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AVANTIKA PUBLIC POLICY & LAW REVIEW

SCHOOL OF LAW AND PUBLIC POLICY

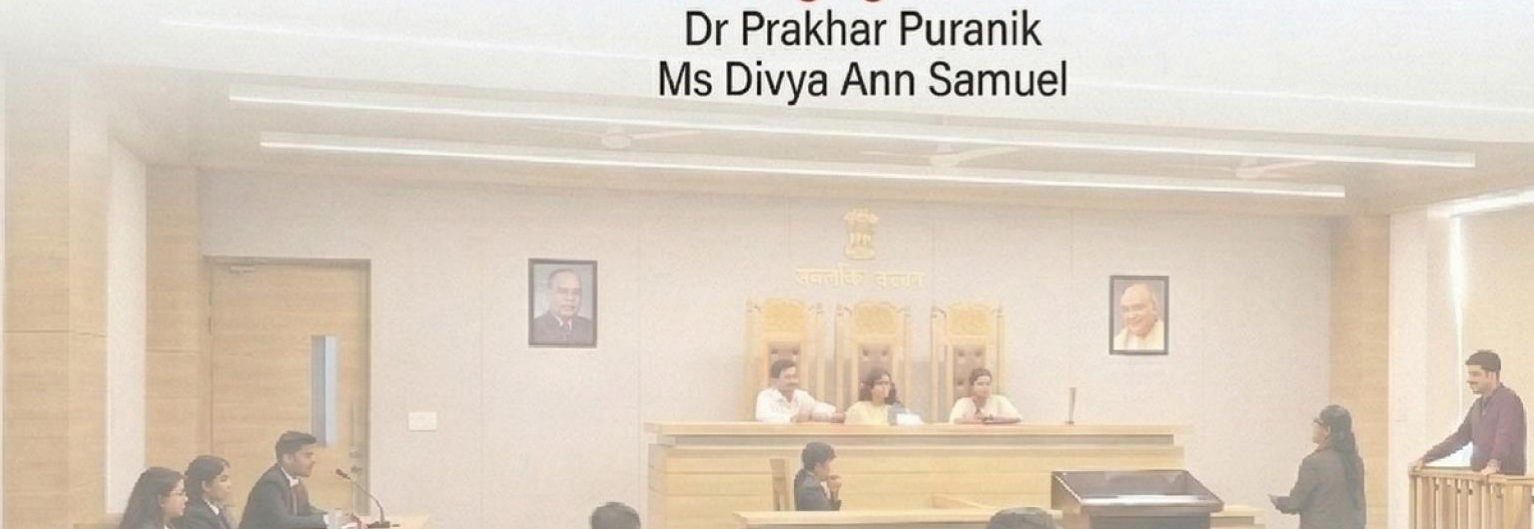
VOLUME 01, ISSUE 01
(November/December 2025)

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Legal recognition of same-sex marriage in India: Constitutional Rights and Social Realities

- Saanjh Inuganti

Introduction

Marriage has been a fundamental part of society for a long time. While the institution of marriage has a different meaning as per various religions, depending on their values and customs, what remains universally common is its societal, customary, and multigenerational nature. Thus, there is no standard definition of marriage, and it may be interpreted differently.

Marriage has largely and commonly happened between two people of the opposite sex. When a sacred practice has been accepted for a long period of time by many people, the idea of something new that may eventually threaten its course will always be questioned, and maybe even create a stir. So too is the concept of same sex marriage, as parties in a marriage have been viewed as a male and a female so widely that the concept of two people of the same sex coming together in a matrimonial relationship may seem odd or unwelcome.

Largely, this is because marriage is a fundamental unit in society. It upholds multilingual traditional roots, values, and cultures. Bringing any amendment to something this morally important to society may, in the long run, be harmful.

On the other hand, practitioners of same-sex marriage may say otherwise, as it violates various articles of the constitution, their fundamental rights, for them to be an integral part of an individual's life, to be included in the ambit of marriage by broadening the definition of a "husband" and "wife," etc.

Traces in India

The notion of queer is rejected because it is seen as a fresh concept rather than an already existing one, now emerging in the spotlight. While it is strongly contested that homosexuality is one of the outputs of westernization, which was introduced in the Indian territory from the 21st century onwards, we can find references of its existence in Vedic literature of Hindu Mythology. Some instances include:

- a) **Mitra and Varuna**¹- They were Vedic deities depicted as intimate companions with texts of *Shatapatha Brahmana* describing symbolic acts of same-sex union in lunar phasis². Their stories include non-vaginal penetration (with scriptures of the same found), such as fathering children through alternative means, in the modern world known as surrogacy.
- b) **Sculptures and Temples**³- Carvings at various historic sites, such as the famous Khajuraho, depict intimate acts between same-sex couples.
- c) **Trtiya Prakrti**⁴- The *Kama Sutra* acknowledged the third gender individuals along with same sex couples, their relationships, appearances, orientation, and roles in society. In the ancient text, same-sex unions are mentioned as bonds of love and trust, with examples of third gender individuals marrying one another.
- d) **Mythological Figures**- Mythological figures such as *Shikhandi*, who is a gender changed warrior in the Mahabharata⁵, *Bhagiratha*, known to be born from the union of two women, etc⁶.

