

CONSTITUTIONAL CONUNDRUMS: A JUDICIAL ANALYSIS OF SAME-SEX MARRIAGE IN INDIA

Khushi Luniya* Gizelle Fernandes*

ABSTRACT

The present article covers the constitutional intricacies of the recognition of same-sex marriage in India. While the consensual same-sex relationship has been decriminalized in Navtej Singh Johar v. Union of India, the non-recognition of same-sex marriage is a burning constitutional issue. It has been observed that there is a conflicting judicial interpretation of fundamental rights available under Articles 14, 15, and 21 guaranteeing equalities, against discrimination, and liberty of person. Of recent memory, the ruling of the Supreme Court turned down the legitimization of same-sex marriage, while choosing to make the issue a matter for determination by the legislature. The approach urged here is one that ensures such tension can be controlled: that the judiciary takes up its role based on the Constitution while calling for reforms in the legislature to accommodate changing social realities. The article enforces the requirement of an inclusive legal framework toward LGBTQIA+ rights through a detailed examination of legal precedents, constitutional provisions, and societal challenges. The way forward will have to be through a collaborative effort by the judiciary, legislature, and society that ensures equality, dignity, and justice to every citizen of the state without any discrimination on the grounds of sexual orientation.

Keywords: Same-Sex Marriage, Constitutional Rights, Constitutional Conundrum.

INTRODUCTION

In a country of almost 1,452,381,757 people, according to data unveiled by the United Nations on August 11, 2024¹, the **law of the land** is of supreme importance as it governs the functioning of the nation and the livelihood of the common man. In India, the Constitution is a document

*BBA LLB, FOURTH YEAR, SHANKARRAO CHAVAN LAW COLLEGE.

*BBA LLB, FOURTH YEAR, SHANKARRAO CHAVAN LAW COLLEGE.

¹ 'World Economic Situation and Prospects 2024: Mid-Year Update' [2024] World Economic Situation and Prospects (WESP) 180

of apex importance as it sets the framework for the governance of the nation and protects its citizens against tyranny of any sort or kind.

Being the most populous country as of today, the livelihood of more than millions depends on this very book. Therefore, isn't it important for the Constitution to safeguard the basic fundamental rights of its citizens, as stated in its very own articles and provisions?

With more than half the population of the world dependent on its jurisdiction, the constitution of India has a huge role to play. It is therefore the duty of the Indian judiciary to make sure that its people are not marginalized. The non-recognition of same-sex marriages in India presents itself as a major constitutional conundrum in the country.

Ancient Hindu mythology depicts men changing into women, and characters of a third gender can be found in sacred writings. "Swarinis", a term used in Kamasutra often referred to lesbians who married each other and raised their children together. Similar visual representation can be seen in Madhya Pradesh where erotic sculptures showing sexual fluidity between homosexuals can be seen in the Khajuraho temple.²

However, a penal law was imposed in 1860 by the former British colonial rulers which came into force in 1862 as it was against the order of nature. This law made same-sex relations illegal and restricted marriage rights only to heterosexual couples. Since then, the LGBTQ community in India has faced marginalization and scrutiny from the public at large. The conflict of rights given in Article 14, Article 15 and Article 21 with the age-old tradition of iron-fisted customs and norms persists in the matter of same-sex marriage.

The constitution provides the citizens of India with a number of fundamental rights owing to the fact that we live in a so-called "**democratic nation**"³. Ironically, when it comes to the application of those rights in the real world, there are a number of loopholes that make the difference in achieving justice. The Constitution in theory guarantees a number of rights however in the practical application of those very rights the common man is in many cases left stranded on his own, to fend for himself. It is high time that we as a nation take time to

² Yadav, A. (2021) *A brief history of LGBTQ+ in India*, *The CBS Post*. Available at: <https://newsletter.sscbs.du.ac.in/a-brief-history-of-lgbtq-in-india/> (Accessed: 18 August 2024).

³ India, Constitution (adopted 26 November 1949, entered into force 26 January 1950) preamble.

introspect and ask ourselves whether the present scenario of justice in India, is what the original framers of the constitution truly wanted.

