# The 360° UPSC Debate: Same-Sex Marriage in India –

# Source: Indian Express

**Urban Elite Concept Or Integral Right?**

The Supreme Court of India began hearing petitions seeking the legalisation of same-sex marriage on April 18, 2023. Whether Supreme Court, or Parliament, will pave the way for same-sex marriage in the coming days will be seen, but the question that has come up for the debate on marriage equality is whether same sex marriage is an 'urban elitist concept' or integral right in comparison to other rights enshrined in the Indian Constitution.

**WHY ARE WE EVEN HAVING THIS DEBATE IN THE FIRST PLACE?**

**In a landmark decision in 2018, i.e. (Navtej Singh Johar Case) the Supreme Court of India decriminalised homosexuality** by striking down Section 377 of the Indian Penal Code.

Only those portion of Section 377 which criminalised consensual homogenous sex has been struck down as violative of article 14.

Despite the 2018 verdict, members of India’s lesbian, gay, bisexual, transgender queer and more (LGBTQ+) community worry **about societal rejection and discrimination against LGBTQ+ individuals.** Legal rights for LGBTQ individuals in India have grown over the last decade, with the majority of these developments brought about by the Supreme Court’s intervention.

**WHAT IS CENTRE’S ARGUMENT ON SAME-SEX MARRIAGE?**

* The union government is of the opinion that **is same-sex marriage is not recognised in Indian traditions, ethos, culture, or societal conceptions of the institution of marriage**”
* Also, government says that such a **decision belongs to Parliament and not the judiciary and that the petition represented urban elitist attitudes and would not be supported by the majority of people**.
* Marriage, it has been suggested, **is a sacrament between a biological male and a biological female to make a holy union in order to have children.** As a result, it is contended that Parliament, rather than the Court, is the appropriate institution to debate and decide whether same-sex marriages should be legalised.

Tushar Mehta, India’s Solicitor General, argued that the **state has a legitimate interest in regulating marriages, citing factors such as the age of consent, prohibition of bigamy, prescription of prohibited degrees of marriage (Sapinda relationship- which means one cannot marry their lineal ascendants, such as parents or grandparents)**, **judicial separation, and divorce**. Mehta also foresaw a future in which arguments about sexual orientation freedom and autonomy could be used to challenge the law on incest.

Centres says hat the right to personal autonomy **does not include the right to have same-sex marriage recognised**.’

As per the Union Government, **The Transgender Persons (Protection of Rights) Act, 2019, has already safeguarded fundamental rights** such as the **right to privacy and the right to choose one’s sexual orientation**. The establishment of **additional rights**, the acknowledgment of relationships, and the provision of legal legitimacy for said relationships **can only be carried out by a competent legislative body rather than through judicial decision-making**.

Marriage is widely regarded as a **crucial component of a nation’s social policy on a global scale.** The responsibility of defining, recognising, and regulating same-sex marriage falls within the jurisdiction of the appropriate legislature, which is composed of elected representatives of the people. The decision not to recognise same-sex marriage is merely a reflection of legislative policy.

**What activists asserts?**

Activists from the community claims that by denying marriage between homosexual government is creating inequality and violating article 14.

According to Senior Advocate Saurabh Kirpal, **an overwhelming 99% of same-sex couples want to tie the knot.** They **believe tying the knot will give their relationship significance, direction, and a distinct sense of self**. Once upon a time, they said, they were deemed as lawbreakers. One speaker described their experience as that of “third-class citizens” According to some individuals, there is a common belief that they are “inferior citizens” and hence should be satisfied with their status.

In a recent court hearing**, Senior Advocate Mukul Rohatgi presented arguments on behalf of the LGBTQ+ petitioners, stating that the right to marriage for non-heterosexual couples is implied in Articles 14, 15, 16, 19, and 21**. Rohatgi further emphasised that this right is particularly significant in light of the Supreme Court’s previous rulings in the cases of Navtej Singh Johar vs. Union of India and KS Puttaswamy and Anr. vs. Union of India. In the wake of the historic ruling in N. S. Johar Ors. V. UOI, which invalidated Sec. 377 of the IPC insofar as it criminalises consensual same-sex relations, there is growing momentum to apply the principles of transformative constitutionalism and progressive realisation to expand the rights of LGBTQ+ individuals. Advocates argue that recognising same-sex marriages under the law would be a crucial step in this direction, giving LGBTQ+ couples a new dimension of legal recognition and protection.

