

POSITION OF SAME SEX MARRIAGES IN INDIA: A LEGAL ANALYSIS

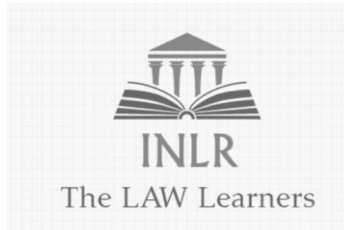
Aayushi Mungee¹

ABSTRACT

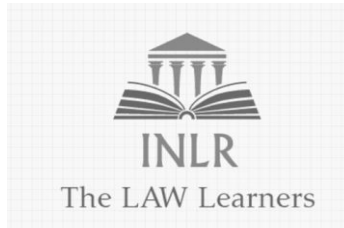
This paper aims to recommend that the option of marriage, not merely civil unions, should be made legally available for LGBT people in India. In advocating a case for same-sex marriage, this paper tries to present a scenario for reshaping marriage itself by disengaging the social contract that is the basis of marriage from the religious and cultural significance that our history has placed on the institution since its establishment. Committed unions among the humanity should be encouraged and enjoy appropriate legal and social protection, but there is no need to impede these unions with irrelevant religious associations and traditional prejudices.

This paper contends that the acceptance of same-sex marriage will require changes in public attitudes. For biological, historical, and religious reasons, marriage has been considered to be a right of the heterosexual couples throughout most of human history. As known, one reason for having the institution of marriage is to reproduce and protect children, as according to the human experience, in general, children grow up better as individuals and collective unit of the society when raised by loving parents instead of being homeless, abandoned or raised by the State itself. As a known fact, only heterosexual couples produce children through “standard” reproduction (genital-to-genital intercourse).

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The paper lastly presents a comparative analysis with family law in India, and the legality of same-sex marriages under the relevant statutes. Alternative institutions like civil unions are also analyzed.



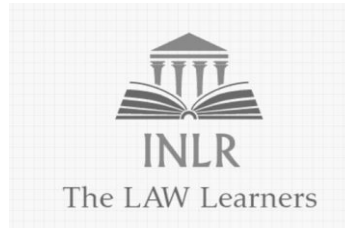
1. INTRODUCTION

Marriage, contrary to popular opinion, is not a personal relationship. It is a social institution that is constantly evolving, and any view contradicting popular views on marriage are repressed.² The definition of 'Marriage' given in the Merriam Webster dictionary is (a) the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law (b) the state of being united to a person of the same sex in a relationship like that of a traditional marriage [same-sex marriage] (c) the mutual relation of married persons [wedlock] (d) the institution whereby individuals are joined in a marriage.

In an era where even the dictionaries have started recognizing the same-sex marriages, are countries ready to accept them. Out of the total 195 countries of the world, only 27 of them have recognized same-sex marriages in some form. These are:

1. The Netherlands(2000)
2. Belgium(2003)
3. Canada(2005)
4. Spain(2005)
5. South Africa(2006)
6. Norway(2008)
7. Sweden(2009)
8. Argentina(2010)

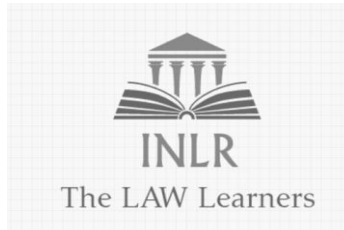
² Joyce Aschenbrenner, Politics and Islamic Marriage Practices in the Indian Subcontinent, 42 ANTHROPOL. Q. 305–315 (1969); CHRISTOPHER LASCH, The Suppression Of Clandestine Marriage In England: The Marriage Act Of 1753, SALMAGUNDI 90–109 (1974).



