



Same Sex Marriage

Why in News

Recently, the Central Government opposed **same-sex marriage** in Delhi High Court stating that a marriage in India can be recognised only if it is between a “biological man” and a “biological woman” capable of producing children.

Key Points

▪ Background:

- Petitions, seeking recognition of same sex marriages under the [Hindu Marriage Act \(HMA\), 1955](#) and the [Special Marriage Act \(SMA\), 1954](#), were filed in 2020.

▪ Centre’s Response/Argument:

◦ Supreme Court’s Order:

- In reading down the provision of [Section 377 of the Indian Penal Code \(IPC\)](#), the [Supreme Court](#) only **decriminalised a particular human behaviour** but neither intended to, nor did in fact, legitimise the human conduct in question.

◦ Societal Morality:

- There exists a “**legitimate State interest**” in limiting the recognition of marriage to persons of opposite sex. The considerations of “**societal morality**” are relevant in considering the validity of a law and it is for the Legislature to enforce such societal morality and public acceptance based upon Indian ethos.

◦ Not in Consonance with Existing Laws:

- The fundamental right under **Article 21** is subject to the procedure established by law and it **cannot be expanded to include the fundamental right for same sex marriage** to be recognised under the laws which in fact mandate the contrary.

- **Article 21** of the constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable.

- Any interference with the existing marriage laws would cause complete havoc with the delicate balance of personal laws in the country.

◦ Sanctity of Marriage:

- Living together as partners or in a relationship with a same-sex individual is “not comparable” with the “Indian family unit concept” of a husband, wife and children, arguing that the institution of marriage has a “sanctity”.

▪ Legality of same-sex marriages in India:

- The **right to marry is not expressly recognized either as a fundamental or constitutional right under the Indian Constitution.**
- Though marriage is regulated through **various statutory enactments**, its recognition as

a fundamental right has only **developed through judicial decisions of India's Supreme Court.**

- Such declaration of law is binding on all courts throughout India under [Article 141](#) of the Constitution.

▪ **Important Supreme Court Decisions:**

- **Marriage as a Fundamental Right (*Shafin Jahan v. Asokan K.M. and others 2018*):**
 - While referring to **Article 16** of [Universal Declaration of Human Rights](#) and the Puttaswamy case, the SC held that the **right to marry a person of one's choice is integral to [Article 21](#)** of the Constitution.
 - **Article 16** (2) in the Indian constitution provides that there cannot be any discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them.
 - The **right to marry** is intrinsic to the liberty which the Constitution guarantees as a fundamental right, is the **ability of each individual to take decisions** on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty.
- **LGBTQ Community Entitled to all Constitutional Rights (*Navjet Singh Johar and others v. Union of India 2018*):**
 - The SC held that members of the [LGBTQ community](#) “are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution” and are entitled to equal citizenship and “equal protection of law”.

Way Forward

- The LGBTQ community **needs an anti-discrimination law that empowers them to build productive lives and relationships** irrespective of gender identity or sexual orientation and place the onus to change on state and society and not the individual.
- Once members of the LGBTQ community “are entitled to the **full range of constitutional rights**”, it is beyond doubt that the fundamental **right to marry a person of one's own choice has to be conferred on same sex couples** intending to marry. More than two dozen countries have legalized same-sex marriage.

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