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# Legal Recognition of Same Sex Relationship: A Comparative Study of India and U.S.A.

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## ABSTRACT

*Legal protection to same sex relationship forms a major right for the LGBTQ community; it's their right to choose their own partner and to be able to enjoy all rights that a heterosexual couple enjoys without any discrimination. While there are countries where the same sex couples receive equal legal recognition as any other couple, there are some countries where there is no law that legally recognizes a marriage or relationship of a same sex couple. This paper is an attempt at analysing the position of same sex couples before law in two such countries i.e., U.S.A. and India where one give all the benefits and recognition to a same sex couple that a heterosexual couple receives and the other though does not out rightly prohibits same sex relationship yet has no law that allows equal recognition to them. This paper is an comparative study between these two countries that talks about the origin of LGBTQ rights to the their present status and what the future holds for them. Here the author has also made an attempt to understand the underlying issue behind the difference in legal status and as to whether the people and society and their prejudice has any role in it and if so should they be allowed to call shots in such situation.*

## I. INTRODUCTION

The right to be in a same sex relationship or as can otherwise be said the rights of homosexuals to choose their partner have evolved over the years in almost every country. Every country in the past have seen days where people who were homosexuals were not legally or socially accepted or their relationship with the same sex was considered an abnormality and having such a relationship was made punishable under law. Even though almost all the marriage laws are gender neutral yet for a long time when people talked about marriage they only took into the heterosexual version of this concept. From then till now, from disrespecting their sexuality and their freedom to choose their own partner to giving them freedom to explore their sexuality the law has come a long way. People are finally starting to accept them as equal and the developing laws have role to play in it. Though there might be many countries where same sex marriages are not legally recognized but at the least, they are not punished under the law for

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having such a relationship. While some countries have legalized homosexual marriages or gay marriages and they are treated at par with other heterosexual marriages but there are still countries that has not out rightly recognized such marriages thus depriving homosexual partners of all the benefits or recognition that comes with a legally valid marriage. The law revolving around this topic was evolved a lot over the years all over the world. While many international organizations which include the United Nations has also passed resolution in support of the LGBTQ rights or in other words in favour of same sex relationship.

This paper aims to deal with the laws dealing to same sex relationship and marriage both in USA and India. In this paper the author has tried to establish that decriminalisation off having consensual sex with same sex is not the end game rather recognising them as an equal and giving them equal legal and social recognition is the final focus of the LGBTQ community. This paper looks forward to doing a comparison between the laws of both these countries and find out how the laws are different or similar to each other. Whether the laws of India were inspired from laws of any such country and how have they influenced the laws here. This paper also includes various case laws that paved the way to give legal recognition to same sex couples and thereby ending the age-old concept up of discrimination based on someone's gender identity or sexual orientation. The author has tried to do a comparison between the case laws about the countries relating to this matter.

## **II. LEGAL RECOGNITION OF SAME SEX RELATIONSHIP IN USA:**

The history of legal involvement in same sex goes way back to the 1970s when for the very first time a law suit was filed in the Hawaii trial court by three same sex couples who questioned state's involvement into a person's sexuality and their freedom to marry anyone. It was in the case of *Baehr v. Milke*<sup>2</sup> that the question of discrimination of state against the same sex couple was brought to light thus marking the very first step towards LGBTQA+ rights. They argued that the prohibition imposed by the State to marry within the same sex group is unconstitutional. The Court in this case held that the state has failed to show that it had any interest in discrimination on the basis of gender in recognition of valid marriage under the law and since this burden was put on the state, the Court asked the state to issue marriage licenses to same sex couples. However, this ray of hope given by the Hawaii Supreme Court to same sex couples was short lived and was crushed by introduction of the Defense of Marriage Act (DOMA) in the year 1996. This law basically provided definition of "marriage" for federal

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<sup>2</sup> *Baehr v. Milke*, [1996] WL 694235 (Cir. Ct. Hawaii).

purposes i.e., a marriage is a legal union of a man and a woman as husband and wife<sup>3</sup>, thus, making the same sex marriages invalid. This law also empowered the states to refuse recognition to same sex marriages that has been granted under the laws of other states.