9. Portugal(2010)
10. Iceland(2010)
11. Denmark(2012)
12. Uruguay(2013)
13. Brazil(2013)
14. New Zealand(2013)
15. England and Wales(2013)
16. France(2013)
17. Luxembourg(2014)
18. Scotland(2014)
19. United States(2015)
20. Ireland(2015)
21. Finland(2015)
22. Greenland(2015)
23. Colombia(2016)
24. Malta(2017)
25. Australia(2017)
26. Germany(2017)

This means that only 13.8% nations have legalized same-sex marriages. This clearly shows that the legal recognition of same-sex relationships has been and still remains an important but also argumentative issue worldwide.

The movement for LGBT rights had an advancement since the early 1970's. The first change came in 1973 when the American Psychiatric Association removed homosexuality from its list of mental disorders, which was followed shortly by the American Psychological Association and the American Medical Association. Subsequently in 1975, the U.S. Civil



Service Commission removed its ban on the employment of gays and lesbians which provided them a basic right to employment without unnecessary social hassles. Progressing to changes on a larger scale, cities such as San Francisco, Minneapolis, Seattle, and Detroit—and some smaller municipalities like Ann Arbor, MI, and Austin passed gay rights ordinances, removing the employment discrimination against homosexuals.

Beyond the increasing numbers of political ordinances and laws in favour of homosexuality, social historians displayed the societal mindset. They describe the period from 1910 to 1920 as one of enormous social ferment, manifest in part by the beginnings of a revolution in gender roles and in sexual practices outside marriage³.

It can be seen that marriage holds significantly more appeal for same-sex couples than do other relationship statuses. Same-sex couples are more likely to marry in the first year after marriage is open to them than they are to enter into other status categories in the first year after those become available⁴.

2. CHANGE IN THE LEGAL SYSTEM

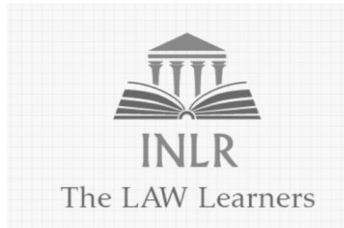
Until the beginning of the 21st century, there was no modern law enacted that recognized the legality of same-sex marriages. Polls across the America⁵ and Europe⁶ show that support for same-sex marriage has been rising at a steady rate.

³NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 158–59 (2000)

⁴ United States v. Bitty, 208 U.S. 393, 401 (1908) (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885))

⁵ Frank Newport, For First Time, Majority of Americans Favor Legal Gay Marriage, GALLUP (2011) (accessible at

<http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx>) (last accessed August 10th, 2015); Margarita Corral, Support for Same-sex Marriage in Latin America, in LATIN AMERICA PUBLIC OPINION PROJECT, “INSIGHTS” SERIES (2010) (accessible at <http://www.vanderbilt.edu/lapop/insights/I0844.enrevised.pdf>) (last accessed August 13th, 2015).



But there's always another aspect to the issue. There are instances of African countries criminalizing homosexuality and enforcing extremely harsh penalties against homosexuals. Examples of this are the draconian laws enforced by Nigeria⁷, Uganda⁸ and several Central African countries⁹.

This chain of judgments was started in 2013, when the Supreme Court of United States ruled in favour of the rights of same-sex couples in *Hollingsworth v. Perry*¹⁰ and *United States v. Windsor*¹¹. In these judgments, the Supreme Court of United States ruled that any ban on same-sex marriage would be unconstitutional and that the Federal Government would have to recognize any marriages that were conducted at the state level. Another judgment improving the stand of homosexuality was *Obergefell v. Hodges*¹² where the Supreme Court of US held that states cannot refuse to issue same-sex marriage licences, effectively legalizing gay marriage across the United States.

It is unarguable that the initial focus has to be on de-criminalising consensual sexual acts. But this in itself will not end the discrimination faced by persons who are engaged in long-term committed relationships with others of their own sex. It would require legal recognition of long-term same-sex unions, on par with heterosexual marriages.