While it may not be clear if marriages between homosexual couples existed earlier, these figures and characters make it certain that homosexuality has been a part of Indian history as well. However, it has been forgotten or remained unknown because there may have been a shared taboo since then for recognizing them, resulting in their deaths as a form of honor killing.

This shows that some fights have consistently been silent amongst other battles.

Constitutional Rights

By not granting same-sex couples the right to marry, the court is discriminating them based on their sexual orientation and gender identity. Marriage, being a vital and celebrated part of life, must not be discriminatory in nature but a choice accessible to all. Right to marry in words isn't specified in any legislation however it may be interpreted by using various articles of the

¹ Bhagavata Purana (6.18.3)

² Shatapatha Brahmana (2.4.4.19)

³ Erotic Sculptures of India by Devangana Desai/ Kama Sutra

⁴ Tritiya-Prakriti: People of the Third Sex by Amara Das Wilhelm

⁵ Mahabharata, Vana Parva, Section CLXIV/ Shikhandi and Other Tales, They Don't Tell You by Devdutt Pattanaik

⁶ Kritivasi Ramayana, pg. 22-33, titled Born to Two Mothers, The Hero Bhagiratha by Ruth Vanita

constitution such as Article 21 right to life with dignity⁷ by choosing a partner (for a person, a dignified life may begin once they get married to someone of their choice), 19(1)(a) freedom of speech and expression⁸ and 19(1)(e) freedom to reside and settle⁹. Article 21¹⁰, not being specific, leaves enough room for interpretations such as these or otherwise. The term “expression” in article 19(1)(a)¹¹ can be interpreted as sexual orientation or expression. These provisions indirectly conceptually address the right to marry. Additionally, not recognizing same-sex unions for marriage deprives them of their other rights, such as property, adoption, maintenance, etc., which can be granted through a marital relationship only.

Constitutional Remedies

1. **Social acceptance:** How can a homosexual couple, if granted the right to marry, live in a society that doesn't accept it? It would make the life of the couple and their kid (if they choose to have one) more challenging than it already is. Expecting the majority to change their views on marriage and become inclusive overnight is rather impractical. These thoughts and opinions may have been carried for years, and bringing any kind of change takes time. In a society where females have existed for the longest period with males, there still exists gender inequality and discrimination; for a third gender and same-sex couple to get married and be accepted on a whim by the same society is too much to expect. Thus, now may not be the right time to legalize the marriage between same-sex couples. In the future, if society develops a tolerant temper and accepts this change, then it can be a matter of consideration.
2. **Procreation and Technological Advancements:** Historically, marriage has been a sacred union between a male and a female for the purposes of companionship and procreation. While same-sex couples can fill the need of companionship, they falter when it comes to procreating since they cannot naturally do so. They will be dependent on technology. We haven't advanced in the technological sphere to such a point that we can completely depend on it for procreation. Additionally, being dependent on technology for a fundamental process doesn't fulfil the purpose of human potential.

⁷ The Constitution of India, Article 21, 1950

⁸ The Constitution of India, Article 19 (1) (a), 1950

⁹ The Constitution of India, Article 19 (1) (e), 1950

¹⁰ Id

¹¹ Id

3. **Universal stance:** Nature would have never made procreation possible between a male and female if it didn't intend to. It could have naturally made us asexual, like many species, or made only one sexually developed being; however, it evolved in a way that only a blend of male and female would be able to create. Additionally, it has been scientifically proven that for the best upbringing of the child, the need for a masculine and firm figure is important.

Conclusion

The LGBTQIA have paved the way to new insights and consistently emphasized the principles of inclusivity, protection of rights, and freedom in India. The courts repeatedly recognize the rights of LGBTQIA+ couples and have made multiple reforms over the short course of time ever since they've come into the limelight. Thus, slowly but steadily, changes are being made. However, amendments are required in a sphere as complex and socially intertwined as marriage in the Indian society. It will take more discussions, debates, but more importantly, the right time for same-sex couples to gain legal recognition for a married relationship. If these queer couples have a future painted in color or grey, is the question that remains unanswered.