It was not until the case of *Lawrence v Texas*<sup>4</sup> in the year 2003 that same sex couples got any relief under the law. It was in this case that the court finally took a step towards securing equal rights for same sex people when it declared that the U.S. laws that prohibit private homosexual activity, sodomy, and oral sex between consenting adults are unconstitutional thus declaring the Texas's law prohibiting private homosexual activity between consenting adults unconstitutional on the ground that it violated the Due Process Clause<sup>5</sup> of the Fourteenth Amendment to the U.S. Constitution. Justice Anthony Kennedy while authoring Opinion of the Court of this judgement while reaffirming "right to privacy" stated:

*"The petitioners [Lawrence and Garner] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime"*<sup>6</sup>

Though this case did not explicitly talk about the same sex couples right to marry but it marked the beginning of series of case laws that are about to come up that was going to shape up the legal rights of same sex couples. After this case the Massachusetts Supreme Judicial Court gave an unprecedented ruling with regard to the right of same sex couples to be married and be recognized under the law in the case of *Goodridge v. Department of Public Health*<sup>7</sup>. The Court in this case stated that any legislation that prohibits marriage on basis of sex is unconstitutional under the Constitution of Massachusetts thus allowing the first same sex couple to be legally married on May 17, 2004. Even after the passing of such an unprecedented judgement by the highest court Massachusetts Commonwealth that finally recognized the right to marriage as a fundamental right, that discrimination on basis of sex in this matter is unconstitutional. However, it took almost a decade to make this applicable to all fifty states after a ruling by the Supreme Court in *Obergefell v. Hodges*<sup>8</sup>. However, these 10 years were no less eventful either. After the decision of Massachusetts Supreme Court that legalised same sex marriage under Massachusetts constitution a lot of suits started being filed before courts of various other states.

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<sup>3</sup> Defense of Marriage Act 1996, s. 3.

<sup>4</sup> *Lawrence v Texas*, [2003] U.S. LEXIS (5013).

<sup>5</sup> Due Process Clause has been established under 14<sup>th</sup> Amendment and 15<sup>th</sup> Amendment to the U.S. Constitution that prohibits the government to arbitrarily deprive people of their right to life, liberty and property except as authorized by the law.

<sup>6</sup> *Supra* 45.

<sup>7</sup> *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>8</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

It was in the year 2008 when the California Supreme Court pass the judgment that legalised same sex marriage in the state of California where the court said that the then existing definition of marriage which included only opposite sex marriage violated the constitutional rights of same sex couples. A similar decision was taken by the court of Connecticut where it was decided that the states statute which dealt with civil unions discriminated against same sex couples and thereby through this decision the court asks the state to recognize marriage between same sex couples. Similar to this various other Courts also decided in favour of same sex marriage. Some states even amended their constitution in order to make the definition of marriage more inclusive and to allow and legally recognize same sex marriages.

One of the major or landmark judgment that was passed in June 2013 where the US Supreme Court passed a judgment and declared the Defense of Marriage Act (DOMA) To be unconstitutional to the extent it denied federal recognition to same sex marriages i.e., he declared Section 3 of the act that dealt with definition of marriage as unconstitutional as it infringed upon the 14th and 15th amendment to the US constitution<sup>9</sup>.

It was this case that gave rise to a significant number of lawsuits that challenged bans imposed on same sex marriage by state in the federal court. Majority of the US district courts, and courts of appeal agreed with this decision and held that ban on same sex marriage is violative of the constitutional rights of the LGBTQ community. It was this opinion of the majority of the Courts that laid to the landmark judgment of *Obergefell v. Hodges*<sup>10</sup>. This landmark civil rights case<sup>11</sup> brought in a mandate under which all the states were required to issue marriage licenses to same sex couples without any discrimination. Under this judgment Supreme Court of the United States held that fundamental right to marry is guaranteed under the United States constitution and that same sex couple cannot be discriminated in exercise of this right from both Due Process Clause<sup>12</sup> and Equal Protection Clause<sup>13</sup> of the 14th amendment to the United States Constitution.