India is a country with a significant population and rich cultural heritage. However, on the global stage, it is often overshadowed by other countries due to our lack of social reforms. We as a country still have miles to go but nevertheless, we still seek importance in important matters pertaining to the world. A question we must all ask ourselves is what is holding us back? Why aren't we able to catch up with other countries on the global stage? What is it that we lack?

In today's date and time, internationally there are currently 36 countries where same-sex marriage is legal. However, if seen nationally the current India has been keen to shake off India's colonial baggage, renaming streets and cities and trying to create an India in charge of its own destiny. However Victorian laws governing same-sex marriage are still retained in India. It is nothing but the age-old mentality that is stopping us from moving on and up to par with other nations across the world.

A five-judge Bench of the Supreme Court on Tuesday, **October 17th 2023**, in a 3:2 verdict ruled against legalizing same-sex marriage in India leaving it up to the legislature to decide if non-heterosexual unions can be legally recognized. India's Supreme Court refused a bid to make same-sex marriage legal.⁴

In contradiction to this, in the case of **Shafin Jahan v Asokan KM (2018)**, 16 SCC 368, AIR 2018 SC 1933⁵, The highest court ruled unequivocally that the freedom to wed the person of one's choosing is guaranteed by **Article 21**⁶. In this case, the court held that choices in matters of marriage lie within an area where individual autonomy is supreme.

Therefore, in reality, it is evident that the deficiencies in the adjudicating authorities of India have widened the gap between the **ideal** and **reality** and it becomes more evident with each passing day.

⁴ Constitution of India (2023) Wikipedia. Available at: https://en.wikipedia.org/wiki/Constitution_of_India (Accessed: 31 October 2023).

⁵ 16 SCC 368, AIR 2018 SC 1933

⁶ Article 21, THE CONSTITUTION OF INDIA 1950

This article delves into the complex constitutional conundrums surrounding same-sex marriage in India, providing a comprehensive judicial analysis of the subject.

“**Love is Love,**” this phrase holds an eloquent and powerful impact on today’s generation, be it for any type of love.

The document lays down the framework that demarcates the basic structure, structure, procedures, powers, and duties of government institutions and sets out fundamental rights, directive principles, and the duties of citizens, based on the proposal suggested by M.N. Roy. It is the longest-written national constitution in the world⁷. The Indian Constitution, adopted in 1950, lays the foundation for the nation's legal and political framework. It enshrines fundamental rights and principles that are intended to safeguard individual liberties and ensure equal protection under the law. In the context of same-sex marriage, several constitutional provisions and landmark judicial decisions play a pivotal role.

Article 21⁸ - Right to Life and Personal Liberty: The Indian Constitution provides the right to life and personal liberty under Article 21. Over time, the judiciary has broadened this right to include the rights to privacy, dignity, and personal autonomy. These interpretations became known as the foundation for recognizing individuals' right to choose their life partners, regardless of gender. The Special Marriage Act (SMA) violates the right to dignity and decisional autonomy of LGBTQIA+ persons and by doing so contravenes Article 21⁹

Article 14¹⁰ - Equality Before the Law: Article 14 of the Constitution guarantees the right to equality before the law and equal protection under the law. It forbids discrimination for a variety of reasons, including gender. Arguments in support of same-sex marriage frequently depend on Article 14 to suggest that limiting marriage rights to LGBTQIA+ individuals constitutes sexual orientation discrimination.

Article 15¹¹ - Discrimination: Article 15 expressly outlaws discrimination based on religion, race, caste, sex, or place of birth. While the term "sex" has generally been used in the context

⁷ Constitution of India (2023) Wikipedia. Available at: https://en.wikipedia.org/wiki/Constitution_of_India (Accessed: 31 October 2023).

⁸ Constitution of India 1950, art 21

⁹ Reliance was placed on *Shakti Vahini v. Union of India*, (2018) 7 SCC 192

¹⁰ Article 14, THE CONSTITUTION OF INDIA

¹¹ Constitution of India 1950, art 15.

of gender-based discrimination in this article, it has also been used in arguments for LGBTQIA+ rights, underlining that discrimination against same-sex couples is prohibited.

