



LGBTQ+ Rights in India: The Supreme Court's Verdict

This editorial is based on [“Law and custom: On the Supreme Court’s verdict on same-sex marriage”](#) which was published in The Hindu on 18/10/2023. The article discusses the recent judgment of the Supreme Court of India that refused to grant legal recognition to marriages between persons of the same sex.

For Prelims: [Article 14](#), [Article 15](#), [Article 21](#), [Articles 245 and 246](#), [Special Marriage Act \(SMA\)](#), [civil unions](#), [adoption rights](#)

For Mains: Supreme court judgments and issues related to it, LGBTQ rights ,challenges, Gender justice

The [Supreme Court’s](#) refusal to accord legal recognition to marriages between persons of the same sex is being seen as a setback to the queer community in the country. Given the progress in law in recent years and the deepening of the meaning of individual rights, there was widespread expectation that the five-judge Constitution Bench would give the [Special Marriage Act \(SMA\)](#), a law that allows any two people to marry, a gender-neutral interpretation to include people belonging to the same sex.

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 stopped short of the extra step needed to allow marriages or [civil unions](#) that are not heterosexual. All five judges have chosen to leave it to the legislature to enact such a law.

What are the Observations made by the Supreme Court?

- **On Legislature to Frame the Laws:** The court held that it **can neither strike down or read words into the [Special Marriage Act \(SMA\) 1954](#)** to include same sex members within the ambit of the **SMA 1954. The top court said it is for [Parliament](#) and [state Legislature](#) to formulate laws on it.**
 - In the absence of any central law, the judgment read that State legislatures can enact laws recognising and regulating **same-sex marriages;** the Constitution under [Articles 245](#) and [246](#) empowers both the [Parliament](#) and the State to enact marriage regulations.
 - The **State may choose from a number of policy outcomes;** they may make all marriage and family-related laws gender neutral, or they may create a separate SMA-like statute in gender-neutral terms to give the queer community an avenue for marriage, they may pass an Act creating [civil unions](#), or a domestic partnership legislation, among many other alternatives.
 - Tamil Nadu has already amended the [Hindu Marriage Act](#) in 1968 to allow self-respect or ‘Suyamariyathai’ marriages.
- **On the Right to form Civil Unions:** The minority opinion batted for the state to recognise queer unions, even if not in the form of marriage. The **right to enter a union cannot be restricted on**

the basis of sexual orientation (which violates [Article 15](#)); moreover, marriage is significant because of a bouquet of rights, and for same-sex couples to enjoy these entitlements, it is necessary that the state accord recognition to such relationships.

- However, the majority opinion said the **government is not obligated to recognise the bouquet of rights** flowing from such a Union.
- **On Trans persons' Rights:** The majority opinion of the Bench affirmed that **transgender individuals have the right to marry within the existing legal framework**. The judgment emphasized that gender identity is distinct from sexual orientation, highlighting that transgender individuals can be in heterosexual relationships similar to cisgender individuals. Therefore, **such marriages can be legally registered under marriage laws**. Additionally, the judgment recognized that intersex individuals who identify as either male or female also have this right.
 - The Court affirmed the Madras High Court decision in [Arun Kumar v. Inspector General of Registration \(2019\)](#), which declared marriage between a Hindu male and a transwoman a valid union.
- **On Adoption Rights:** The majority opinion refused to strike down the [Central Adoption Resource Authority \(CARA\)](#) regulations that restrict queer couples from joining in adopting a child. While it noted that these regulations are discriminatory and violative of [Article 14](#), the **majority opinion did not support adoption rights for same-sex couples**, citing the need to explore all areas for the benefit of children in need of stable homes.
- **On Entitlements:** The court **acknowledges the need for equal rights for queer couples** in areas like **ration cards, joint bank accounts, pensions, and gratuity**. However, there is a disagreement on whether the judiciary or the legislative and executive branches should address these issues..
- **On Natal family Violence and Protection:** Many queer persons face violence from natal families and are reportedly kidnapped in an attempt to end relationships. The judgment identified that families of LGBTQ persons as well as the police are the primary actors in such violence, and has **issued directions to the police department to not force queer persons to return to their family**.
 - Previous High Court orders have recognised the legitimacy of queer couples in live-in relationships and afforded them protection from violence.
 - The petitions, *Amburi Roy v Union of India* and *Rituparna Borah v Union of India*, argued for the right to choose a family.
- **On Sex, Gender, and Discrimination:** The verdict rejected the government's argument that same-sex unions are unnatural or non-Indian. It **acknowledged that queer love has existed in India for a long time and that the constitutional legitimacy of same-sex relations** is not undermined by societal acceptability.