This judgment made same sex marriage legal in all the states and territories of the United States of America except for American Samoa. This judgement made the same sex couples to get the federal benefits that a heterosexual couple is entitled to get under the law. Under the U.S. legislation currently same sex couples are entitled to various benefits like family medical leave

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<sup>9</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>10</sup> *Supra* 8.

<sup>11</sup> *Supra* 8.

<sup>12</sup> *Supra* 5.

<sup>13</sup> Equal Protection Clause forms the part of the 14<sup>th</sup> Amendment text and Under this clause state is required to protect its citizens and that no state shall within its jurisdiction deny any person equal protection of law.

benefits, veteran affairs benefits, Social Security Administration benefits, etc they are entitled to all the types of federal marriage benefits that is extended to married couple under the law. Any same sex couple who is married in any of the states of the United States of America is to be considered married in all other states as well as are given all the benefits recognition that is embodied upon a married couple. After the Obergefell judgment certain states tried to deny full rights to same sex couples to varying degrees some even tried to deny adoption rights completely. However, the silver lining being that the majority of states still recognize that same sex couples have equal rights to adopt a child as that of any other married couple. There are hundreds of benefits which have finally become available to same sex couples all thanks to the Court's progressive thinking and willingness to treat each person with equality and non-discrimination, allowing the law to be up to date with time.

### III. LEGAL RECOGNITION OF SAME SEX RELATIONSHIP IN INDIA

The rights revolving around same sex relationship has very recently developed in India. It was until the year 2018 when the act of having a relationship with the gender of same sex was considered a criminal act and was thus made punishable under the IPC. In 2018 after a landmark judgement given in favour of the LGBTQ community that allowed them to have same sex relationship between two consenting adults in their private space thus taking the very first step towards protecting same sex couples. It was in the year 2018 that the Supreme Court took a decision, in which the Article 15 of the constitution was interpreted broadly, and any discrimination based on the on basis of gender identity or sexual orientation was made unconstitutional and got rid of Victorian era laws.

Right to marry has been recognised under Article 16 of the Universal Declaration of human rights however, this right has not been explicitly recognized under the India Constitution either as a constitutional right or as a fundamental right. The right to marry is regulated by several legislations or statutory enactments however it forms a part of fundamental right have developed over the years through various case laws. The first case that recognized right to marry according to one's own choice was a *suo moto* case taken up By the Supreme Court in which the court stated that One of the inherent aspects of Article 21 of Indian constitution is once right to marry to the person of his or her choice and any violation of this right is considered as an inability on the part of the state to protect its citizen and their fundamental rights<sup>14</sup>. This opinion was further confirmed in the case of ***Justice KS Puttaswamy and another v. Union of***

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<sup>14</sup> *In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014*, *Suo Motu Writ Petition (Criminal) No. 24 OF 2014*.

*India and others*<sup>15</sup> where the Apex court broadly discussed the concept of choice. While discussing the same, in para 81 of the judgment, the judges mentioned that under the Indian context right to privacy includes 3 parts i.e., privacy that involves the person, informational privacy and privacy of choice that protects a person's autonomy over his personal choices. The Court further emphasised that in its conclusion where it held,

*“Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.”*<sup>16</sup>

Soon after The Puttaswamy judgment two more cases i.e., *Shakti Vahini v. Union of India*<sup>17</sup> and *Shafin Jahan v. K.M. Ashokan and Others*<sup>18</sup> confirmed that right to marriage is a part of Article 21 of the Indian constitution and that this every adult has the right to choose his life partner of his own choice. There are more than 6 marriage laws that cover various types of marriages letter recognize as legal marriage before the law. Not even one of these codified marriage acts neither explicitly defines marriage as a union between a man and a woman nor does they prohibit same sex union. However, these entire laws do have a hetero-normative foundation and over the years they have been interpreted so as to not recognize same sex marriage. However, in the year 2017 an attempt was made to include same sex marriage under the definition of legal marriage, where a bunch of eminent citizens gave a draft Uniform Civil Code to the Law Commission in in which they suggested various changes that can be made in order to make the laws more inclusive. In this draft Uniform Civil Code, they suggested that marriage should be defined as “the legal union as prescribed under this act of a man, a man with another man, a woman with another woman, a transgender with another transgender or a transgender with a man or a woman”<sup>19</sup>. However, this draft still remains a proposal and much to the Supreme courts dismay there has been made no attempt to enact a uniform Civil Code that would bring about equal footing for all the citizens<sup>20</sup>.