In the case of **Shafin Jahan v. Asokan K.M. (2018)**¹², the Supreme Court recognized the right to marry as integral to Article 21. The court held that the right to marry a person of one's choice is a fundamental right, underscoring the importance of individual autonomy and personal liberty.

In the landmark judgement of **Navtej Singh Johar and others v. Union of India (2018)**¹³, consensual same-sex relations were decriminalized and the case emphasized that members of the LGBTQIA+ community are entitled to the full range of constitutional rights. The judgment affirmed equal citizenship and equal protection of law for LGBTQ individuals.

THE CONUNDRUM

Same-sex marriage is a complex issue in India that presents a number of constitutional conundrums. The central question in these quandaries is whether the current constitutional framework sufficiently recognizes the rights of LGBTQIA+ people and their freedom to marry the person of their choice.

A significant precedent was set by the Shafin Jahan case¹⁴, which recognized the right to marry as a basic right. The recent ruling by the Supreme Court regarding same-sex marriage, however, made it clear that the Constitution does not grant any basic right to marriage. The inconsistency between the two court cases and its decision emphasizes the necessity of a thorough and cogent interpretation of fundamental rights when it comes to same-sex relations.

The recent ruling by the Supreme Court, which highlighted that state legislatures and Parliament should draft rules pertaining to same-sex marriage, raises concerns over the division of powers. It is the duty of the judiciary to shelter the fundamental and essential rights of its citizens, it is upon the legislatures of the state and Union to formulate laws and statutes keeping in mind the basic structure of the constitution and its essence. It is a necessity to form the proper balance between the two branches of government when it comes to the protection of the citizens or laws regarding same-sex marriage.

¹² 2018 SCC OnLine SC 201

¹³ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

¹⁴ Shafin Jahan v. Asokan K.M and Ors., (2018) 16 SCC 368.

Equal protection under the law is guaranteed under Article 14. However, arguments against same-sex marriage frequently rest on cultural norms and traditional beliefs, and this leads to questions about how to deal with the conflict of an individual right versus the societal norms and values. The difficulty lies in making sure that religious or cultural beliefs do not get in the way of equal protection. It should also be not forgotten that many customs and beliefs were added and subtracted to enrich so as to fulfil a citizen's needs in accordance with the current needs of the world. If these customs had not been changed, we would still be practising *sati pratha*, *Ghoonghat system*, child marriage, patriarchy and other atrocious customs of India. It is to be noted that change is the only constant and religious beliefs should not hinder those changes that are meant in *bona fide*.

The judiciary's recognition in the latest verdict of the right to privacy is a key component in the case of same-sex marriage. It emphasizes the value of individual freedom of choice and autonomy in private affairs. However, the question of whether this right extends to same-sex marriage remains a subject of debate, with some arguing that it should be limited to consensual sexual relations.

The Special Marriage Act, 1954 adds yet another level of complexity to the constitutional puzzle. This Act supports a secular foundation for marriage by permitting marriages between people of various religious origins and without being subject to personal laws. Nonetheless, same-sex weddings are not specifically addressed by the Act. Consequently, the question of whether a new statutory framework is required or if the term "same-sex" or something similar should be added to the act.

Encouraging marriage between individuals from different religious origins, the SMA's¹⁵ inclusion is in line with the secularism and equality provided in the Indian Constitution. Nonetheless, there is a legal vacuum created by the Act's silence about same-sex unions. The dilemma is how to acknowledge same-sex unions with the Act's secular orientation.

Another conflict could arise in relation to whether a new act altogether must be legislated or there must be favourable amendments in the act itself. Amending the act could be a quicker route but forming a new legislation shall give an in-depth knowledge of the dos and don'ts.

ARGUMENTS FOR THE SAME-SEX MARRIAGE

¹⁵ THE SPECIAL MARRIAGE ACT, 1954

From a judicial standpoint, the petitioners of the case cite constitutional precepts and prior case law. These arguments stress the necessity of affirming LGBTQIA+ people's rights and bringing Indian legislation into line with changing international norms.