⁶ Most Irish people support gay marriage, poll says, PINKNEWS (2011), <http://www.pinknews.co.uk/2011/02/24/most-irish-peoplesupport-gay-marriage-poll-says/> (last visited August 15th, 2015).

⁷ Adam Nossiter, Nigeria Tries to "Sanitize" Itself of Gays, THE NEW YORK TIMES, February 8, 2014, <http://www.nytimes.com/2014/02/09/world/africa/nigeria-uses-law-and-whip-to-sanitize-gays.html> (last visited August 12th, 2015).

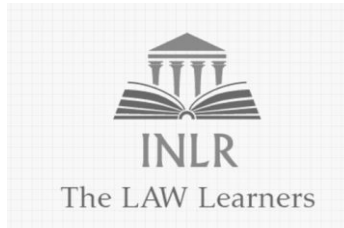
⁸ Paul Semugoma, Chris Beyrer & Stefan Baral, Assessing the effects of anti-homosexuality legislation in Uganda on HIV prevention, treatment, and care services, 9 SAHARA-J J. SOC. ASP. HIV/AIDS 173–176 (2012).

⁹ Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries, JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS) (2009)

¹⁰ *Hollingsworth v. Perry*, 133 S. Ct. 2652

¹¹ *United States v. Windsor*, 133 S. Ct. 2675

¹² *Obergefell v. Hodges*, 135 S. Ct. 2584



Both inside and outside the LGBT communities, there are differing views about the desirability of marriage—either in any given individual’s personal life or as to government policies that use marriage as a condition for a wide range of benefits¹³. There are, however, compelling practical reasons to seek social and legal recognition of same-sex relationships. Certain legal benefits such as succession, maintenance, and pension rights that are available to married couples are not available to same-sex couples. Economic benefits from laws like the Employment Provident Fund Scheme, 1952 and Workmen’s Compensation Act, 1923 are given only to those related by blood or marriage¹⁴.

3. ALTERNATIVES TO MARRIAGE

3.1 Live in relationships

Live in relationships, also called cohabitation relationships, have been growing increasingly popular in various countries, including India. In most places, people who do not have an option of getting married or recognized in any official capacity resort to this option¹⁵.

In India, they have been recognized as official marriages in certain circumstances¹⁶. Although same-sex marriages are still not recognized, even if they fall under the same circumstances.

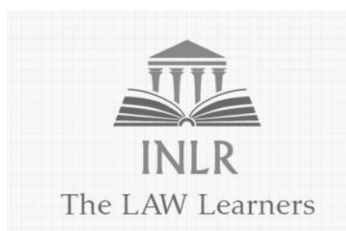
3.2 Civil Unions

¹³Mary L. Bonauto, Goodridge in Context, 40 Harv. C.R.-C.L. L. Rev. 1 (2005).

¹⁴ Employment Provident Fund Scheme, S. 2(g) (1952). Workmen’s Compensation Act, S. 2(d) (1923).

¹⁵ Kathleen Kiernan, Cohabitation in Western Europe: Trends, Issues, and Implications, in ALAN BOOTH, ANN C. CROUTER & NANCY S. LANDALE, JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY (2002).

¹⁶IndraSarma v. V.K.V. Sarma, AIR 2014 SC 309



Some countries have the alternative to marriage known as Civil Unions, they carry all the benefits and protection of marriage. Same as marriage, they also have to carry all the responsibilities of marriage¹⁷. They were meant to be a compromise, wheresame-sex couples got all the benefits of marriage, although the definition of traditional marriage would beunchanged, therefore avoiding the conflict with religious entities.

The problem is of course, with the attempt to reinstate a system of separates but equals that defined the Jim Crow laws in the United States before the Civil Rights movement¹⁸. It shows that same-sex partners are being treatedin a way that is considered to be “lesser” than the institution of marriage, which is reserved for straight couples,who would be considered more “natural” or “pure”¹⁹. Such unions have no equivalent in India.

