle 33 concerns "the right to freedom from criminalization and sanction on the basis of sexual orientation, gender identity, gender expression, or sex characteristics" (The Yogyakarta Principles + 10).

5. FINDINGS

The data collected from questionnaire of 17 by random sampling analysis of total 41 people, the result shows below: -

6. Do you feel the LGBTQIA+ (Non- conventional) families face discrimination in the Indian society?
41 responses

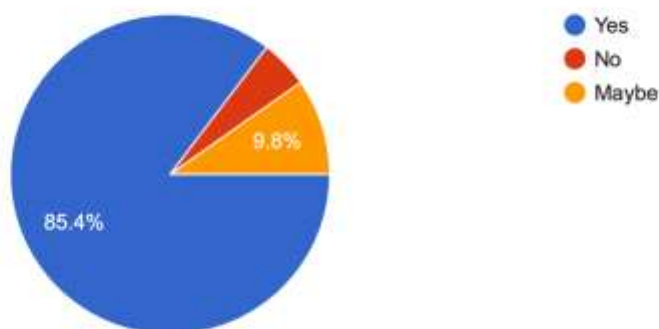


Figure 1: Discrimination against non-conventional family

From the above **figure**, it is shown that 85.4 % people agree to the fact that the LGBTQIA+ individuals face discrimination till today even after decriminalisation of homosexuality. Whereas very few have disagreed to the fact. Rest 9.8% considered both (a mixed few).

8. Do you feel the acceptance of non-conventional families in Indian society will affect the social morality?
41 responses

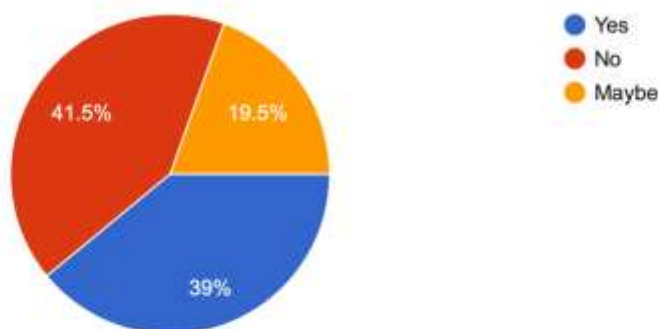


Figure 2: Acceptance affecting social morality

From the above **figure**, the gap very few between agreement and disagreement of acceptance of non-conventional family affecting social morality in Indian society i.e., 41.5% disagreed the above question and 39% agreed. Whereas 19.5% considered both.

10. Are the existing laws sufficient to protect their rights and equalities?

41 responses

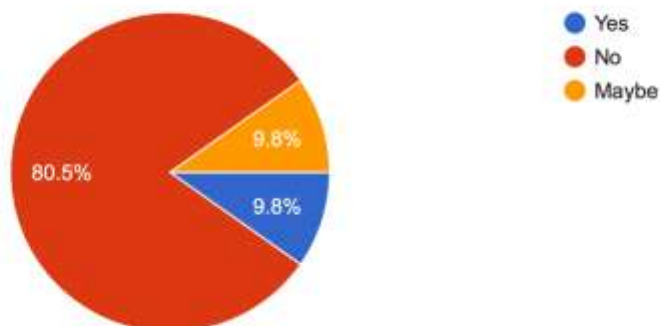


Figure 3: Sufficiency of existing laws

From the above figure, 80.5% accept that the existing laws are not sufficient to protect the rights and equalities of LGBTQIA+ individuals. Whereas 9.8% disagreed and have mixed few towards the same.

12. Would the separate legislation for the LGBTQAI+ persons receive acceptance and non-discrimination in the society?

41 responses

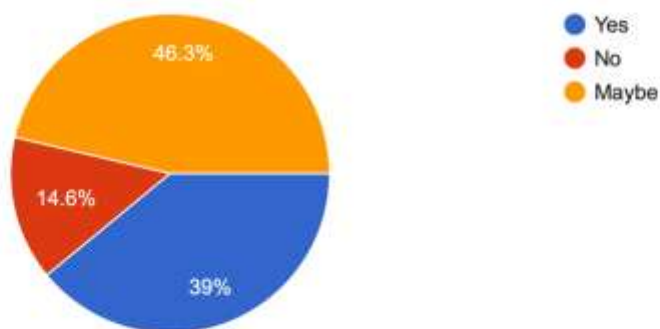


Figure 4: Separate legislation

From the above figure, 46.3% out the responses give their mixed opinion on separate legislation for the LGBTQIA+ individual that would guide towards acceptance and non-discrimination in the society. 39% agreed the same. Rest 14.6% are unsure about the fact.

17. Do you think the Governmental effort is sufficient to bring the LGBTQIA+ community into mainstream?

41 responses

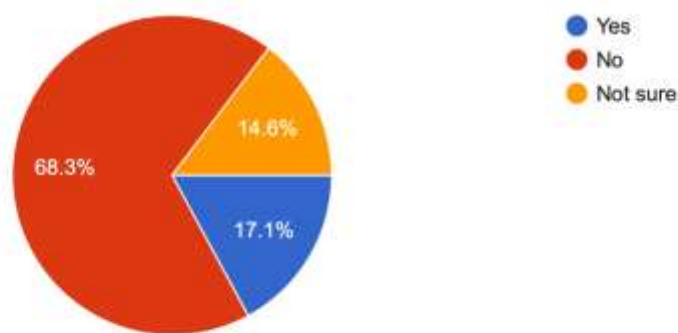


Figure 5: Government efforts

From the above **figure**, 68.3% find that governmental effort is not sufficient to bring the LGBTQIA+ community into mainstream. Whereas only few agreed the same i.e., 17.1% find that government is taking sufficient efforts towards these community. Rest 14.6% are unsure about the fact.

Equality among all individuals shall be the prime moto of the nation to meet the Constitutional morality. The Constitutional morality shall not be disregarded merely to satisfy the social moralities.

6. SUGGESTIONS AND CONCLUSION

From the above discussion it is to be noted that the marriage among the homosexual partner is the root to meet rest of rights that flows along with marriage in India. Furthermore, the state and government need to take appropriate steps and action in protection of the rights by enactment to proper laws. The Judiciary have an important role to investigate the upcoming matters relating to non-conventional family, homosexual, and homosexual partners. The government at the same should take the references of the other countries validating same-sex marriage and other rights and take into the points and factors for such legalization and protection against the discrimination of non-conventional family.

The conclusion that follows is that, although it has existed in a secretive and isolated form throughout history, homosexuality is not a recent phenomenon. Homosexuality and non-conventional family though acknowledged beyond the social norms, nevertheless the basic human rights shall not be denied based on their sexual orientation and gender expressions. Discrimination against children based on their sexual orientation and gender identity is a global threat. The majority of homosexual, bisexual, and transgender children face hostility from both society and family members. To construct them into the social morality, the morality of the constitution shall not be left behind. The role of judiciary and legislation doesn't end here. There shall be proper enactment of laws for their protection of rights. The state shall adopt the appropriate legislations and provisions from properly and completely recognising homosexual rights such as rights to marriage, homosexual partners' rights to adoption surrogacy, foster care, and live-in relationship.

7. Acknowledgement

I acknowledge by supervisor (Prof.) Dr. Madhubrata Mohanty from SOA National Institute of Law, Siksha O Anusandhan (Deemed to be) University for guiding me to complete the article and to the Faculty of Legal Study department of my university for providing me the library and the various portals to research for the completion of this article.

8. Declaration of interests

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

9. Funding

The author received no financial support for the research, authorship and/or publication of this article.

10. Ethical Consideration: Not Applicable

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