What are the Issues related to the Judgement?

- **Violation of Fundamental Rights:** The verdict goes **against the fundamental rights of LGBTQIA+ individuals as recognized by the Supreme Court** in previous judgments. These rights include equality, dignity, and autonomy, which have been affirmed as fundamental in the past.
 - The Supreme Court in various judgements such as *Lata Singh vs State of UP (2006)*, *Safin Jahan vs Ashokan (2018)*, *Shakti Vahini vs Union of India (2018)* and *Laxmibai Chandarangi vs State of Karnataka (2021)* has held that [choosing a life partner is a Fundamental Right under Article 21](#).
- **Ignoring Lived Realities:** The verdict fails to take into account the real-life experiences of LGBTQIA+ individuals who often face discrimination, violence, and stigma in society due to their sexual orientation and gender identity.
- **Undermining Constitutional Morality:** The critics argue that the verdict undermines the principle of constitutional morality. They say that the **state should respect the diversity and plurality of its citizens**, rather than imposing the views of the majority on minority groups.
- **Denial of Legal Benefits:** The verdict denies LGBTQIA+ couples the **social and legal benefits of marriage, such as inheritance, adoption, insurance, pension, etc.** The lack of legal recognition for [same-sex marriage](#) results in these couples being deprived of the rights and privileges enjoyed by heterosexual couples.
- **Contradiction with International Human Rights Standards:** The verdict **contradicts international human rights standards and norms**. It claims that international standards

uphold the right to marry and establish a family for all individuals, irrespective of their sexual orientation and gender identity. The verdict, in this view, is not in alignment with these global norms.

What are the Options left for the LGBT People Now?

- **Legal Avenues:** One possible path is to continue pursuing legal avenues. This may involve waiting for the committee's report and potentially filing new cases if the findings align with the petitioners' arguments.
 - The Central government has said that it would constitute a committee, chaired by the Cabinet Secretary, to set out the benefits and entitlements for same-sex couples.
- **Individual Rights:** Another approach is for individuals in queer relationships to wage **solitary battles for specific rights** associated with marriage, such as joint bank accounts or pension rights, by challenging discrimination.
- **Political Activism:** The LGBTQ+ community needs to make queerness an integral part of political conversations and demands upon elected representatives, particularly in the lead-up to the 2024 Lok Sabha elections. This political activism may involve building solidarity among different LGBTQ+ groups to amplify their concerns.
- **Exploring Alternatives:** The LGBTQ+ community should explore alternative ways to expand their rights. The courts, while important, are not the only means of securing progress. This implies that **community-building, education, and public awareness campaigns** may play a crucial role in advancing LGBTQ+ rights in India.

Conclusion

The Court denied the right to marry for same-sex couples, going against expectations of non-discrimination in marriage and passed on this responsibility to the legislature. While there are legal requirements for marriage, the personal choice to seek validation through it is protected by the Constitution, with some statutory limits. The majority opinion of the SC bench opposed the adoption for queer couples but supports trans persons in heterosexual marriages.

All judges agree on the right of same-sex couples to cohabit without coercion. The Legislature may feel hesitant in legalizing same-sex marriages due to opposition based on religious and cultural reasons. The LGBTQIA+ community can find hope in the Court's call for a government committee on queer couples' rights, but the path to legal equality remains challenging.

Drishti Mains Question:

Recently, the Supreme Court has denied legal status to same sex marriages in India. Discuss the issues with the Court's judgment and options available to the LGBT community now.

Legal Insights

Same Sex Marriage

UPSC Civil Services Examination, Previous Year Question (PYQ)

Prelims

Q. Which Article of the Constitution of India safeguards one's right to marry the person of one's choice? (2019)

(a) Article 19

- (b) Article 21
- (c) Article 25
- (d) Article 29

Ans: (b)

Mains

Q. Explain the constitutional perspectives of Gender Justice with the help of relevant Constitutional Provisions and case laws. **(2023)**

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