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Same-Sex Marriage Rights in India: An Overview

ABHINAV SANDEEP KHADIKAR¹ AND ROHIT AJAY DEORAS²

ABSTRACT

After the landmark judgement of Navtej Singh Johar vs Union of India which decriminalised section 377, the fight for equal rights never ended for the LGBT+ community (hereinafter community). It was always thought that the community would fight for marriage rights next. Unsurprisingly, there are certain petitions filed in the Delhi High Court. The petitioners seek legal recognition for same-sex marriages in India under certain statutes. The article highlights on how the community has approached the court. The article explains the reasons why the community is fighting to gain same-sex marriage rights. After looking closely at the petitions, the article would do a study on the same sex marriage rights in the United States of America to see if legalising same-sex marriages had a positive impact on the lives of people from the community. Based on that, certain suggestions have been given so the community can gain equal marriage rights.

Keywords: LGBT+ Community, Petitions, Petitioners, Government, Marriage.

I. INTRODUCTION

Marriage is considered to be of utmost religious, cultural, and social importance. Marriage is considered to be sacred and the religious ceremonies involved in marriages are considered to be quite pertinent. Marriage is considered to be a ceremony which is performed by two individuals to celebrate their love for each other. In Oxford dictionary, marriage is defined as ‘the legal relationship two people who are married to each’.³ This definition also includes same-sex married couples.

Even though same-sex marriage is legally recognized in almost 30 countries around the world, many people in Indian society do not accept the LGBT+ community (hereinafter community) let alone same-sex marriage. Some people even go to the extent of calling homosexuality a disease. For different reasons, various people in the Indian society have a very negative attitude

¹ Author is a student at NMIMS Kirit P. Mehta School of Law, India.

² Author is a student at Kirit P. Mehta School of Law, India.

³ *Marriage*, Oxford Learner’s Dictionaries, <https://www.oxfordlearnersdictionaries.com/definition/english/marriage>

towards homosexuality and consider it to be unnatural, immoral, and anti-cultural.⁴ The community knows this very well as they face a lot of discrimination due to such reasons.

Marriage is an instrumental as well as an intrinsic good.⁵ As an instrumental good, Marriage has numerous social and economic consequences. The two parties in a marriage get some rights. There are property rights, insurance and tax benefits that married couples receive. As an intrinsic good, marriage is a way of declaring your love to your significant other. Same-sex partners do not get to avail these benefits. The constitution of India gives the citizens the right to equality. However, it is known that same-sex partners do not get equal marriage rights as heterosexual partners which makes their case that their right to equality gets violated.⁶ The current provisions only make it seem as if same-sex partners are treated as second-class citizens. For this, there are certain petitions that have been filed for the recognition of same-sex marriages under different statutes. Each petition has a unique way of achieving the same goal.

The United States of America (Hereinafter USA) is a nation where same-sex marriage had been legalized not too long ago. The community there started fight for equal rights very early. It took years for them to achieve equal marriage rights. After attaining those rights, certain studies were carried out to see whether legal recognition of same-sex marriage rights has had a positive impact on the lives of the community in USA. These studies can be taken as an example on why India needs to legally recognize same-sex marriages.

II. FIGHT FOR RECOGNITION OF SAME-SEX MARRIAGE IN INDIA

The historic ruling in the ‘right to privacy’ case⁷ was a big win for the LGBT+ community in India. This historic ruling helped in the Navtej Singh Johar case⁸ legalized any sexual conduct between consenting adults of the same sex which liberated the LGBT+ community in India to a huge extent. With this momentum, the community now fights for the right to marry. The community has major arguments on why they fight for marriage equality. People from the community believe that equal marriage rights is a prominent step towards equal rights in general. Hence, there are currently a few petitions in front of the Delhi High Court for the recognition of same-sex marriage in India.

