



Same Sex Marriage in India

For Prelims: [Same-Sex Marriage, Section 377, Indian Penal Code \(IPC\), Homosexuality, LGBTQ Community, Supreme Court, High Court, Constitution Bench.](#)

For Mains: Impact of Judgement of [Supreme Court](#) on petitions to [legalise same sex](#) marriage on social fabric and progress of Indian Society.

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Why in News ?

Recently, The [Supreme Court](#) has delivered its long awaited verdict **rejecting petitions** to legalise [same-sex marriage](#) and delved deeper on the provisions of [the Special Marriage Act, 1954](#) to examine the issue thoroughly, which have convergence and interrelationship with [homosexuality](#).

What is the Observation of the Supreme Court (SC)?

- **Against Constitutional Validity:**
 - A five-judge Constitution Bench of the apex court headed by [Chief Justice of India](#) ruled in a **3:2 verdict** against giving constitutional validity to same-sex marriages.
- **Domain Of Parliament:**
 - The CJI, in his opinion, concludes that the **court 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.**
- **Other Observations:**
 - However, at the same time, the **SC says the relationship of marriage is not a static one.**
 - **SC holds that** queer persons have an **equal right and freedom to enter into a “union”.**
 - **All five judges** on the Bench, agreed that **there is no fundamental right to marry** under the Constitution.

CJI and Justice Kaul (Minority Opinions): Favoured extension of **Civil Union** to same-sex couples:

- A '**civil union**' refers to the legal status that allows same-sex couples specific rights and responsibilities that are normally conferred upon married couples. Although a civil union **resembles a marriage, it does not have the same recognition** in personal law as marriage.

What is the Legality of Same-Sex Marriages in India?

- The right to marry is **not expressly recognized either as a [fundamental or constitutional right under the Indian Constitution but a statutory right](#).**
- 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.
- **Earlier Views of Supreme Court on Same-Sex Marriages:**
 - Marriage as a **Fundamental Right (Shafin Jahan v. Asokan K.M. and others 2018)**:
 - While referring to Article 16 of the [Universal Declaration of Human Right](#) and the [Puttaswamy case](#), the SC held that the right to marry a person of one's choice is integral to [Article 21](#) of the Constitution.
 - [Article 16 \(2\)](#) in the Indian constitution provides that there cannot be any discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them.
 - The **right to marry is intrinsic to the liberty which the Constitution guarantees as a fundamental right**, as the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty.
 - [LGBTQ Community](#) Entitled to all **Constitutional Rights (Navjet Singh Johar and others v. Union of India 2018)**:
 - The SC held that members of the LGBTQ community **"are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution"** and are entitled to equal citizenship and "equal protection of law".

What is the Special Marriage Act (SMA) 1954?

- **About:**
 - Marriages in India can be registered under the respective personal laws [Hindu Marriage Act, 1955](#), [Muslim Personal Law Application Act, 1937](#), 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** has provisions 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 solemnized marriage under this law, then **the marriage is not governed by personal laws but by the Special Marriage Act**.
- **Features:**
 - Allows people **from two different religious backgrounds to come together** in the bond of marriage.
 - Lays down the procedure for **both solemnization and registration of marriage**, where either of the husband or wife or both are not Hindus, Buddhists, Jains, or Sikhs.
 - **Being a secular Act**, it plays a key role in liberating individuals from traditional requirements of marriage.

What are the Arguments in Favour of Same Sex Marriage?

- **Equal Rights and Protection Under the Law:** All individuals, regardless of their sexual orientation, **have the right to marry and form a family**.
 - Same-sex couples should have the same legal rights and protections as opposite-sex couples.
 - Non-recognition of same-sex marriage **amounted to discrimination** that struck at the root of the dignity of [LBTQIA+ couples](#).
- **Strengthening Families and Communities:** Marriage provides social and economic benefits to couples and their families which will also benefit the same-sex people.

- **Cohabitation as a Fundamental Right:** The [Chief Justice of India \(CJI\)](#) acknowledged that cohabitation is a fundamental right, and it is the government's obligation to legally recognize the social impact of such relationships.
- **Biological gender is not 'absolute':** The Supreme Court of India says that **biological gender is not absolute**, and that gender is more complex than just one's genitals. There is **no absolute concept of a man or a woman**.
- **Global Acceptance:** Same-sex marriage is legal in many countries around the world, and denying this right to individuals in a democratic society goes against the global principles.
 - **In 32 countries, same-sex marriage is legal.**

What are the Arguments Against Same Sex Marriage?

- **Religious and Cultural Beliefs:** Many religious and cultural groups believe that marriage should only be between a man and a woman.
 - They argue that **changing the traditional definition of marriage would go against the fundamental principles of their beliefs and values.**
- **Procreation:** Some people argue that the primary purpose of marriage is **procreation, and that same-sex couples cannot have biological children.**
 - Therefore, they believe that same-sex marriage should not be allowed because it goes against the natural order of things.
- **Legal issues:** There are concerns that allowing same-sex marriage will **create legal problems, such as issues with inheritance, tax, and property rights.**
 - Some people argue that it would be too difficult to change all the laws and regulations to accommodate same-sex marriage.
- **Issues with Adoption of Children:** When queer couples adopt children, it can lead to **societal stigma, discrimination**, and negative impacts on the **child's emotional and psychological well-being**, especially in Indian society where acceptance of the LGBTQIA+ community is not universal.

What Could be the Way Forward?

- **Raise Awareness:** The purpose of awareness campaigns is to promote equality and acceptance of all sexual orientations and expand public opinion about the LGBTQIA+ community.
- **Legal Reforms:** Amendments in the **Special Marriage Act, 1954 to allow same-sex couples to legally marry** and enjoy the same rights and benefits as opposite-sex couples.
 - Meanwhile bring the contract like agreement so that homosexual people can enjoy similar rights like heterosexuals.
- **Dialogue and Engagement:** Engaging in a dialogue with religious leaders and communities can help **bridge the gap between traditional beliefs and modern attitudes** towards same-sex relationships.
- **Legal Challenges:** The Indian LGBTQIA+ community can challenge the constitutionality of the current laws that prevent same-sex marriage in court. Such legal challenges **can help establish a legal precedent** that will pave the way for the legalization of same-sex marriage.
- **Collaboration:** The legalisation of same-sex marriage requires a **concerted effort from all stakeholders, including the LGBTQIA+ community**, the government, civil society, and religious leaders.
 - By **working together**, we can create a more inclusive society where everyone has the right to love and marry whomever they choose, regardless of their gender.

UPSC Civil Services Examination, Previous Year Question (PYQ)

Prelims

Q 1. 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 2. Examine the scope of Fundamental Rights in the light of the latest judgement of the Supreme Court on Right to Privacy. **(2017)**

PDF Refernece URL: <https://www.drishtias.com/printpdf/same-sex-marriage-in-india>

