

Same-sex marriage: Caught in debate between judicial overreach and judicial restraint in India

It is indeed intriguing to question how Nepal and India, despite similar cultural realities, have displayed contrasting interpretations.

By Harsh Mahaseth and Ananya Soni Oct 29, 2023



Same-sex marriage (Representational Photo)

Five years after the Supreme Court of India struck down the colonial-era criminalization of gay sex, it has now turned and refused to interfere with the process of legalizing same-sex marriages, while concluding that the issue must be tackled by the country's legislature.

It has been observed that traditional values still play a dominant role in Asian politics and policy-making, which may be attributed to the delay in the adoption of LGBTQIA+ rights. Currently, only Taiwan (since 2019) and Nepal (since 2023) recognize same-sex unions in Asia.

In their ruling, the Supreme Court of Nepal ruled that under the Nepalese Constitution and the international conventions, LGBTQIA+ people are entitled to the same rights as heterosexual people. The Court observed that an individual's gender identity and sexual orientation are protected by their right to privacy, by extension of which it was held that it was violative of their right to privacy to deem their sexual behaviour to be unnatural. The Court also ordered the establishment of a special committee, which was tasked with advising the Nepalese government on the adoption of suitable legislation. The verdict of the Supreme Court has also called for the creation of a "transitional mechanism", to facilitate the registration of weddings of gender and sexual minorities, while additionally directing the executive to establish a separate and specific register of marriages for heterosexual and homosexual couples respectively.

Only 1,140 km away, the Supreme Court of India's five-judge bench unanimously ruled against legalizing same-sex marriages by holding that the constitution provides no fundamental right to marry, and in a 3:2 verdict, ruled against civil unions for non-heterosexual couples. The bench unanimously also turned down the challenge posed to the provisions of the Special Marriage Act, of 1954. Four of the five judges wrote separate judgments, which is no real testimony to the complexity of the case.

Contrast with Nepal

The Chief Justice of India (CJI), D Y Chandrachud, noted that the court is not empowered to make the law, and it can only interpret it and give effect to it. In light of the same, the apex court left it to a panel suggested by the Indian government to address the human concerns of same-sex couples, while recommending that the

panel consider providing same-sex couples access to facilities such as joint bank accounts and pensions. The Court stressed that same-sex unions must not be discriminated against. This ruling indicates that people belonging to the LGBTQIA+ community can now engage in relationships without the fear of legal repercussions. However, it is also important to note that they have no legal status in terms of other crucial matters such as succession, inheritance or even hospital visitation rights.

It is indeed intriguing to question how Nepal and India, despite similar cultural realities, have displayed contrasting interpretations. A possible attempt to solve the dilemma can be made by examining the political landscape and leadership in both countries. Nepal has witnessed more proactive support for LGBTQIA+ rights by its leadership, contributing to a more progressive interpretation of these laws, while India, on the other hand, grapples with variations in political and legislative will.

The Indian judiciary brought back the principle of separation of powers to the nerve centre throughout its verdict, one such instance being when it was said that, “we are deeply conscious, that no matter how much we empathize with the outcome sought, the means to arriving at such a destination, must also be legally sound, and keep intact, the grand architecture of our Constitutional scheme. For if we throw caution to the wind, we stand the risk of paving the way (wherein each brick may feel justified) to untold consequences that we could not have contemplated. While moulding relief, as a court we must be cognizant that despite being empowered to see the capabilities of the law in its grand and majestic formulation, we must not be led aground because we are blinded, by its glow.”.

At this juncture, it is crucial to question whether what the judiciary feared was truly judicial overreach, or merely judicial interpretation in the context of a highly political environment. In the past, whether it be legalizing gay sex, changing the legislative position on adultery, or large issues of privacy and surveillance, the Courts have taken action and passed orders under the abstraction of judicial activism. Notably, in the landmark ruling of *Indira Nehru Gandhi vs Raj Narain*, interestingly of which Chief Justice of Chandrachud’s father was a part, the apex court observed that “in the Indian Constitution, there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution does not apply to India.”. Yet, in other instances, much like the ruling against same-sex marriage, the courts have asserted that the principle of separation of powers is part of the basic structure of the Constitution of India.

Inconsistency in stances

To the critics, judicial activism is the encroachment into the other organs of democracy. To its defenders, it is dynamism and interpretation. To the cynics, currently, it appears that the concept is a tool available to be moulded at the convenience of the judiciary. The inconsistencies in the stances taken by the judiciary highlight the need for a textual incorporation of judicial activism into the Indian Constitution, to ensure that it is fixed in meaning and applicable uniformly at every distinct instance.

Back in 1996, former CJI AM Ahmadi had said, “This is the reason why the court has had to expand its jurisdiction by, at times, issuing novel directions to the executive; something it would never have resorted to had the other two democratic institutions functioned in an effective manner. However, by virtue of the fact that the present situation is a corrective measure, the phenomenon of judicial activism in its aggressive role will have to be a temporary one”.

In 2023, the Indian judiciary has placed its faith and the fate of its citizens in the hands of parliament. One awaits the people’s verdict on whether the judiciary’s decision proved just, and this verdict, like many instances in history, lies in the hands of time.

(Harsh Mahaseth is an Assistant Professor and Assistant Dean (Academic Affairs) at Jindal Global Law School, O.P. Jindal Global University, India. Ananya Soni is a law student at Tamil Nadu National Law University of Law, India. Views are personal.

Read more at: <https://www.southasiamonitor.org/spotlight/same-sex-marriage-caught-debate-between-judicial-overreach-and-judicial-restraint-india>