



Statement on Legislative Inaction on Marriage Equality

The Central Government, in a filing before the Supreme Court in response to a number of petitions demanding marriage equality pending before the court, has argued that the legislature - and not the judiciary - is the competent authority tasked with deciding whether the right to marry should be extended to the LGBTQ+ community. The government has asked the court to decide on two questions to determine the validity of the admissibility of these petitions before the question of marriage equality is decided on its merits:

- 1. In view of the law-making power only being available with the competent legislature under Article 246 of the Constitution of India read with (Entry 5 List III) of VII Schedule of Constitution, can a constitutional court legislate to create a separate socio-legal institution of marriage between persons not contemplated by the existing legislation or interpret the existing legislation in such a way that it destroys the fundamental fabric of the existing legislations which necessarily presuppose a marriage between a biological man and a biological woman?*
- 2. While creating an institution like marriage, which is essentially a socio-legal concept, is it not constitutionally imperative to leave the question to the appropriate legislature which represent the democratic mandate, which would decide the issues based on societal ethos, societal values and larger societal acceptability in the Indian context of understanding of marriage as an institution?*

The question of whether the Supreme Court has the power to decide upon the creation of a separate institution of marriage must be deliberated upon by legal experts. However, the government's assertion that marriage equality is an issue "not contemplated by the existing legislation" is inaccurate at best and misleading at worst. While arguing that it is "constitutionally imperative to leave the question to the appropriate legislature which represents the democratic mandate," the government has conveniently ignored its own repeated attempts to prevent any discussions around marriage equality in parliament.

Since 2019, Pink List India has tracked the views of Indian politicians on LGBTQ+ rights. We have maintained an exhaustive record on our website, with individual report cards available for each elected representative in the Lok Sabha with their track record on LGBTQ+ issues - both within and outside parliament. Four separate instances demonstrate that parliament has failed to discuss the expansion of the definition of family, despite having had the opportunity to do so.

Questions in Parliament

In May 2008, Shahid Siddiqui of the RLD asked a question in the Rajya Sabha on whether the government intended to recognise same-sex marriage.¹ In December 2020, Derek O' Brien of the TMC asked a similar question in the Rajya Sabha.² In both cases, the government responded that it had no intentions to take any such steps.

The Surrogacy (Regulation) Bill

In 2018, concerns were raised around restricting queer couples (who are currently not eligible to adopt children in India) from becoming parents.

Kakoli Ghosh Dastidar of the TMC, Lavu Sri Krishna Devarayalu of the YSRCP, Sangeeta Kumari of the BJP, Hema Malini of the BJP, Anubhav Mohanty of the BJD, Gautham Sigamani of the DMK, Supriya Sule of the NCP, T Sumathy of the DMK, and Shashi Tharoor of the INC spoke out against the Surrogacy (Regulation) Bill while referring to the harm it causes to LGBTQ+ individuals in the Lok Sabha.

The then health minister, JP Nadda, and BJP MP Nishikant Dubey prevented further conversations on the issue by claiming that the bill was restricted to conventional understandings of a family. Anupriya Patel of the Apna Dal (Sonelal), who was the Union Minister of State for Health, defended the exclusion of single and gay people by saying, "A child needs a normal family, a mother and father."³

The Assisted Reproductive Technology (Regulation) Act

In 2021, MPs raised concerns around the bill failing to allow single men and LGBTQ+ couples from availing ART treatments.

Sangeeta Azad of the BSP, Karti Chidambaram of the INC, Adhir Ranjan Choudhary of the INC, Kakoli Ghosh Dastidar of the TMC, Hasnain Masoodi of the JKNC, Anubhav Mohanty of the BJD, Pratima Mondal of the TMC and Supriya Sule of the NCP specifically mentioned the violation of the rights of the LGBTQ+ community in the Lok Sabha. Their concerns were not met with a response from the government.⁴

¹ Government of India, Ministry of Law and Justice, Rajya Sabha Question No. 4059 by Shahid Siddiqui, Answered on 05/05/2008.

² Government of India, Ministry of Law and Justice, Rajya Sabha Question No. 586 by Derek O'Brien, Answered on 06/02/2020.

³ [Discussion on motion for consideration of the Surrogacy \(Regulation\) Bill, 2019.](#)

⁴ [Discussion on motion for consideration of Assisted Reproductive Technology \(Regulation\) Bill, 2020.](#)

Private Member Bills

In April 2022, Supriya Sule of the NCP introduced a private member's bill to bring about changes to the Special Marriage Act in favour of LGBTQ+ couples.⁵ In the same parliamentary session, Dr DNV Senthilkumar of the DMK introduced another private member's bill to enshrine rights to marriage, adoption, guardianship, surrogacy, and prohibition against discrimination at the workplace and in housing.⁶ Both bills have not yet been taken up for consideration by the Lok Sabha, and will most likely lapse before the term of the 17th Lok Sabha comes to an end next year.

This demonstrates that Parliament has been seized of the issue of marriage equality, of the challenges posed to the exercise of fundamental rights by LGBTQ+ citizens of India, and of the far-reaching ramifications the denial of recognition of marriage has for access to a range of other rights and privileges extended to cisgender heterosexual citizens of the country.

The government's stated desire to decide upon the question of marriage equality through deliberations in the legislature, therefore, is not accompanied by any demonstration of actual intent in allowing these deliberations from taking place in Parliament. This reflects a broader refusal of parliament to engage on questions around LGBTQ+ rights: between 2015 and 2016, two private member bills by Shashi Tharoor of the INC proposing the reading down of Section 377 were prevented from being introduced in the Lok Sabha.

In the face of legislative inaction, and a lack of demonstrable legislative intent, judicial recourse remains the only alternative available to the LGBTQ+ community in India to ensure both a protection of fundamental rights and an extension of recognition by the state.

To access Pink List India's archive on statements by Lok Sabha MPs, head to pinklistindia.com/pinksabha.

17 April, 2023.

⁵ [The Special Marriage \(Amendment\) Bill, 2022](#).

⁶ [Equal Protection of Rights for LGBTQIA+ Persons Bill, 2021](#).