RECOGNITION OF FOREIGN SAME-SEX MARRIAGE IN INDIA: A LEGAL EXPLORATORY ANALYSIS

Abstract

There has been both strong support and opposition on social, political and religious grounds to same-sex marriage. Some jurisdictions through regulations either permit full-fledged marriage between same-sex couples or recognise same-sex civil unions. Other jurisdictions prescribe punishments for homosexual relationships. Given the absence of an internationally uniform approach, there is a strong possibility for conflict and legal contradiction. What happens when a same-sex couple marries in Netherlands, which has legalised homosexual relations, and then moves to a country, such as India or Pakistan, which does not permit such marriages? Will, India or Pakistan legally recognise such same-sex marriage or refuse to accept it? The paper discusses the legal issues involved in recognition of foreign same-sex marriage celebrated outside India. The paper also explores the legal position of same-sex marriage celebrated in India.

I Introduction

ON JUNE 26, 2015, same-sex marriage was declared legal in the United States (US) when the US Supreme Court pronounced the right of same-sex couples to marry.[1] With this landmark judgment on same-sex marriage, the US is following a trend set by many European nations[2] including the United Kingdom (UK), which liberalised its laws on same-sex marriage by enacting the Marriage (Same Sex Couples) Act, 2013.[3] Even in Europe, legislation on same-sex relationships differs significantly, although, in general, European societies have become more accommodating of same-sex relationships and have accorded different degrees of recognition ranging from partnerships, civil unions and full fledged marriages.[4] Around this time, Indian Supreme

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1 *Obergefell* v. *Hodges*, 135 S.Ct. 2584 (2015). In this case, an Ohio resident sued the state when he failed to get his name registered on the death certificate of his partner of 23 years. See F. S. Befort and M. J. Vargas, "Same-Sex Marriage and Title VII" 56 *Santa Clara Law Review* 207 (2016).

2 J. Gardiner, "Same-Sex Marriage: A World Wide Trend?" 28(1) *Law in Context A Socio-Legal Journal* 93 (2010); S. R. Levit, "New Legislation in Germany Concerning Same- Sex Unions" 7 *The ILSA Journal of International & Comparative Law* 470 (2001); B. D. Oppenheimer, A. Oliveira *et.al.*, "Religiosity and Same-Sex Marriage in the United States and Europe" 32 *Berkeley Journal of International Law* 196 (2014).

3 Marriage (Same Sex Couples) Act, (2013), UK, part 1: Extension of marriage to the same-sex couples, *available at*: www.legislation.gov.uk/ukpga/2013/30/contents/enacted (last visited on Mar. 1, 2017).

4 *J. M. Scherpe,* "The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights" 10 *The Equal Rights Review* 83(2010).

Court upheld the validity of section 377 of the Indian Penal Code (IPC), which penalises carnal intercourse against the order of nature.[5] The Supreme Court judgment came in the wake of the decision of High Court of Delhi which read down section 377 of IPC insofar it criminalizes private consensual sexual acts between adults as violative of the Constitution.[6] Though section 377 of IPC does not refer to same-sex marriage, the Supreme Court decision makes it difficult to argue in support of recognition of same-sex marriage, since decriminalization of homosexuality fundamentally precedes the accord of full marital rights to same-sex couples.[7]

The issue of same-sex marriage raises serious questions about the traditional concept of family and is itself contested under the domestic laws of different countries. Since, marriage is considered a foundation of society; the legal and policy regulation surrounding it has been associated with the cultural and religious ethos of the society.[8] Religious norms show contempt towards same-sex marriage/union.[9] In spite of the

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5 IPC, s. 377 reads: "Unnatural offenses: 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 the term which may extend to ten years, and shall also be liable to fine."

6 *Suresh Kumar Koushal* v. *NAZ Foundation* (2014) 1 SCC 1, earlier in *Naz Foundation* v. *Government of NCT of Delhi,* 2009 (160) DLT 277, the high court read down s. 377 as unconstitutional in so far it criminalises consensual sexual acts of adults in private. See R. Wintemute, "Same-Sex Love and Indian Penal Code S 377: An Important Human Right Issues for India" 4 *NUJS Law Review* 32 (2011); M.C. Nussbaum, "Disgust or Equality: Sexual Orientation and the Indian Law", The M.K. Nambiar Lecture, National University of Juridical Sciences Kolkata, (2015), *available at*: https://www.law.berkeley.edu/wp-content/uploads/2015/04/Disgust-or-Equality-Sexual-Orientation-and-IndianLaw_Nussbaum.pdf (last visited on Mar. 2, 2017).

