

A tale of people's Constitution: Recognition of same sex marriage in India

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June 11, 2023



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Part III of the Indian Constitution contains a list of Fundamental Rights guaranteed to its citizens and in some cases persons, for an equal and dignified life. The nature of these rights is conditional and distributed equally among the '[legal equals](#)'. The concept of legal equals is based on the premise that all right bearing individuals of the State are equal in the eyes of law. Additionally, [Article 15\(1\)](#) of the Constitution prohibits any form of discrimination only on the grounds of sex, religion, race, caste, place of birth, or any of them. Notwithstanding this, India's constitutional history portrays a puzzling picture of the understanding and action of the State and its institutions with respect to the concept of equal citizens. Historically, the Judiciary, the guardian of rights, has time and again stood in a complex position when it comes to protection of the rights of individuals from the State. The scenario further complicates with the dual purpose of fundamental rights which simultaneously secures

individual as well as group rights. Debates over a similar dilemma of balancing the rights of individuals and the group commenced in the country with the hearing on the 'Constitutionality of Same-sex marriage' before the five membered Constitutional bench of the Apex court on 18th April 2023.

Although the petitions were filed under the [Special Marriage Act, 1954](#) seeking legal recognition of the marital relationship between two equals belonging to the same sex, the fundamentals are guided by [Article 21](#) which envisages a life with dignity for each citizen. The story of recognition of same sex marriage or marriage equality, stems from a landmark judgment of the Supreme Court's constitutional bench in [Navtej Singh Johar v. Union of India](#), when the Apex Court in 2018 unanimously read down [Section 377 IPC](#) which criminalized sexual acts between consenting adults as standing in violation of [Article 14](#), [15](#), [19](#), and [21](#) of the Constitution. Under this pretext, the plea was to recognize their right to be part of a socio-legal institution – marriage. The objections from the State arrived on [three grounds](#): *first*, it was argued that the matter of recognizing same sex marriages rests under the jurisdiction of the competent legislature, not the judicature. *Second*, 'Popular will' recognizes marriage between heterosexual persons, and marriage equality is an elitist concept. *Third*, marriage is not confined to the private sphere and hence, it requires societal recognition.

Few observations could be made in the light of this debate. *First*, there is no doubt that the task of legislation belongs to the purview of the legislature. However, when the legislature seems apathetic towards the rights of a section of the citizenry, who in the eyes of the Constitution are equal rights bearing individuals, to the extent that it hampers their right to live a dignified life, it is their constitutionally granted right to seek remedy in front of the judiciary.

Second, the essence of Fundamental Rights crumbles, when the State leaves the fate of the rights of a section of the citizenry to popular will. This approach essentially differentiates the interest of 'the minority' by categorically excluding them from the popular will of 'the majority'. Additionally, it is irreconcilable with the Fundamental Rights, as the Constitution unequivocally secures rights against any form of discrimination breaded by the existing structures where all the legal equals are placed. The Constitution not only recognizes the rights of the citizens against a sovereign State but also against the existing structural evils like caste, race, sex, religion that feeds unequal power relations. A Constitution which has encompassed individuals as the fundamental unit of the rights, should not ideally leave the fate of individual's rights to the majority.

Third, the notion of marriage equality being an elitist concept is an incompatible presumption. Under this assumption, marriage which is purportedly integral to Indian social construct would be prima facie rendered discriminatory. Additionally, such discriminatory notion is irreconcilable with Article [15\(1\)](#) of the Constitution which prohibits any form of discrimination propagated by social institutions. *Fourth*, the State is correct in mentioning that marriage requires societal recognition as it is essentially a social institution. This is precisely where the State holds a duty towards the individuals not falling under the purview of existing marital laws to step in and provide legal recognition 'to marry' for this section of the citizenry.

The [Directive Principles of State Policy](#) requires the State to promote a decent standard of living for all its citizens ensuring social justice and minimizing inequalities. The argument of the State in the present case about marriage-equality becomes counterproductive to the fundamentals of the Constitution which about seven decades ago recognized social rights for all citizens by actively discouraging discriminatory practices such as race, caste, patriarchy, to name a few. The resistance of the State to same-sex marriage or marriage equality essentially stands as a paradox to the transformative vision of the Indian Constitution.

Granville Austin in his grand gesture, regarded the Constitution as a meeting point of the Rights and Principles in pursuit of a social revolution. The General Assembly members envisioned a State that not only replaced a colonial logic of governing and administering, but also freed the population from the shackles of legacies of injustice. Although Indian judiciary's equality jurisprudence had endorsed a formalistic approach since [Champakam Dorairajan](#), and more than six decades later Delhi High Court in [Naz Foundation](#) and [Anuj Garg](#) upheld a substantive approach to equality. Rather than rationally justifying differential treatment of individuals and communities, the Court in the aforesaid cases viewed inequality as discrimination arising out of denial of inclusivity and human dignity. It is against this differential premise that the spirit of constitutional morality is evoked and the case of marriage equality must be re-modelled to accommodate rights of all equals by the State and its institutions in India.

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