

Same Sex Marriage

November 24, 2020

Marriage in India continues to retain its moral and cultural origins in which lies the deeply rooted idea of heterosexual exclusivity of marriage. But to choose a life partner is an absolute right of an individual forming essence of personal liberty under the Constitution. Hence the myopic view of the present issue needs to be broadened.

In news: Plea in Delhi HC to recognize same sex marriage

Placing it in syllabus: Indian society

Static dimensions

1. Problems faced by community due to non recognition
2. Arguments for recognition
3. Hurdles

Current dimensions

1. In news

Content:

In news:

- The Delhi High Court recently issued notice to the Centre on a petition seeking a direction to the government to recognise same-sex marriages under the **Hindu Marriage Act (HMA) and the Special Marriage Act (SMA)**.
- The Centre has been asked to submit its response within four weeks.
- The petition was filed by members of the lesbian, gay, bisexual and transgender (LGBT) community and certain activists.
- The plea argued that the Supreme Court had in 2018 **decriminalised consensual homosexual sex** in India.

- There is **nothing in the HMA that mandated that marriage should take place only between a Hindu man and a Hindu woman.**
- While there is no statutory bar under the HMA and the SMA against gay marriages, they were not being registered throughout the country.

Decriminalization of Article 377:

- Section 377 of the Indian Penal Code makes sexual activities “against the order of nature” illegal.
- Portions of the section were first struck down as unconstitutional with respect to gay sex by the Delhi High Court in July 2009.
- That judgement was overturned by the Supreme Court of India (SC) on 11 December 2013 in **Suresh Kumar Koushal vs. Naz Foundation.**
- The Court held that amending or repealing section 377 should be a matter left to Parliament, not the judiciary.
- In August 2017, the Supreme Court upheld the **right to privacy** as a fundamental right under the Constitution in the landmark **Puttaswamy judgement.**
- The Court stated that the protection of sexual orientation lies at the core of the fundamental rights and that the rights of the LGBT population are real and founded on constitutional doctrine.
- In January 2018, the Supreme Court ruled unanimously in **Navtej Singh Johar v. Union of India** case that Section 377 was unconstitutional “in so far as it criminalizes consensual sexual conduct between adults of the same sex”.

Problems faced by community due to non recognition:

- Exclusion and discrimination by society

- Lack of family and social support which results in them leaving home
- Dropping out of school earlier
- Unable to find regular jobs, have less options than others
- Being ignored in the community and isolated
- Unable to access various services
- Migrate to other countries for seeking safer livelihood and acceptance
- Get rejected from religion
- Attempt suicide, prone to substance abuse
- Sexually abused
- Decide to follow their parents to marry opposite sex and then divorce
- Greater unemployment and poverty

Arguments for recognition:

- Right to marry is a part of 'right to life' under **Article 21** of the Constitution.
- Not giving recognition to same-sex marriages has resulted in **deprivation of many benefits** that would otherwise be available to heterosexual married couples.
- Prohibition of marriage of LGBT people on the basis of sexual orientation and gender identity is an **absolute discrimination towards them**.
- It **violates the right to equality** as granted by the Constitution.
- Various countries such as the U.S., Australia, Germany, Canada, Spain, South Africa, Brazil, and England have made same-sex marriages are legal.

Hurdles:

- It would be an uphill task to seek amendments to the personal laws of all religions.
- Any judicial intervention in this regard would be perceived as interference in religious freedom.

- Bringing legislative amendments to the SMA to include same-sex marriages needs parliamentary approval which is again based on preconceived religious notions.
- Indian society which considers marriage as a sacred bond, finds it difficult to accept the unusual same-sex marriages.

Mould your thought:

1. Critically analyse the problems faced by the LGBT community due to non-recognition of same-sex marriages.

Approach to the answer:

- Write about the problems faced by them
- Why should they be given recognition
- What are the hurdles in giving recognition
- Way forward (conclude by writing about decriminalizing Article 377)