According to senior advocate Menaka Guruswamy, **the notion of same-sex marriage is not limited to the elite. It also addresses numerous small towns**. Marriage is a highly sought-after goal among youth in that region, and the plea is to spare them the ordeal. She pleaded for a positive implementation of the right to marry.

Advocate Arundhati Katju, Menaka Guruswamy, and Govind Manoharan have argued that the failure to recognise same-sex marriage constitutes discrimination that undermines the dignity and self-fulfilment of LGBTQ+ couples. During the court proceedings, it was emphasised that individuals who identify **as LGBTQ+ make up approximately 7-8% of the country’s population.** **Petitioners have highlighted that LGBTQ+ citizens are not afforded legal protection under approximately 15 laws that guarantee rights such as wages, gratuities, adoption,**[**surrogacy**](https://indianexpress.com/article/explained/what-laws-regulate-surrogacy-in-india-nayanthara-vignesh-8202717/)**, and more**.

**How Supreme Court Responded on Same-Sex Marriage**

The Supreme Court reserved its decision on a slew of petitions seeking the right to **marriage for members of the LGBTQ+ community under the Special Marriage Act of 1954**. According to the Supreme Court of India, **same-sex marriages cannot be considered an urban elitist concept simply because more people from cities are coming out of the closet.** “We do not follow either **popular or sectional morality**. What the **Constitution states is up to us**. If you say this is how young people feel, those on the other side would put tonnes of materials at us, claiming this is how the country feels,” Chief Justice Chandrachud responded.

**According to the CJI, there is no absolute concept of a man or a woman at all**. The postulation is far more complex than categorising a person according to the genitals they are born with. CJI Chandrachud said the **matter might be tackled on three levels.**

* **One, the government could easily make administrative modifications**.
* Two, **by modifying subordinate legislation such as rules and regulations, which were also within the purview of the government**.
* Three, **by enacting substantial legislative changes to formally recognise the right of same-sex couples to marry by gender neutralizing the Special Marriage Act**.

**WHAT ARE THE ARGUMENTS FOR SAME-SEX MARRIAGES**

**“Article 21 of the Indian Constitution says that the right to get married is part of the right to life. The Human Rights Charter says that the right to get married is part of the right to start a family”**

* **Right to marry as a right in the constitution:** **Lata Singh v. State of Uttar Pradesh**, a 2006 case involving an **inter-caste marriage**, was one of the first to address this problem. The Supreme Court **ruled that because the petitioner was a major, she had the right to marry whoever she wanted** and that there was no statute prohibiting an inter-caste marriage.

In 2014, a supreme court judgment later specifically ruled that, "An intrinsic part of Article 21 of the Constitution would be the freedom of choice in marriage,”. Again in 2021, SC held that Intimacies of marriage lie within a core zone of privacy, which is inviolable and even matters of faith would have the least effect on them. **The right to marry a person of choice was held to be integral to Article 21 of the Constitution of India**. *(Laxmibai Chandaragi B. v State of Karnataka(2021))*

* **The Human Rights Charter says that the right to get married is part of the right to start a family.**
* Advocates of marriage equality contend that the principle of equal rights necessitates parity in all respects. In **a just and equitable society, discrimination based on race, religion, gender, or sexual orientation is unacceptable, and the withholding of marriage rights constitutes a blatant form of such discrimination**. Both gay and heterosexual couples should be **entitled to the legal rights that come with marriage**, including those related to taxes, property ownership, inheritance, and adoption. The act of denying equal rights to individuals who identify as gay or lesbian can be classified as homophobia, regardless of any attempts to justify or disguise it.
* **Denying someone the right to choose a life partner on their own terms is a clear abuse of this right**.
* Since same-sex weddings are not supported by law, **many couples say they have had to deal with a lot of problems. Indian law makes it hard for LGBTQ+ people to own or transfer property.**
* **Gay and lesbian couples are not allowed to use an Indian surrogate mother to have children.**
* Only option they have **try to adopt as single parents**.
* legalising same-sex marriage would not only be a big step towards equality, but that **it would also lead to more gay people coming out** publically.

