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UNIVERSITY



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:

Right to Equality & Non Discrimination.

Author name – PV Vishruth

The notion of homosexuality within India has long been linked to the influences of Western civilization, often portrayed as an outcome of the expanding sway of Western culture in the Indian sphere. Yet, as we delve deeper into the epics of ancient India and their connections to homosexuality, we come to realize that it is not solely derived from one region but has flourished across various parts of the world. The Indian subcontinent boasts a vibrant heritage of same-sex relations embedded in its traditions, sculptures, texts, and epics. In the tale of King Bhagiratha, named after the union of two widows (each representing a bhaga, or female organ) of King Dilipa, blessed by Lord Shiva. As we uncover further evidence through more stories, the abundance appears endless. However, in the modern era particularly following British rule and its imposed laws the acceptance of same-sex relationships has fragmented. From India's once vivid and dynamic history to the shift into a post-colonial landscape that rigidly embraced orthodox Christian perspectives viewing homosexuality and same-sex relations as sinful, the contemporary world appears split into two clear camps. One advocates for same-sex relations, envisioning a harmonious society where individuals enjoy the freedom to choose their desires and stand firm in their beliefs. The other aligns with conservative ideologies, rooted in religious doctrines and the enduring traditional institution of marriage that has persisted for generations. This divide raises a profound question for society at large: Do we need to amend pre-existing laws and institutions to grant a specific group the same rights as others, or should we cling to the status quo? Do we dare to challenge and overhaul current statutory frameworks, or do we prioritize safeguarding the rights of *same-sex relations*?

I. Understanding Same Sex Relation/Marriage

As commonly perceived, same-sex relations extend far beyond the simplistic idea of individuals of the same gender entering intimate bonds, for instance, two men in a close partnership or two women in a committed union. It encompasses a wide array of people with diverse orientations, socio-political perspectives, and fluid identities. Often labeled an amorphous community, it persistently confronts the rigid records of conservative school of thoughts. In doing so, it boldly challenges entrenched societal norms while demanding honor for personal choices. Members of this community do not confine their identity to biological markers instead; they affirm the psychological essence of sexual orientation and individual preference.

Same-sex relations are frequently misconstrued as a byproduct of modern liberal and political movements, yet they have been intricately woven into various cultures and societies throughout history. The varying ways in which individuals express and identify themselves contribute to a lack of uniformity within the community itself, fostering an ambivalent stance for the state in addressing their needs effectively.

The full range of same-sex relations falls under the umbrella label of LGBTQ+, where each letter signifies a distinct sexual orientation: L for Lesbian, G for Gay, B for Bisexual, T for Transgender and Q for Queer. The '+' symbol underscores that the group is inclusive but not exhaustive, incorporating terms like intersex and asexual, etc. This is a multifaceted concept that demands a nuanced grasp of gender and sexuality as integral facets of human existence. Globally, the LGBTQ+ community has advanced significantly toward social acceptance. In India, the journey has been protracted, with the judiciary often stepping in to champion the community's cause.

II. Background of Same Sex Relation

The idea of same-sex relations has echoed through historical periods, from the mythological figure Shikhandi, who underwent a gender transformation, to textual references in the Kama Sutra acknowledging the "third sex" (tritiya-prakriti) as an accepted practice, without ever explicitly banning existence beyond conventional gender boundaries. Numerous Hindu temples feature carvings illustrating men and women in sexual acts with the third gender, known as Hijra.

Countless instances depict Hindu deities and figures shifting forms across genders.

The emergence of prominent figures in the realm of same-sex relations, such as Jeremy Bentham and Thomas Cannon, who vocally opposed state and societal oppression that restrained expressions of sexuality, further enriches this narrative. Individuals like Jean-Jacques-Régis de Cambacérès are credited with France's pioneering move in 1791, becoming the first nation to decriminalize homosexuality.

III. Legal Recognition in India

As noted earlier, ancient Indian societies actively embraced and never forbade same-sex relations or marriages; this changed dramatically with the arrival of the British Empire. Despite the vocal inclusivity of Indian culture toward homosexuality, the subcontinent was now subject to British codes. Statutes molded for Britain's social fabric were imposed in India with minimal adaptation, failing to align with the region's demographic and cultural realities.

