

## ARTICLE

### **SAME SEX MARRIAGE: STRUGGLE FOR EQUALITY**

Recently, the Supreme Court of India began hearing a series of petitions seeking solemnisation of same-sex marriage under the Special Marriage Act. The Special Marriage Act of 1954 provides a civil form of marriage for couples who cannot marry under their personal law.

In the proceedings the center advised the Supreme Court to defer the case to Parliament on the matter, stating that the law cannot be revised to permit same-sex marriage again.

In this context, there is a need to look into the matter of Same-sex marriage and its related issues.

#### **What are Arguments Against the Same Sex Marriage?**

- **Religious Definitions of Marriage:** Marriage has traditionally been between a man and a woman in many religions. The Special Marriage Act, 1954 was created to overcome the limitations of religious personal laws, not to create a new institution of marriage.
- **'Legitimate' Interest of State:** The state has a legitimate interest in regulating marriage and personal relationships, as seen in laws regarding age of consent, prohibited degrees of marriage, and divorce. The right to marry is not absolute and subject to state laws. Just like a parent cannot claim absolute control over their child's education, individuals cannot claim absolute control over their personal relationships.
  - The state can claim legitimate interest to regulate, when to marry, how many times to marry, whom to marry, how to separate, and law on bestiality or incest.
- **The Right to Privacy:** In 2017, the Supreme Court recognized the right to privacy as a fundamental right and stated that sexual

orientation is a crucial part of one's identity that must be protected without discrimination.

- However, privacy exists but it cannot be extended to marriage, which has a necessary public element. Consenting sexual relationships between adults are private, but marriage has a public aspect that cannot be ignored.
- **Legislation by Parliament:** Only Parliament has the authority to decide on same-sex marriage as it is a matter of democratic right and court should not legislate on the issue. There could be potential unintended consequences in law and the complexity of dealing with the various permutations and combinations of genders falling under the LGBTQIA+ community (which has 72 categories).
- **Interpreting the Law:** The Special Marriage Act (SMA) cannot be interpreted to include same-sex marriage because the Act's entire architecture would need to be examined, not just a few words. For example, the Act provides specific rights to a wife, and it's unclear who would have these rights in a same-sex marriage. Additionally, allowing one party in a same-sex marriage to have a specific right could create a problem for heterosexual marriages.
- Law provides specific rights to a wife like "the law says that the wife acquires the domicile of the husband upon marriage. So, who will be the wife in a same-sex marriage?"
- Issue of divorce, under the SMA, a wife may seek divorce on the ground that her husband has been guilty of rape, sodomy, or bestiality.
- **Issues with Adoption of Childrens:** When queer couples adopt children, it can lead to societal stigma, discrimination, and negative impacts on the child's emotional and psychological well-being, especially in Indian society where acceptance of the LGBTQIA+ community is not universal.



- **Gendered terms:** Argument that gendered terms like 'mother' and 'father', 'husband' and 'wife' would be problematic in same-sex marriages.

### What are Arguments in Favour of Same Sex Marriage?

- **Threat to Human Race:** Opposing same-sex marriage by saying it will end the human race is unreasonable because adoption is a solution for queer couples who want to raise children.
- **Elitist Concept:** The demand for marriage equality comes from less economically privileged people who need legal protection. Claiming that it's a matter for urban elites is deceptive. E.g. The story of Leela and Urmila, two policewomen who were suspended and locked up for getting married in 1987, shows the discrimination faced by LGBTQIA+ people in society.
- **Extend Special Marriage Act to Queer Indians:** The Special Marriage Act should be extended to include queer Indians by using gender-neutral language like "spouse" instead of "husband" or "wife". This would grant them the right to marry without asking for special rights.
  - The Special Marriage Act allowed for a Bengali Hindu and an Anglo-Indian Roman Catholic to marry in 2006, and they hope this legislation will be extended to queer Indians.
- **Cohabitation as a Fundamental Right:** The Chief Justice of India (CJI) acknowledged that cohabitation is a fundamental right, and it is the government's obligation to legally recognize the social impact of such relationships.
  - The justices suggested that recognition is needed for such relationships to receive certain benefits, but not necessarily as marriage. The CJI emphasized the importance of providing a sense of security and social welfare for people in such relationships.

- The court suggested labels like "contract" or "partnership" instead of "marriage". The government said there is no fundamental right to seek recognition of same-sex relationships as marriage.
- The Supreme Court of India discussed the recognition of cohabitation as a fundamental right for same-sex couples, which would entitle them to benefits without being equated to marriage.
- **Assimilation of same-sex couples:** The CJI has emphasized the need to assimilate same-sex couples into society rather than ostracizing them. The decriminalization of Section 377 of the IPC has recognized the existence of same-sex relationships.
- Government should address the practical issues faced by same-sex couples, such as joint bank accounts and entitlement to pension and gratuity.
- **Indian Culture and Value System:** In culturally rich India, where social norms and obligations wield significant influence, the acceptance of same-sex relationships still poses a challenge, even after legal recognition.
- It goes against the traditional values and beliefs of the Indian society. However, the recognition of same-sex marriage adds to the diversity of relationships that exist in society.
- **Human Dignity:** In Navtej Singh Johar vs. Union of India, the Supreme Court granted same-sex couples the freedom to lead a dignified private life.
- **Biological gender is not 'absolute':** The Supreme Court of India says that biological gender is not absolute, and that gender is more complex than just one's genitals. There is no absolute concept of a man or a woman.
- **'Bouquet of rights' being denied:** The LGBTQIA+ community is being denied important legal benefits like tax benefits, medical rights, inheritance, and adoption by not being allowed to marry. Marriage is not just about dignity, but also a collection of rights.

**What could be the Way Forward?**

- **Raise awareness:** The purpose of awareness campaigns is to promote equality and acceptance of all sexual orientations and expand public opinion about the LGBTQIA+ community.
- **Legal reforms:** Amends in the special marriage Act to allow same-sex couples to legally marry and enjoy the same rights and benefits as opposite-sex couples. Meanwhile bring the contract like agreement so the homosexual people can enjoy similar rights like heterosexuals.
- **Dialogue and engagement:** Engaging in a dialogue with religious leaders and communities can help bridge the gap between traditional beliefs and modern attitudes towards same-sex relationships.
- **Legal challenges:** The Indian LGBTQIA+ community can challenge the constitutionality of the current laws that prevent same-sex marriage in court. Such legal challenges can help establish a legal precedent that will pave the way for the legalization of same-sex marriage.
- The legalization of same-sex marriage requires a concerted effort from all stakeholders, including the LGBTQIA+ community, the government, civil society, and religious leaders. By working together, we can create a more inclusive society where everyone has the right to love and marry whomever they choose, regardless of their gender.