⁴ Madhusmita Mishra, *Homosexuality and Same-Sex Marriage – National and International Perspectives*, SSRN Electronic Journals 1, 2 (2012), <https://dx.doi.org/10.2139/ssrn.2159605>

⁵ Saurabh Kirpal, *Sex and the Supreme Court: How the Law is Upholding the Dignity of the Indian Citizen* 133 (Hachette India 2020)

⁶ *Ibid.* at 134

⁷ Justice K.S. Puttuswamy vs Union of India, (2017) 10 SCC 1

⁸ Navtej Singh Johar vs Union of India, AIR 2018 SC 4321

On 5th October 2020, Kavita Arora and Ankita Khanna had filed a joint petition in the Delhi High Court claiming that their fundamental rights under Articles 14, 15, 19, and 21 of the constitution have been violated. The couple did this because their application to be married under the Special Marriage Act, 1954 had been rejected just a few days prior.⁹ Menaka Guruswamy argued in Court on behalf of the couple. They argued that there are certain benefits that married couples have. Due to unavailability of any provision that recognizes same-sex marriage, the couple have faced multiple issues as they do not possess the relevant documents that married couples do. The main prayer is that same-sex couples should be able to get their marriage recognized legally under The Special marriage Act, 1954.

In October 2020, Vaibhav Jain and Parag Mehta filed a petition in the Delhi High Court claiming that their rights under Articles 14, 15, 19, and 21 of the constitution have been violated.¹⁰ The petitioners argued that the non-recognition of their marriage under the Foreign Marriage Act, 1969 is unconstitutional and discriminatory. They had arguments similar to the ones as Kavita Arora and Ankita Khanna. They argued that they had complied with all the appropriate laws.

Abhijit Iyer Mitra, Gopi Shankar, Giti Thadani and G Oorvasi have jointly filed a petition claiming that the Hindu Marriage Act, 1955 should recognize same-sex marriage. They argue that the act permits marriage between ‘two Hindus’ instead of two Hindus of the opposite sex.¹¹

In February 2021, Udit Sood, Saattvic, Lakshmi Manoharan and Gagandeep Paul filed a petition in Delhi High Court praying that marriage between two consenting adults of the same sex be recognized under the Special Marriage Act, 1954.¹²

The latest petition was filed by a same-sex couple Russell Blaine Stephens and Joydeep Sengupta along with queer rights activist Mario Leslie Dpenha. The couple got married on August 6th 2012. Stephens who is a citizen of USA wishes to apply for Overseas Citizen of India (Hereinafter OCI) status as a spouse of an OCI cardholder. However, the Consulate General of India has already denied registration of their marriage on grounds that the marriage cannot be legally recognized in India. Stephens legitimately fears that his application for OCI

⁹Saurabh Kirpal, *Why It's Time To Consider Same Sex Marriage*, Article 14 (Nov. 27, 2020), <https://www.article-14.com/post/why-it-s-time-to-consider-same-sex-marriage>

¹⁰ Ibid.

¹¹ Priyanka Chakrabarty, *In Depth: Petition to Legalise Same Sex Marriage – Who Does it Leave Behind?*, SheThePeople (Jan. 21, 2021), <https://www.shethepeople.tv/top-stories/opinion/petition-to-legalise-same-sex-marriage-india-who-does-it-leave-behind/>

¹² Richa Banka, *Fresh plea seeks legalisation of same-sex unions*, Hindustan Times (Feb. 26, 2021), <https://www.hindustantimes.com/india-news/fresh-plea-seeks-legalisation-of-same-sex-unions-101614302399453.html>

status will be denied.¹³ The Delhi High Court has merged all petitions into one.

However, the Government has opposed the petitions in Court. The Government argues that marriage between two adults of the same sex goes against 'societal morals' and the 'Indian family Unit' concept. They were of the opinion that any interference with all the current marriage laws would cause a lot of havoc with the existing marriage laws. They argued that no uncodified personal law or codified statutory law recognizes same-sex marriage.¹⁴

III. SAME-SEX MARRIAGE RIGHTS IN THE UNITED STATES OF AMERICA

In the United States of America, the government as well as the people are very protective of their fundamental rights. In 2003, the Massachusetts Supreme Judicial Court gave a landmark judgement. In its judgement, the Court ruled that the states must allow same-sex couples to marry.¹⁵ This judgement came at a time when a lot of debates about the legal recognition of same-sex marriages had already arisen. While this decision did not exactly legalise same-sex marriage, it opened up a discussion on equal marriage rights. After this landmark decision, various states in America started legalizing same-sex marriage which included Connecticut, San Francisco, Washington, California, and etc. However, it was not legal in all 50 states.