4. HINDU MYTHOLOGY ON SAME-SEX MARRIAGE

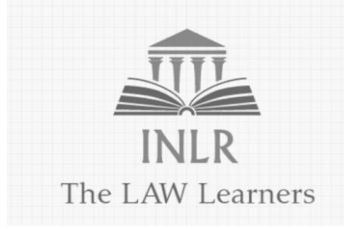
The texts of Kamasutra, a fourth century sacred treatise on eroticism describes women’s manly behaviour during intercourse but has been interpreted as describing only heterosexual interactions, however it can be interpreted as something related to acceptance of unconventional, non-normative sexual acts²⁰. The Kamasutra states that two male friends

¹⁷ William N. JrEskridge, Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions, 64 ALBANY LAW REV. 853 (2000).

¹⁸LESLIE VINCENT TISCHAUSER, JIM CROW LAWS (2012).

¹⁹ Alison Avery et al., America’s Changing Attitudes toward Homosexuality, Civil Unions, and Same-Gender Marriage: 1977–2004, 52 SOC.WORK 71–79 (2007); Paul R. Brewer & Clyde Wilcox, Same-Sex Marriage and Civil Unions, 69 PUBLIC OPIN. Q. 599–616 (2005).

²⁰‘VatsyanaKamasutra’ by Ruth Vanita in Same-Sex Love and the English Literary Imagination (New York: Columbia University Press, 1996), pp.46-53.



who care for and trust each other may 'unite' (II. 9. 36). The term used is 'parasparaparigraham', meaning mutual marriage, intercourse, take, accept or seize²¹.

In the Manusmriti, the chapter on penance and expiation, it is noted that if a kanya (virgin) got intimate with another kanya, they would be fined 200 panas (currency of the time), pay the double of the bride price during marriage and receive 10 lashes of the rod. If a stri (married woman) got intimate with another a kanya, she shall immediately have her head shaved, get two fingers cut off and be made to ride through the town on a donkey²².

Although there are several dharmic texts that contain prohibitions of homosexuality, there are also a number of mythological stories that show homosexual experiences as natural and joyful²³. This shows that homosexual interactions were not acceptable even then, however, the punishments were not as severe as they are now under the Indian Penal Code.

5. POSITION OF INDIAN LAW

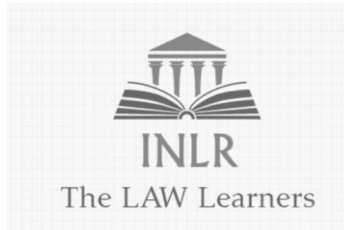
The Indian laws holds a very diplomatic approach towards legality of homosexuality. They are framed in such a manner that it does not expressly prohibit same-sex marriage. For example, when the Hindu Marriage Act defines the people who will be eligible to marry under the act²⁴, it does not lay down any provision that states specifically that only people of the opposite-sex can get married to each other.

²¹APTE, V. S. The student's Sanskrit-English Dictionary (Delhi, MotilalBanarasidass, 2000), 319

²²NARRAIN, A. 'Queer. Despised Sexuality, Law and Social Change', published by 'BOOKS for CHANGE', 1st edition 2004, page 36.

²³NANCY BONVILLAIN, WOMEN AND MEN: CULTURAL CONSTRUCTS OF GENDER, at 281 (Prentice Hall) (2001)

²⁴Section 2, The Hindu Marriage Act, 1955.



Section 377(now repealed) of the Indian Penal Code 1861, provided that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term that may extend to ten years, and shall also be liable to fine. For an act to constitute a carnal intercourse, penetration is sufficient to be the offence described in this section²⁵.

However, consummation of marriage, in the case of two males getting married, would be a violation of criminal laws. In addition, even if same-sex partners were allowed to be legally married, there is always the chance that they may be prosecuted for their sexual relationship. Therefore, any marriage that might exist, at least in the case of two males getting married, would be one without any sexual activity. If the couple decides to engage in sexual activity, they would have to constantly worry about prosecution under the Indian Penal Code.

