



EDITORIAL ANALYSIS

Time: 10 min

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Law and custom: On the Supreme Court's verdict on same-sex marriage

Syllabus: GS1/Social Empowerment; GS2/Government Policies & Interventions

In Context

- The Supreme Court of India recently unanimously ruled against legalising same sex marriages.
 - All five judges have chosen to leave it to the legislature to enact such a law.

About Same-Sex Marriage

- **Meaning:**
 - It is the practice of **marriage between two men or between two women.**
 - Same-sex marriage has been **regulated through law, religion, and custom** in most countries of the world.
- **Legal position on the issue of same-sex marriage in India:**
 - **India does not recognise** registered marriage or civil unions for same-sex couples.
 - Though, same-sex couples can attain equal rights and benefits as a live-in couple (analogous to cohabitation) as per a **Supreme Court of India judgement in August 2022.**

Apex Court's opinion

- **Inclusion in the Special Marriage Act (SMA):**
 - The petitioners in the recent case, have sought a broader interpretation of the SMA to include same-sex marriages too.
 - The CJI opined that the **SC cannot strike down the provisions** of the Special Marriage Act (SMA) or read words differently.
 - The focus of the petitions filed is the gender-neutral interpretation of the SMA whereas, Special Marriage Act (SMA) is a secular legislation designed to facilitate inter-caste and inter-faith marriages.
- **Non-inclusion in Article 21:**

- Over the years, the amplitude of Article 21 of the Constitution has been expanded **to cover the rights of privacy, dignity and marital choice**, but the highest court has not allowed marriages or civil unions that are not heterosexual.
- The right to seek social and legal validation through marriage is a **matter of individual choice** protected by the Constitution, but the Court still views it as being **subject to statutory limitations**.
- **What is agreed upon & what is not?**
 - **The majority disfavours** the position that queer couples have a right to adopt children, but agrees with the minority that there is no bar on trans persons entering into heterosexual marriages.
 - There is **no disagreement** among the judges about the right of such same-sex couples **to cohabit and be free from coercion and threats**.

Centre's position

- **Centre has previously cited** in the Supreme Court a batch of pleas seeking legal validation of same-sex marriage, saying it would cause **complete havoc with the delicate balance of personal laws and accepted societal values**.
- If there ought to be such a change, it must come from the legislature.
 - The state is **entitled to limit its recognition to marriages** involving heterosexual couples.

Arguments in favour of legalising Same-Sex Marriage

- **Restricting Rights:**
 - The question of equal equality is about love and liberty and denying marriage to those of our fellow people who require that implies restricting their rights, treating them unjustly, physically and morally and risking severe personal harm.
- **Right to equality:**
 - The critics have cited that the right to marry cannot be withheld from a section of people **based solely on their sexual orientation**.
 - They have argued that barring them from marriage violates their right to equality.
- **Global practice:**
 - According to global think tank Council of Foreign Relations, same sex marriages are legal in at least 30 countries, including the United States, Australia, Canada and France.

Arguments against Same Sex Marriage

- **Against Biological relation:**
 - Marriage in India can be recognised only if it is between a biological man and a biological woman capable of producing children.
- **Judicial interference:**

- The government has said that any interference by a court in the marital statute based on personal laws will create havoc in society and will run against the intent of Parliament in framing the laws.
- **Fundamental rights are not absolute:**
 - Fundamental rights cannot be an untrammelled right and cannot override other constitutional principles.
- **Unnecessary hype:**
 - The matter is neither of national importance nor has it affected the majority of the population.
- **Absence of civil rights issues:**
 - The 2018 judgment of the Supreme Court decriminalised homosexuality but did not get into civil rights issues.
 - As a consequence, same-sex relationships are legal but civil rights such as marriage, inheritance or adoption, are not guaranteed to the lesbian, gay, bisexual, transgender, queer and intersex community.
- **Lack of legal framework:**
 - The legal framework governing the institution of marriage in this country does not presently allow members of the LGBTQ+ community to marry the person of their choice.
 - Couples cannot protect the family, and matters like adoption, opening a joint bank account or admission of children remain uncertain on account of failure of the law to recognise same sex unions.

Global position on Same Sex marriages

- The **Netherlands** was the **first country in 2001** to legalise same-sex marriage by amending one line in its civil marriage law.
- Since the first same-sex marriages took place in the Netherlands in 2001, more than 30 other jurisdictions have enacted laws allowing **same-sex marriages**, some through **legislation** while others through **judicial pronouncements**.
- Many countries first recognised same-sex civil unions as the **escalatory step to recognise homosexual marriage**.
- Most countries in **North and South America** and **Europe** have legalised same sex marriage.

Way ahead

- The Supreme Court of India's refusal to accord legal recognition to marriages between persons of the same sex is a **huge legal setback** to the queer community in the country.
- Given that large sections of India may be opposed to the legalisation of same-sex marriages on religious and cultural grounds, the **possibility of Parliament taking the initiative** to do so is **quite bleak**.
- LGBTQA+ community still has quite a struggle ahead before the law catches up with its yearning for equality.

[Q] Examine the rationale behind Supreme Court of India's refusal to accord legal recognition to marriages between persons of the same sex. What should be the rational way ahead?