It was in the 2015 that the Supreme Court of the U.S. legalized same-sex marriage in all the 50 states. This judgement was given in the famous Obergefell v. Hodges case.¹⁶ Various states in the U.S. like Michigan, Kentucky, Ohio, and Tennessee had laid down the definition of marriage as a union between a man and a woman. This outraged the community and they filed suits in the Federal District Courts in their home States. In these law suits they claimed that the state officials have violated the Fourteenth Amendment of the Constitution by denying them their right to marry. Each and every District Court ruled in the favour of the same-sex couples and the case went to the United States Supreme Court. The main issue before the Hon'ble Supreme Court was whether the definition of marriage as a union only between a man and a woman violates the Fourteenth Amendment of the Constitution. The Hon'ble Supreme Court held that this definition of marriage was violating the Fourteenth Amendment as this definition excluded same-sex couples from marriages but included opposite-sex couples. The Court further explained that same-sex couples have the fundamental right to marry under the Due

¹³ *Petition seeks legal recognition of same-sex marriage Delhi HC issues notice to Centre*, The Indian Express (Jul. 6, 2021), <https://indianexpress.com/article/cities/delhi/petition-seeks-legal-recognition-of-same-sex-marriage-delhi-hc-issues-notice-to-centre-7391874/>

¹⁴ Sofi Ahsan, *Centre opposes same-sex marriage in Delhi HC says not comparable with 'Indian family unit concept'*, The Indian Express (Feb. 26, 2021), <https://indianexpress.com/article/india/same-sex-marriages-legal-recognition-centre-7204303/>

¹⁵ *Hillary Goodridge vs Department of Public Health and Commissioner of Public Health*, 440 Mass 390

¹⁶ *Obergefell vs Hodges*, 135 S. Ct. 2584

Process and Equal Protection Clause of the Fourteenth Amendment. This decision was also pertinent as it invalidated the Defence of Marriage Act, 1996. According to this act, same-sex marriage was prohibited which was held as unconstitutional in the aforementioned case. A few studies were conducted to understand the impact of the judgement on the lives of the community.

IV. STUDIES ON THE IMPACT OF LEGALISATION OF SAME-SEX MARRIAGE IN THE USA

The judgement naturally had impact on the lives of people from the LGBT+ community in USA. A study was conducted to examine the changes in personal well-being of 279 LGBT+ individuals in same-sex relationships during the transition to federal marriage recognition.¹⁷ Longitudinal panel data was taken once before and three times after the historic judgement in the Obergefell v. Hodges case. It was found that individuals who had higher levels of psychological stress due to internalised homonegativity, vicarious trauma, and isolation prior to the ruling saw their levels of psychological stress decrease after the ruling. Similarly, individuals with lower levels of life satisfaction prior to ruling saw their levels of life satisfaction increase after the ruling.

The second study was conducted to see if there has been a decrease in antigay bias. The results were once again positive. The data showed that Americans showed higher levels of acceptance for the LGBT+ community and the antigay bias had decreased at a much steeper rate than expected. The data showed that legislation passed in the favour of the community did have some very positive implications. USA which was once a very conservative nation with one of the highest levels of antigay bias during the AIDS epidemic had turned into a progressive nation.¹⁸

The third study was conducted to see why the LGBT+ community wanted to fight for the right to marry even if their intentions were never to marry themselves. The study found that the fight to achieve equal marriage rights was symbolic. It was mainly to acquire provisions which would treat the same-sex couples as equivalent to heterosexual couples. It was always about ensuring that married same-sex couples get the same benefits as married heterosexual couples. This is another example of how the LGBT+ community has fought back over the years to

¹⁷ Brian G. Ogolsky et. al., *As the states turned: Implications of the changing legal context of same-sex marriage on well-being*, J Soc Pers Relat 3219, 3231-3233 (2018), <https://doi.org/10.1177/0265407518816883>

¹⁸ Eugene K. Ofofu et. al., *Same-sex marriage legalisation associated with reduced implicit and explicit antigay bias*, 116(18) PNAS 8846, 8849-8850 (2019), <https://doi.org/10.1073/pnas.1806000116>

finally be one step closer to being free from exclusion, discrimination, isolation, bullying, etc.¹⁹

V. DISCUSSION

It is impossible to make a case for the petition which has targeted the Hindu Marriage Act. This is because the Act is not really gender neutral. The law does specify the minimum age for marriage and it mentions how the bridegroom of minimum 21 years of age marries the bride of minimum 18 years of age. Section 27 of the Foreign Marriage Act directly specifies that marriages solemnized according to the law in force in the foreign country will be valid in India.²⁰ The language of the Act makes it a bit easier to make a case for legal recognition of same-sex marriage. The Special Marriage Act was legislated to give Indian Citizens a choice to marry beyond the scope of their religion. The reason why this act has been targeted in two of the petitions is because recognition of same-sex marriages in India would make most sense under this act. This way, there would not be the added factor of the various religious personal laws interfering with the right to marry protected under article 21 of the Constitution.

