

Marriage Equality and Indian Employment Law

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Introduction

The movement towards securing rights for the lesbian, gay, bisexual, transgender, queer or questioning community (LGBTQI+) in India has been a subject of both progress and challenges. For years, the LGBTQI+ community in India has strived to attain recognition, equality and non-discrimination. In recent years, there has been tremendous progress in recognising rights of LGBTQI+ people in India, and a growing awareness of the importance of inclusivity and diversity.

Marriage equality necessitates legal recognition and equal treatment of all individuals, regardless of their sexual orientation or gender identity, and allowing the right to marry. In April 2023, the Indian Supreme Court commenced hearing the case concerning the recognition of marriage equality and marriage rights of the LGBTQI+ community in India. In India, marriage is primarily governed by the personal laws of the respective couples and civil unions for couples who cannot marry under the personal laws are governed by the Special Marriage Act 1954 (SMA). The petitioners in this case have challenged the SMA as being applicable only to a spousal relationship of a heterosexual couple. Such a definition was contended as being violative of Articles 14, 15, 19 and 21 of the Indian Constitution. The petitioners have petitioned primarily for declaration that the SMA applies to 'a marriage between any two persons'. A five-judge constitution bench of the Indian Supreme Court reserved the case for judgement on 11 May 2023. Previously, the Indian Supreme Court has observed that 'familial relationships may take the form of domestic, unmarried partnerships or queer relationships' and that such 'atypical forms' of relationships also deserve legal recognition.

Despite the significant progress in LGBTQI+ rights, the status quo is marred with challenges. The social stigma and societal attitudes are still largely conservative. Discrimination and marginalisation of LGBTQI+ people persist. They face significant hurdles in their personal and professional lives, and there is still only limited legal protections for their rights, such as marriage and adoption rights, lack of employment opportunities and healthcare disparities.

Implication of recognition of marriage equality on employment law

The potential impact and implications of recognising marriage equality and recognising the right of homosexual couples to enter into a civil union of marriage in India are briefly analysed below.

- **Recognition as 'family' or 'dependant'**

Currently, definitions of the word 'family' and 'dependants' across employment laws in India recognise only heterosexual relationships. For example, under the Employees Provident Fund Scheme 1952, 'family' in case of a male member is defined as 'his wife, his children, whether married or unmarried, his dependant parents and his deceased son's widow and children'.

Recognition of marriage equality would require amendment of such laws to ensure benefits under employment laws are not denied to homosexual couples.

- **Nomination for gratuity and wages**

Under the Payment of Gratuity Act 1972, in case an employee has a living family member, nomination in favour of any other person would be void. Such a condition for nomination is also mandatory under the Payment of Wages (Nomination) Rules 2009 and for the Employee's Provident Fund Scheme 1952. Therefore, if homosexual civil unions are recognised, partners in such relationships should be recognised and be eligible to be nominated under gratuity and wage legislations.

- **Taxation benefits**

The benefits of certain deductions under Section 80C (2) of the Income Tax Act 1961 (such as contribution to a provident fund under the central government and payments for deferred annuity) are restricted to the existence of a wife/husband. Such restrictions are to be amended to widen the ambit to introduce the concept of 'spouse', irrespective of gender.

- **Maternity benefits**

The benefits of the Maternity Benefit Act 1961 extend to both an employed woman and a commissioning mother. In case of expansion of maternity benefits to the LGBTQI+ sector, some possible considerations in implementation would be regarding if both female individuals in a homosexual marriage would be eligible for maternity and adoption benefits and if male homosexual couples would be eligible for adoption benefits.

Recognition of marriage equality under the new labour codes

The proposed Union Code on Social Security 2020 ('SS Code 2020') uses the terms 'dependants' and 'family' in relation to a deceased employee and with regard to an employee and unorganised worker, respectively, and has not restricted the verbiage to include only heterosexual couples. Both terms use the word 'spouse' as of the eligible parties (relatives) for claiming benefits as per the SS Code 2020. The SS Code 2020, however, retains the restrictions on nomination as imposed by the Payment of Gratuity Act 1972. The SS Code 2020 continues the practice of extending a legal recognition of spousal relationships to only a heterosexual relationship.

The way ahead

In addition to the legal framework around marriage equality, organisations can acknowledge the rights of homosexual couples and marriage equality at the workplace to be ahead of the curve. Some of the measures that organisations can take to ensure better inclusivity could be through the introduction of inclusive policies at the workplace – to include parental leaves for homosexual couples, new categories of leave entitlements, such as leaves on account of an employee undergoing gender-reassignment

surgery during the term of employment, or if an employee wants to take leave to support a partner's gender-reassignment surgery, and benefits in the form of reimbursement to cover the cost of gender-reassignment surgery or therapy consultations for an employee. Further, usage of inclusive language in communications and documents should be encouraged. This is essential in building mutual respect among employees belonging to different diversity. For instance, the term 'partner' or 'spouse' can replace the stereotypical usage of the terms 'husband' or 'wife' which would be inclusive of non-binary or non-heterosexual couples.

The impact of marriage equality on employment law aspects can be significant and will mark a crucial step towards inclusivity and equality in the workplace. The recognition of marriage equality would lead to improved workplace protections, benefits and anti-discrimination measures, fostering a more inclusive work environment for LGBTQI+ individuals. Despite progress in this sphere in India, challenges persist in achieving true equality, as discrimination and bias are still present in workplaces. Continued efforts in education, advocacy and policy implementation are essential to ensure that all employees, regardless of their sexual orientation, are treated fairly and with dignity. Adopting diversity and promoting an inclusive workplace culture will undoubtedly pave the way for a more just and equal society for future generations.

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