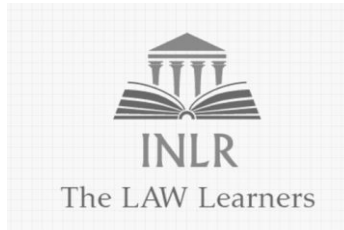
A change in approach came with judgment of Delhi High Court in Naz Foundation v. Govt. of NCT of Delhi²⁶which stated that Section 377 of the Indian Penal Code was unconstitutional insofar as the restrictions on homosexual activity were concerned. The Court read the word “sex” with a liberal interpretation, including biological sex, as well as sexual orientation into the word. This approach specifically indicates that any law which specifically targets homosexuals would be prima facie void.

But his case was later overruled in Suresh Kumar Koushal v. Naz Foundation²⁷ by the Supreme Court of India. The Supreme Court stated that role of reforming the law was that of the legislature, and that the judiciary could not strike down certain provisions of the law. The bench, however, only commented on the ability of the High Court to strike down the law, they did not vitiate the opinion of the Delhi High Court that Section 377 was unconstitutional.

²⁵ Section 377, Indian Penal Code 1861

²⁶Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277.

²⁷Suresh Kumar Koushal v. Naz Foundation, AIR 2014 SC 563.



In the case of Hindu marriages, it is not unusual for people to get married and not get the official documentation of the marriage. In case the need for legal intervention was necessary, the judges would examine evidence of the marriage. It may include photographs and recordings which are used to see if two people were married. The need for following the ceremonies is emphasized. Since human mythology placed importance on the fulfillment of ceremonies, Indian laws too recognizes it and not following the ceremonies could result in the marriage not being legitimate²⁸. If the ceremonies cannot be proved, there can be no valid Hindu marriage²⁹.

Even though they might have completed all the required procedures and ceremonies for marriage, same-sex couples have not been able to get official recognition. The couples involved would have been married in every sense of the word, in accordance to the rites and ceremonies prescribed by religion, however, they would not be considered married from the perspective of the State.

In the case of *Suresh Kumar Koushal v. Naz Foundation*³⁰, the Court held that the classification between those indulging in carnal intercourse in the ordinary course and against the order of nature is intelligible, thus making Section 377 not violative of Article 14 of the Constitution³¹. This judgment clearly ignored the precedents which require a justification of the classification in relation to the stated objective being pursued.

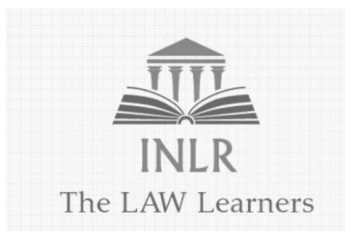
Secondly, the Court held that Section 377 did not violate Article 15, providing no reasons whatsoever. It failed to address one of the crucial issue on which the judgment of *Naz Foundation* was based. The reasons in *Naz Foundation* as to why discrimination on the

²⁸*Vishnu Prakash v. Sheela Devi*, (2001) 4 SCC 729.

²⁹*Margaret Palai v. Savitri Palai*, AIR 2010 Ori 45.

³⁰(2014) 1 SCC 1

³¹Constitution of India 1950



grounds of sexual orientation was violative of Article 15 and that the term “sex” in the Article included “sexual orientation”. Similarly, the bench discussed several landmark cases under Article 21 but did not provide any reasoning as to how Section 377 is not in violation of Article 21.

Finally, the Court stated that the decision to repeal Section 377 had to be left to the Parliament, effectively directing a group that it recognizes as a minority that its rights should be protected by the majoritarian arm of government i.e. Parliament³².