In the year 2018, the Apex Court took a huge decision that came to be known as a landmark judgment towards giving equal protection to same sex couples. This judgment i.e., *Navtej*

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<sup>15</sup> *Justice KS Puttaswamy and another v. Union of India and others*, (2017) 10 SCC 1.

<sup>16</sup> *Supra* 8(Dr. DY Chandrachud J.).

<sup>17</sup> *Shakti Vahini v. Union of India*, AIR (2018) SC 1601.

<sup>18</sup> *Shafin Jahan v. K.M. Ashokan and Others*, AIR (2018) SC 357.

<sup>19</sup> Anurag Dey, ‘Uniform Civil Code draft handed over to law panel chief’ Catchnews (New Delhi, 12 October 2017) <http://www.catchnews.com/amp/india-news/a-new-ucc-for-a-new-india-progressive-draft-ucc-allows-for-same-sex-marriages-85386.html> (accessed 20 January 2021).

<sup>20</sup> Samanwaya Rautray, ‘No attempt to enact uniform civil code despite repeated court appeals: Supreme Court’ (New Delhi, 14 September 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/no-attempt-to-enact-uniform-civil-code-despite-repeated-court-appeals-supreme-court/articleshow/71120973.cms> (accessed 20 January 2021).

**Singh Johar v. Union of India**<sup>21</sup>, while dealing with the question of constitutionality of section 377 Indian Penal Code read down section 377 and held that the section is unconstitutional the extend where it criminalises consensual sexual conduct between adults of the same sex. In this judgment the Court overturn the decades old law that made having conceptual sex with similar gender punishable on the grounds that it violated their right to equality and that it was rational arbitrary and unconstitutional. The Supreme Court unanimously held that a legislation that prohibits two consenting adults to choose with whom they want to involve in sexual intercourse in the privacy of their own lives is violative of right to dignity, privacy, freedom of expression that is guaranteed under Article 19(1)(a) and the right to equality provided for under Article 14 of the Indian constitution. Through this judgment the Court reminded the country that it is a constitutional democracy where people with diverse faiths and orientations and ideologies live together and that they do not have to agree with each other, but they need to respect constitutional values of equality and non-discrimination. While delivering this judgment Justice Indu Malhotra made a very bold statement and she said that the history owes an apology to the LGBTQ community for depriving them of their rights a being treated equally and without any discrimination.

At the end, the court in this judgement also made a note that people belonging to the LGBTQ community are entitled to equal protection under law and equal citizenship rights without any discrimination whatsoever. It is this statement in question when the same sex couples are not recognised as legally married couples and are deprived of various benefits that a married couple has before the law. Decriminalising consensual sexual acts between two consulting adults of same sex is not the end of the discrimination that same sex couple faces. It is very much important that same sex couples are recognized and are given equal treatment as to that of any heterosexual couple would get under law be it succession, maintenance, adoption, pension rights, tax benefits, etc. There are various legislations under the Indian law under which to get any benefits one has to be either related by blood or marriage such as Employment Provident Fund Scheme, 1952 and Workmen's Compensation Act, 1923. This fight that the same sex couples are fighting has finally been brought before various high courts in in India. Recently, in the year 2020 as many as three petitions have been filed before the Delhi High Court asking to recognize marriage between same sex couples. However, all these petitions are filed asking to include same sex marriage in different provisions. The first petition that has been filed before the before the Delhi High Court in October 2020<sup>22</sup> has been done by two women who are asking

