

# INACTION AND INTERVENTION: ON THE HANDLING OF SOCIAL ISSUES

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The [Supreme Court's decision to refer to a Constitution Bench](#) the issue of granting legal recognition to same-sex marriages can be seen as an important step towards ensuring gender equality, despite apprehension that it is encroaching on the legislative domain. Petitioners before the Court view the idea of giving of legal status for marriages between people belonging to the same sex as a natural consequence of the 2018 judgment decriminalising homosexuality. The government, however, contends that there is no need to depart from the heteronormative understanding of marriage. And even if there ought to be such a change, it must come from the legislature. The question before the Court is whether it should interpret provisions of marriage laws in India, especially the Special Marriage Act, 1954, as permitting marital unions between same-sex couples. The Act allows the solemnisation of a marriage between any two persons and is used by those who are unable to register their marriages under their respective personal laws. The Union government has argued that the decriminalisation of consensual relations between adults of the same sex has removed the stigma attached to homosexuality, but has not conferred the right of marriage. And that the state is entitled to limit its recognition to marriages involving heterosexual couples. There is no discrimination, it claims, in keeping same-sex couples out of the definition of marriage.

In terms of the equality norm, the central question is not very complicated. It can be recognised that no civil right available to married heterosexual couples ought to be denied to those who belong to the same gender. The incidental consequences on issues of property and succession may not pose insurmountable difficulties. The Centre's other argument, invoking religious norms and cultural values, against recognising same-sex marriages is weak and inadequate. It is futile to argue that it will undermine faith or rock societal values. The mere fact that many people consider marriage to be a sacrament or a holy union is not enough to deny equal status to the union of people of the same sex or to undermine its essential character as a social and economic contract. Whether the remedy ought to take the form of recognition of same-sex marriages, and, if so, whether it should be through judicial intervention or legislative action, is the question. That the legislature should be involved in bringing about far-reaching changes that may impact the personal laws of all religions is indeed an acceptable proposition. A responsive government that wants to treat this as a matter of policy and not cede space to the courts would act on its own to consider the right of any two people, regardless of gender, to marry or found a family. Legislative inaction on burning social issues will legitimise and invite judicial intervention.

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