**WHAT ARE ARGUMENTS AGAINST SAME-SEX MARRIAGES**

* **“Marriages in India are governed by a complicated legal structure with a religious foundation”**
* Going against natural law would threaten **both the institution of marriage and the family’s role in keeping society together**.
* According to them, talking about equal rights in this situation makes no sense. If that were true, then polygamy and marriages between relatives would also have to be allowed, they argue. Every right has some limits. If homosexuality was made legal, it would be another step towards being accepted by most people, they argue. No one can stop gay people from loving each other or living in relationships, but, according to them, that doesn’t mean they can get married.
* According to Sara McLanahan, who was a sociologist at Princeton University, **homosexuality could raise a class of children who live apart from their mother or father**.
* A similar concept is expressed in David Popenoe’s book **‘Life Without Father’** If same-sex civil marriage becomes more popular, lesbian couples are more likely to end up with children, it argues, **elaborating that fathers are effective at reducing antisocial behaviour and delinquency in boys and sexual activity in females.**
* Eleanor MacCoby, a Stanford psychologist, wrote in her book The Two Sexes-Although the research on child outcomes is limited, **it appears that children raised by lesbians or homosexual men are more likely to develop gender and sexual abnormalities.**

The National Commission for Protection of Child Rights (NCPCR) stated that same-sex marriage would violate the terms of the Juvenile Justice Act. The Juvenile Justice Act of 2015 makes it illegal for a single male, let alone two men, to adopt a girl child. The NCPCR cited a study from the Catholic University of America that found that **children of same-sex couples had twice as many emotional issues than children of heterogeneous parents**. It argued that a proper legislative system regarding same-sex couples must be adopted.

* Many religious organisations and non-governmental organisations say that Indian **society is not ready for such weddings to be legalised**. Their explanations range from the concept of “marriage” to the “psychological impact” on children of growing up with two men or two women as parents.

Marriages in India are governed by a complicated legal structure with a religious foundation. As a result, they are controlled under the Hindu Marriage Act of 1955, the Parsi Marriage and Divorce Act of 1936, the Christian Marriage and Divorce Act of 1957, and Muslim Personal Laws, all of which lack a rigorous statutory framework. Except for the Special Marriage Act (SMA) of 1954, all marriage laws recognise marriages between a man and a woman. SMA was enacted by Parliament to facilitate inter-religious marriages. As a result, the legislative intent behind the use of gender-neutral wording in Section 4 of the SMA cannot be assumed to be in favour of same-sex marriages.

Traditional family and marriage concepts are experiencing evolutionary challenges. The concept of live-in relationships is as ideologically opposed to marriage as same-sex weddings. Even if they are judicially recognised, live-in partnerships are not legally equivalent to marriage. The social appropriateness of such relationships is still in doubt. As a result, the Centre’s concerns about the conceptualization of the family unit are not as regressively homophobic as they appear on the surface, some point out.

Rajiv Mehrishi in his article, “[Same-sex marriage and liberal elite’s conceit: Parliament must decide on the issue”](https://indianexpress.com/article/opinion/columns/same-sex-marriage-liberal-elites-conceit-parliament-decision-8585567/)  says that in the opinion of many, Indian society at large sees marriage as a solemn union of opposite sexes, with the likelihood of procreation, limited by choice or medical issues. ‘No survey or opinion poll is necessary to determine this. The elected representatives are in touch with and responsive to what people feel, otherwise, they would not be elected. They, more than anyone else in the country, know the pulse of the people. If society at large had felt strongly about same-sex marriage, no politician would dare oppose it. There are several laws enacted in the recent past that reflect a demand from society: The tightening of rape laws post the Delhi 2012 rape, for example. For any group, no matter how liberal they imagine themselves to be, to think that they know better than all others, is righteousness at its worst. Maybe rural and small-town India think and feel differently. Unfortunately, holding the beliefs and feelings of an overwhelming majority in contempt, valorising it as intellectual superiority, seems to have become the forte of the “liberal” elite. The demand for recognising same-sex marriage cannot be dismissed out of hand but neither can be the view that is opposed to it. Let everyone be entitled to their views. Let us respect our Constitution and let Parliament and legislatures debate and decide on the issue.’