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Marriages under the Indian Rainbow

Looking at the legal uncertainties around LGBT+ partnerships and marriages in
the Indian context

Dr. Debjyoti Ghosh

twitter: [advocatedeejay](#) @: debjyotig@gmail.com

Section 377 of the Indian Penal Code

- "Unnatural offences: 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."
- 6 September 2018 - the Supreme Court of India unanimously declared the law unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex"
- Marriage or partnership between people of the same gender was left out of the ambit of the judgment.

NALSA Verdict and the Transgender Persons (Protection of Rights) Act 2019

- Verdict gives recognition to people who do not identify on the gender binary
- Gives legal body to the notion of third gender
- Encourages steps to be taken to ensure socio-economic rights.
- Part of the judgment talks about how the use of the gender binary in legislations leave out transgender people.
- Act is a watered-down version of the verdict
- Does not talk about marriage at all.

Marriage in India

- **Guided under the Special Marriage Act**
- **Guided under the Hindu Marriage Act**
- **Guided under other personal laws**

Types of marriage

- **Social marriage** – exchange of vows in front of family and friends, exchanging rings, going through traditional religious ceremonies – has no legal binding unless between two people of opposite genders
- **Legal marriage** – marriage registered with the Marriage Registrar under the laws of India. Heterosexual marriages are also encouraged to be registered for the sake of easier paperwork.

Implications of a marriage registered under law

- Officially recognised spouse/partner
- Legal heir in case of demise of partner – property, insurance, governmental benefits, pensions, etc.
- Hospital visitation rights during a health crisis
- Better legal protection in case of domestic violence or the dissolution of a relationship.

**Implications for
people who are
married under
foreign law but
not recognised
in India**

- No immediate legal rights as partners
- No spousal benefits from government
- Difficult to get joint bank loans and open bank accounts
- Difficult to get housing in certain cases
- Difficult to be nominated as legal heir in case of the demise of a partner
- If married to a foreigner, the partner requires a temporary visitor's visa as opposed to a spousal visa

Differing directions

- 2019 – High Court in Chennai decides on the notion of “Bride” - that the construction of the word “bride” could not be static and had to be interpreted as per the current conditions. Accordingly, given that transgender persons have the fundamental right to a self-identified gender, “bride” under S. 5 of the Hindu Marriage Act, 1955 should be read to mean not just a person assigned female at birth, but also a transgender or intersex person who identifies as female. (*Arunkumar v. Inspector General of Registration, WP(MD) No. 4125 of 2019*)
- 2020 – Sonu and Nikesh Puskarán moved the Kerala High Court to recognise their marriage (done socially) under the Special Marriage Act which does not explicitly disallow unions between non-opposite gendered people. (*WP-C No. 2186/2020*)
- Judge has asked for the views of the State and Central Government on the matter.
- What if the Supreme Court of India overrules the State High Court’s decision?

What is the way forward?

- Public interest litigation?
- Social movements?
- More visibility of non-heterosexual, non-heteronormative couples?
- While there is no specific recipe, given the unique social situation of India, a multi-faceted approach may be the best way forward.