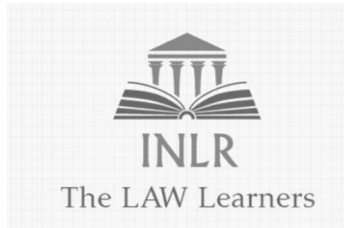
But the situation changed in Sept. 2018 when the Supreme Court of India overruled its 2013 decision and partially struck down Section 377 which was a controversial British-era law banning unnatural intercourse. The Bench stated that consensual carnal intercourse between two adults, in a private space, whether between heterosexuals or homosexuals, does not in any way hamper public decency and morality. The other part i.e. carnal intercourse with children, animals or bestiality, still remains in force.³³

6. SAME-SEX MARRIAGE UNDER THE HINDU MARRIAGE ACT, 1955

The Hindu Marriage Act explains who a Hindu is under the Explanation clause of Section 2 that “The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

³²Gautam Bhatia, The Unbearable Wrongness of *Koushal v. Naz Foundation*, Indian Constitutional Law and Philosophy (December 11, 2013), <http://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation/>

³³ *Navtej Johar v. Union of India* Writ Petition Criminal No. 76 of 2016

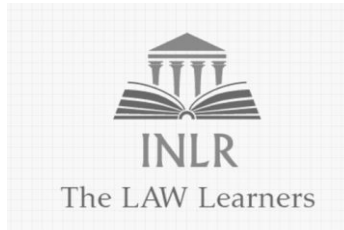


- any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
- any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.”

Section 5 of the Act speaks of the conditions constituting a valid marriage. It states “A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- i. neither party has a spouse living at the time of the marriage;
- ii. at the time of the marriage, neither party (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity
- iii. the bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;
- iv. the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two
- v. the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;”.

Nowhere in this section has the gender of the parties to a marriage been specified. As it clearly says that a marriage may be solemnized between any two Hindus, and considering



how a marriage is a union of two spirits, and as per Hindu Philosophy, the spirit or the Atman has no gender³⁴, this is very much in consonance with the Hindu beliefs. However, this has given rise to varied debates with regard to the acceptance of same sex marriages. There is no law that exists for the governance of marriage between two people of the same sex, however, the law with marriage doesn't expressly prohibit it, nor does it have clarity with regard to parties, thus making a provision for a huge confusion and debate. The issues with Section 5 is the provision for the minimum age of the bride and bridegroom³⁵, however, there are no gender specifications and no definition of the bride and the bridegroom, also, there is no specification there needs to be both a bride and a bridegroom for the marriage.

However gender specification is not expressly stated in the Hindu Marriage Act, but it can be understood from the language which in itself negates the approval of same sex marriages; as in Section 13 (2) (iv) it is mentioned, "that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years." Thus, this provides a hint of the gender of the person entered into marriage nullifying the argument that the gender is nowhere mentioned in the Act.

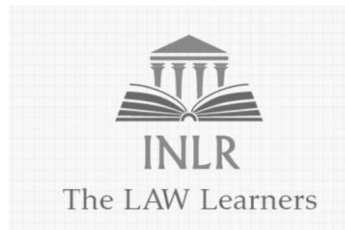
7. CONCLUSION

The law in India with regard to marriage between two people of the same sex isn't clear. The fact that in the surrogacy bill³⁶, where the government doesn't want to allow homosexual

³⁴Atman: The Soul, The Real Self, <http://iskconeducationalservices.org/HoH/concepts/101.htm>.

³⁵Section 5, clause (iii), The Hindu Marriage Act, 1955.

³⁶Surrogacy (Regulation) Bill, 2016



couples to hire surrogates shows that the government at least acknowledges their existence, their acceptance goes a long way though.

But now with decriminalization of laws such as Section 377 of IPC, the people are now free to accept and practice their sexual orientation without the fear of being subjected to legal harassment and arrested and sent to prison.

The first step towards accepting same-sex marriages have been taken by the decriminalization of homosexuality by amending Section 377 of the Indian Penal Code, the next should be to make the provisions of the Hindu Marriage Act clearly gender specific, and avoiding the issues of misinterpretation and confusion.