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<sup>21</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>22</sup> Abhishyant Kidangoor, "Is India Ready to Legalize LGBTQ Marriage?" TIME (New Delhi, 5 January 2021)

the honourable court to include same sex marriage under the provisions of special Marriage Act, 1954. Their major contention being that even after decriminalisation of s. 377 with regard to same sex couples they are still deprived of benefits a spouse would have, they are “strangers in law”. A similar petition has been filed by a same sex couple among whom one is an Indian citizen and another one is in a citizen of US asking to include same sex marriage under the definition of legally recognize marriages under Foreign Marriage Act<sup>23</sup>, their major contention being that when Indian man marries a foreign woman, she immediately gets the right to apply for a PIO (Persons of Indian Origin) Card, which allows her to permanently live and work in India. However, when Indian citizen marries foreign man in another country his husband remains a legal stranger to him and can only tourist visa to stay a maximum of six months. So, for example if the petitioner were to fall ill while visiting India the spouse (of same sex) would have no right whatsoever to have a say in taking next to kin decisions for his husband or wife. A similar petition has been filed which pleads that they should be declared legally married under the Hindu Marriage Act and have similar rights and benefits to that of a Hindu couple. All these petitions are like a ray of hope to the same sex couples, though they all asking for different solutions the end goal is still the same.

#### IV. COMPARISON OF STATUS OF US AND INDIA LAWS

As the people belonging to LGBTQ community started questioning and demanding father rights and for equal protection the government also started thinking recognising their right is well. When we see the laws of both the countries none of them have any special legislation per se that was explicitly enacted to recognize same sex marriage. In both the countries the existing constitution and laws have been either interpreted to broaden to include same sex couples or read down to treat them with equality. One thing that is common in the both countries is that anything that is developed with relation to the rights of the same sex couples as developed through case laws and to the concept of precedents. When we compare the two jurisdictions, we can clearly figure out that the rights of same sex couples are at a nascent stage in India whereas in USA they enjoy equal rights and protection to that of a heterosexual couple. Though India has taken its first step by decriminalising consensual sex between two adults of same gender but the goal is still far. With the Indian government quoting the history of *Sanatan Dharma* and that how it does not align with the same sex marriage when posed with the

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<https://time.com/5926324/india-lgbtq-marriage-case/> (accessed 21 January 2021).

<sup>23</sup> Ruth Vanita, ‘Marriage equality is a constitutional right, do not deny it to same-sex couples’ *The Indian Express* (New Delhi, 4 November 2020) <https://indianexpress.com/article/opinion/columns/marriage-rights-india-same-sex-couples-6929246/> (accessed 21 January 2021).

question of right to marry of same sex couple, the hope of having a legislation that permits and recognizes same sex marriage seems a bit far. For the society that believe in big fat Indian wedding and push the importance of marriage myopic outlook that this is it has when it comes to inter-faith and same sex marriage can be clearly made out. Without a proper precedent or a legislation that recognizes same sex marriage in India the same sex couples are being deprived of major benefits such as economic benefits, protection in case of abuse, succession, adoption rights, etc which they should be able to enjoy as a citizen of Indian and on the account of being married. In the other hand when we see the current status of same sex couple in the United States, it can be clearly made out that they enjoy all the rights and benefits without any discrimination whatsoever. There are more than hundreds of rights that a same sex couple who get married in U.S. would enjoy but will get deprived of in India. India has joined the list of democracies that has decriminalise same sex relationship but it is still to join democracies that recognize same sex marriage with full dignity and respect in order to achieve that it is important the Courts make an interference and recognize same sex marriage as in constitutional right because unless the same is done it would basically mean that the people with different sexual orientation are being discriminated against which is against the very basis of constitution.

## **V. CONCLUSION**

As we come to the end of this paper it clear that the major issue with legal recognition of same sex relationships is the issue of treating them at par with the other heterosexual married couples. Allowing them to live their life on their terms with their choices, this as a human is their basic right. Though the Court's interpretation of the constitutional rights of an individual has helped to start the process but the social recognition is still something that needs to be attained. But since marriage is considered sacramental and a part of religion, interference on part of Court might also be perceived as infringement upon religious freedom but this issue can be tackled with the enforcement of Uniform Civil Code that would bring all the citizens at equal footing before the all. If there is anything that we can learn from the turn of events that took place when same sex marriage was legalized by the U.S. Supreme Court is that the right of a certain class of people cannot be denied to them just because of a majoritarian norm, as it is the Court's duty to protect the rights of each individual who comes before it. It has become very important at the present day that no one faces discrimination and are equally recognized by the law based on their gender identity or sexual orientation and it's high time that our country takes a step in that direction.

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