The Indian Penal Code (IPC) was introduced to address crimes, with Section 377 specifically criminalizing homosexual relations. This provision explicitly barred engagements deemed "unnatural" and as observed by the court as "contrary to nature's order a colonial relic steeped in Victorian morality that lingered post-Independence". Classified as unnatural offenses, it imposed penalties of life imprisonment or up to 10 years in jail, plus fines. Such clauses not only deterred same-sex relations but also contravened nature's perceived blueprint for social and familial structures.

By curtailing personal liberty, expression, and equality, these laws alienated those identifying as homosexual while infringing on their fundamental rights under the Indian Constitution. Numerous Public Interest Litigations (PILs) and writ petitions have been filed in High Courts and the Supreme Court, contesting the constitutional validity of § 377 of IPC, particularly insofar as it penalizes consensual sexual acts between adults in private.

In *Naz Foundation v. Govt. of NCT of Delhi* (2009), the Delhi High Court delivered a landmark ruling affirming individuals' autonomy to select partners and declaring that the state must not meddle in private choices. Though it only partially invalidated the provision, it established

groundwork for reforming colonial-era laws. This decision was overturned in 2013 by Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors., where the Supreme Court criticized the High Court's reliance on "international precedents in its zeal to safeguard the "so-called rights" of LGBT persons."

In National Legal Services Authority (NALSA) v. Union of India (2014), the Supreme Court recognized transgender individuals as the "third gender" and upheld their fundamental rights under Articles 14, 15, 19, and 21, encompassing equality, non-discrimination, expression, life, and dignity while providing essential safeguards for gender identity.

The Justice K.S. Puttaswamy v. Union of India (2017), known as the Right to Privacy case, saw the Apex Court enshrine privacy as a fundamental right under Article 21, explicitly encompassing personal choices such as sexual orientation and intimate relations, which proved crucial for subsequent decriminalization of same-sex acts.

The Supreme Court's precedent in Navtej Singh Johar v. Union of India (2018) culminated in a five-judge bench striking down § 377's relevant portions, thereby decriminalizing consensual adult same-sex relations.

More recently, in Supriyo @ Supriya Chakraborty v. Union of India (2023), petitioners sought legalization of same-sex marriage, but the Supreme Court demurred, asserting that such matters fall to the legislature, not the judiciary, and clarifying that no "right to marriage" exists in the Constitution.

IV. Right to Equality and Non Discrimination

As thoroughly outlined and guaranteed by Articles 14 and 15 of the Indian Constitution, all stand equal before the law, and the State shall not discriminate based on religion, race, caste, sex, or place of birth. Thus, does barring individuals from their personal choices or intruding into private rights constitute a violation of fundamental freedoms in the realm of same-sex relations? Or can the state justify preserving the preferences of the majority?

In a wider perspective, must Parliament revise laws to accommodate one particular community?

Is there truly a pressing need for such variations?

The response need not be overly intricate: yes, for in a nation defined by diversity like India, how can we deny rights to certain individuals merely on account of their sexual orientation? Admittedly, the path forward is arduous, involving revisions to domains like the Special Marriage Act and other personal laws, which could entangle issues of adoption, succession, spousal rights, parenting, and more. Yet, must we stagnate, or evolve alongside the shifting dynamics of human society and fundamental rights?

Solicitor General Tushar Mehta highlighted the intricacies, such as identifying spouses in manwoman frameworks within same-sex dynamics a task far from straightforward amid pervasive uncertainties.

Nevertheless, social realities demand attention: those in same-sex relations endure stigma from society and even rejection by families, prompting a stark query, are we progressing or regressing? Given that same-sex relations trace back to antiquity, can contemporary India embrace their complexities?

In views of the author, we cannot withhold dignity from individuals simply because they defy the societal mold we have forged. As every person is equal in the eyes of the law, who are we to dictate the intimate contours of others' lives? This compels us all to reflect: In our pursuit of unity, will we honor the full tapestry of human expression, or perpetuate shadows of exclusion? † **References**

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