



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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