Court decisions emphasize LGBTQIA+ people's legal entitlement to equal protection, as the Navtej Singh Johar case demonstrates. Refusing same-sex couples the chance to marry could be seen as discrimination against the principles of Article 14.

The recognition of the freedom to marry as a fundamental right in the Shafin Jahan case is one compelling argument in favour of same-sex marriage. The provided right strongly prioritizes personal freedom and the ability to choose a life partner of any gender. International Human Rights Law Proponents argue that India should adopt international norms since same-sex marriage is permitted in many other countries. One could claim that denying same-sex couples the opportunity to be married violates their international human rights standards.¹⁶

Same-sex marriage is viewed as a way to provide inclusivity within the legal system and acknowledge the diversity of human relationships. It is the judiciary's responsibility to make sure that the law adapts to the ever-changing social environment.

Defending the liberty, equality, and dignity inherent in the Constitution is the major claim made by proponents of same-sex marriage. These ideals transcend gender and sexual orientation, and it is the responsibility of the judiciary to uphold them.

ARGUMENTS AGAINST SAME-SEX MARRIAGE

Even in the judiciary, opponents of same-sex marriage present a number of reasons that draw attention to the difficulties and complications surrounding this matter.

Judges who have misgivings about same-sex unions frequently cite religious and cultural traditions that define marriage as a partnership between a man and a woman. They contend that changing this conventional meaning is incompatible with core values.

Some judges contend that same-sex couples cannot naturally have children and that having children is the main reason for marriage. They argue that since same-sex marriage departs from the conventional definition of marriage, it should not be permitted.

¹⁶ Supra 1

Arguments against same-sex marriage include worries about public acceptance and possible discrimination against same-sex couples, particularly in a culture where the support of the LGBTQIA+ population is not universal. Judges who hold this opinion might contend that society's readiness ought to be taken into account.

One legitimate worry is the difficulty of modifying legal systems to allow same-sex marriage. If same-sex marriage were allowed, judges could have misgivings about the possible legal problems and administrative obstacles that might occur.

THE WAY FORWARD

In India, the constitutional dilemma of same-sex marriage must be resolved with a careful and thoughtful approach. Although the judiciary has a significant influence on how laws are made, larger social and legislative factors must also be taken into account.

The goal of the judiciary should be to interpret fundamental rights in a way that is clear and consistent. Hence, life and liberty as well as the basic structure of Equality should not be forgotten. While acknowledging the value of individual liberty and the freedom to be married, it is imperative that these rights be safeguarded free from prejudice based on sexual orientation.

Conversations and well-structured debates with religious authorities, communities, and the general public can aid in helping the public understand the plights and psychology of the LGBTQIA+ community. Increased acceptance and understanding of LGBTQIA+ people can be fostered by this conversation. The LGBTQIA+ community in India may keep arguing that the current laws prohibiting same-sex marriage are unconstitutional. New laws are to be made by the legislature wherein same-sex marriage should be given the same status as traditional marriages. Necessary legal reforms should be initiated thus closing any loopholes.

All parties involved in the process, including the LGBTQIA+ community, the government, civil society, and religious leaders, must work together to make same-sex marriage legal. Working together can contribute to the development of a more accepting society in which everyone is free to love and marry the person of their choice, regardless of gender or sexual orientation.

CONCLUSION

The intricacies involved in striking a balance between legal frameworks, community norms, and individual rights are reflected in India's constitutional dilemmas surrounding same-sex marriage. The difficult task of interpreting the Constitution in a way that guarantees everyone has equal protection under the law falls on the judiciary and the creation of new legislation falls on the legislative body. The quest for justice and equality for the LGBTQIA+ community is still the judiciary's duty to defend constitutional values, even though the latest Supreme Court ruling emphasizes the need for the legislature to address this issue.

Going forward, a comprehensive strategy that considers the changing social environment as well as the requirement for same-sex partnerships to be recognized and protected by law is necessary. Collaboration, communication, legislative changes, and ongoing attention to the constitutional dilemmas that influence same-sex marriage in India will be necessary to strike this balance. The legal institutions of the country must continue to defend the values of liberty, equality, and dignity as the country develops and make sure that these values apply to every citizen, regardless of sexual orientation.

