



## Perspective: Legalising Same-Sex Marriage

**For Prelims:** Special Marriage Act, 1954, LGBTQ+ community

**For Mains:** Issues Regarding Transgenders and Same-sex Marriage, Special Marriage Act, 1954.

### Why in News?

Recently, the Supreme Court issued notice to the Centre Government on a plea by two gay couples **seeking recognition of same-sex marriage under the [Special Marriage Act, 1954](#)**.

### What are the Issues Raised in Various Petitions?

- **Violation of Rights:** [Public Interest Litigation \(PIL\)](#) filed by two [LGBTQ+](#) couples arguing that the state's refusal to recognise them as married violated their constitutional rights.
  - **First Petition:** It was filed by a couple who have been together for almost a decade.
  - **Second Petition:** It was filed by a couple who have been in a relationship for 17 years and are raising children together. However, their **lack of marriage status indicates they cannot have a legal relationship with their children.**
  - **Other Petitions:** Some of the petitions seeking recognition of same-sex marriage under **India's 1954 Special Marriage Act (SMA)** are pending in state-level high courts in Delhi and Kerala.
- **Decriminalisation:** The recognition of same-sex marriage **followed earlier landmark rulings including one declaring [privacy a fundamental right](#) and another that [decriminalised homosexuality in 2018](#).**
  - In 2021 centre Government opposed same-sex marriage in the Delhi High Court stating that **marriage in India can be recognised only if it's between a biological man and a biological woman capable of producing children.**
- **Government's Stand:** The Centre government also stated that 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.**

### What is the Special Marriage Act (SMA), 1954?

- Marriages in India **can be registered under the respective personal laws** Hindu Marriage Act, 1955, Muslim Marriage Act, 1954, or under the Special Marriage Act, 1954.
- It is the **duty of the Judiciary to ensure that the rights of both the husband and wife are protected.**
- The Special Marriage Act, 1954 is **an Act of the Parliament of India with provision for civil marriage for people of India** and all Indian nationals in foreign countries, irrespective of religion or faith followed by either party.
- When a person solemnises marriage under this law, then the **marriage is not governed by personal laws but by the Special Marriage Act.**

## What are the Problems Faced by LGBTQ+ Communities in India?

- **Marginalisation:** LGBTQ+ individuals may experience multiple forms of marginalization - such as sexism, **poverty**, discrimination, social unacceptability or other factors - alongside **homophobia** or transphobia that negatively impact their mental health.
  - Often, such marginalisation **leaves LGBTQ+ people without access to the basic services** such as medical care, justice and legal services, and education.
- **Impact of Family Reactions on LGBTQ+ Children:** Rejection and serious negative reactions kept many LGBTQ+ youngsters from telling their parents about their feelings.
  - In a society bound by a rigid set of social and cultural norms that dictate the terms and conditions of education, career and marriage, the **lack of family support can prove to be a big blow to the mental and physical health of LGBTQ+ people.**
- **Problems of Terminology:** LGBTQ+ people are labelled with negative stereotypes and made fun of, thereby robbing them of their goal of getting recognition and making them feel socially excluded.
- **Socially Unrecognised:** School uniforms, dress code and appearance, access points for travel (including ticket booking forms, security screening and toilets) are often gendered.
  - Frequently, LGBTQ+ **individuals are forced to negotiate their gender identity in public while on public transportation.**
    - As a biological term, sex is always Male, female or transgender. However, **as a social category, gender may vary.**

## What is the Path to Legalisation?

- After India's Supreme Court decriminalised homosexuality, many have raised the question of **taking a step towards legalising same-sex marriage.**
- The SMA is a law that was passed originally to legalise interfaith unions. Now, **LGBTQ+ couples are arguing their marriages should be recognised under the SMA.**
  - Although **awareness about the LGBTQ+ community has increased in India**, there is still stigma and resistance to complete acceptance. So far, **33 countries around the world have recognized same-sex marriage and civil unions.**
- Along with not recognising same-sex marriages, Indian law does not provide for civil unions. Gay and lesbian couples are also **not allowed to have children born with the help of an Indian surrogate mother.**
  - An LGBTQ+ **person can apply to [Central Adoption Review Authority](#) for adoption only as a single parent.**

## What is the Status of Marriages in India?

- The right to marry is **not expressly recognised either as a fundamental or constitutional right under the Indian Constitution.**
  - However, same-sex marriage is also not legalized in India.
- 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.**

## How can Same-sex Marriage be Recognised Legally?

- Legality of same-sex marriages can be achieved using either of the following approaches:
  - Interpreting the current legislation in order to **legalise partnership unions of same genders lawfully.**
  - **Defining the LGBTQ+ culture as a separate category** and whose practices provide for relationships with the same genders.
  - **To legalise marriages between the same genders**, Special Marriage Act, 1954 can be amended.

## What can be the Way Forward?

- **Anti-discrimination Law:** 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 places the onus to change on state, society and the individuals also.
- **Elimination of Distinctness:** The introduction of same-sex marriage would help reduce these forms of prejudice against LGBTQ+ people because it would eliminate the official **“otherness” status** of LGBTQ+ people.
- **Full Scope of Rights:** 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.
- **Creating Awareness and Empowering LGBTQ+ Youth:** An open and accessible forum is needed so they feel recognized and comfortable sharing their feelings.
  - Platforms like Gaysi and Gaylaxy have helped carve out spaces for LGBTQ+ people to interact, share and collaborate.
  - The Pride Month and **Pride Parade Initiative** is also a good step in this direction.

## UPSC Civil Services Examination, Previous Year’s Question (PYQs)

### Mains

**Q.** Examine the scope of Fundamental Rights in the light of the latest judgement of the Supreme Court on Right to Privacy. **(2017)**

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