It isn't surprising that the Government opposed the petitions. It was very predictable. The 'Indian family unit' concept is a way of saying that same-sex marriages are invalid. However, the Courts work on the basis of arguments and facts. The petitioners and the Government both have significant chances of winning the case. India can take the help of the USA. The USA protected the fundamental 'right to marry' of same-sex couples and India also has the fundamental right to marry protected under article 21 of the constitution. In many ways, the Delhi High Court has the jurisdiction to recognize same-sex marriages and using USA as reference can really help the community. It all comes down to protecting the rights of the citizens and a judgement in favour of the petitioners would do the same.

The studies conducted are a prominent indicator of the impact that the judgement can have. The study has shown that legal recognition of same-sex marriage can have very positive effects on the lives of people from the community. These studies are only few of many that show how it's high time same-sex marriage rights should be discussed and that provisions should be made as soon as possible. At the very least, the cases would open up a discussion on how legal recognition of same-sex marriages are pivotal to the community's fight for equal rights. If the community loses this one specific battle, there are chances that they would be able to fight for equal marriage rights again. As time goes on, societies change. The discussions can also have an effect on societies and possibly make the society more progressive. In the future, there could

¹⁹ Sumit Saurabh Srivastava, *Disciplining the 'Desire': 'Straight' State and LGBT Activism in India*, 63(3) Sociol. Bull. 368, 373 (2014), <https://www.jstor.org/stable/43854980>

²⁰ The Foreign Marriage Act, 1969, § 27, No. 33, Acts of Parliament, 1969 (India).

be a government which makes provisions for the legal recognition of same-sex marriages in India. As same-sex marriages get legalized around the world with time, India may soon be one of the nations which is part of the change. At the same time, regardless of whether the petitioners win the case, it is extremely predictable that the matter would move to the Supreme Court. Both the sides would not take the loss in the High Court lightly.

VI. CONCLUSION

The LGBT+ community has officially begun their fight for the right to marry. They have used the momentum from the Navtej Singh Johar Case and have found potentially case-winning loopholes in the different laws. The apparent gender neutrality of the Hindu Marriage Act, the language in the Foreign Marriage Act which says that marriages solemnized according to the law in force in the foreign country will be valid in India, and the scope that the Special Marriage Act is allowed to have really makes an interesting case for the petitioners. While targeting the Hindu Marriage Act does not help the petitioners, the 2 other statutes that have been targeted make sense. The approach of the petitioners for the most part is still very learned and the determination present within the petitioners is evident.

The Government will predictably be adamant on their stance that same-sex marriages should not be recognized as it goes against societal morals and the so called 'Indian Family Unit' concept. They might even make an amendment to the Acts to make it clear that same-sex marriages are not welcome in India if they believe it to be necessary. However, it cannot be denied that the non-legal recognition of same-sex marriages in India is discriminatory in nature and bad for the well-being for many people from the community. If any suggestion is to be made, it is that the Court should hear the plight of the community and make provisions for legal recognition of same-sex marriage as people from the community do not deserve to be treated as second-class citizens in their own country. It is necessary that the judiciary protects the rights of the citizens of India. This is yet another chance for the judiciary to do so.

The Court has a tough decision to make as their decision will have an impact on millions of lives. The hearings have been getting postponed again and again. The hearings have now been postponed to October 25th 2021. The government's initial request to postpone the hearings was on the grounds that nobody is dying because of not being able to get married. What this request does is completely ignore the fact that marriage has certain insurance benefits so if someone's loved one was getting medical care which would be highly expensive without insurance but their insurance did not cover their loved one, that someone would feel a bit hard done by. Marriage does have an importance in the lives of people as it indeed gives benefits other than

being a symbol of love and affection. The LGBT+ community has gone through years of legal battles just to be able to identify as themselves. It is certain that the community would be ready to fight again regardless of how much time it takes. The right to marry is only one of the many battles that the community fights. However, winning this battle would mean a lot to them in their fight for equal rights and hence, the community once again has put all their faith in the judiciary.

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