7 Gustavo Gomes da Costa Santos, "Decriminalising Homosexuality in Africa: Lessons from the South African Experience" in Corinne Lennox & Matthew Waites (eds.), *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: Struggles for Decriminalisation and Change* 313-337 (Institute of Commonwealth Studies, School of Advanced Study, University of London, 2013).

8 C. Weisbrod, "Family, Church, and State: An Essay on Constitutionalism and Religious Authority" 26 *Journal of Family Law* 754 (1988), *available at*: http://digitalcommons.uconn.edu/law_papers/146 (last visited on Mar. 10, 2017); K. Hossain, "In Search of Equality: Marriage Related Laws for Muslim Women in Bangladesh" 5(1) *Journal of International Women's Studies* 97 (2003); K. B. Agarwal, *Family Law in India* 290-292 (Kluwer International, 2010).

9 P. D. Young, *Religion Sex and Politics: Christian Churches and Same-Sex Marriage in Canada* 66 (Fernwood Publishing, 2012); L. D. Wardle, "Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions" *12 Journal of Law & Family Studies* 333 (2010); D. A. Gay, J. P. Lynxwiler et.al., "Religiosity, Spirituality, and Attitudes toward Same-Sex Marriage: A Cross-Sectional Cohort Comparison" *Sage Open* 1-14, (July-Sep, 2015), *available at:* http://sgo.sagepub.com/content/spsgo/5/3/2158244015602520.full.pdf (last visited on Mar. 3, 2017).

strong religious foundations of marriage, many jurisdictions have separated the religious and secular aspects of marriage.[10] There is a variety of legislative and policy response to same-sex relationships in different jurisdictions. The *first* is intolerance *i.e.,* jurisdictions attempt to suppress same-sex relationships by criminalising them.[11] Even today, most jurisdictions punish same-sex relationships and in many cases treat homosexuality a criminal offence and no marriage is permitted between same-sexes.[12] The *second* response includes, some concerted efforts made to decriminalize same-sex relationships, even where public opinion does not clearly support them.[13] The *third* is the acceptance of same-sex relationship and granting them varying degrees of recognition ranging from partnership, civil union to full-fledged marriage. This paper focuses on the recognition of foreign same-sex marriage in India and does not explore the validity of other kinds of same-sex union in the form of civil union and partnership.

The Netherlands and Belgium were the first countries in the world to legalise same-sex marriage.[14] South Africa was the first African nation to incorporate lesbian and gay rights as part of their Constitution.[15] Latin America is heavily influenced by

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10 W. S. Johnson, *Time to Embrace: Same-Gender Relationships in Religion Law and Politics* 197 (Wm. B. Eerdmans Publishing Co, 2006); B. G. Scharffs, and S. Disparte, "Comparative Models for Transitioning from Religious to Civil Marriage Systems" 12(2) *Journal of Law & Family Studies* 410 (2010). The United States treats marriage as a civil institution. In India, religious marriages and civil unions exist side by side. Personal laws are passed for different religious groups in the form of Hindu Marriage Act, 1955 and Muslim Marriage Act, 1986. The civil aspect of marriage is reflected in the Special Marriage Act, 1986, which is open for all communities.

11 W. N. Eskridge, Jr, "A History of Same-Sex Marriage" 79 *Virginia Law Review* 1469 (1993), Faculty Scholarship Series Paper 1504, *available* at: http://digitalcommons.law.yale.edu/fss_papers/1504 (last visited on Apr. 4, 2017).

12 The International Lesbian, Gay, Bisexual, Trans and Intersex Association, or ILGA, lists 76 countries with criminal laws against sexual activity by lesbian, gay, bisexual, transgender or intersex people, *available at*: http://76crimes.com/76-countries-where-homosexuality-is-illegal/ (last visited on Feb. 10, 2017).

13 Allison R. O. Neill, "Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy" 37(1) *Cornell International Law Journal* 212 (2004); J Gardiner, "Same-sex Marriage — A Worldwide Trend?" in P. Gerber and A. Sifris (eds.), *Current Trends in the Regulation of Same-Sex Relationships* (Federation Press, 2011).

14 R. J. Brym, and J. Lie, *Sociology: Your Compass for a New World* 327 (Cengage Learning, Belmont, 2006); N. G. Maxwell, "Opening Civil Marriage to Same-Gender Couples: A Netherlands United States Comparison" 18 *Arizona Journal of International & Comparative Law* 157 (2001).

15 M. P. Byrn, "Same-Sex Marriage in South Africa: A Constitutional Possibility" 87 *Minnesota Law Review* 512 (2002). Constitution of the Republic of South Africa, 1996, s. 9(3), *Fourie* v. *Minister of Home Affairs*, case no. 232/2003 (Supreme Court of Appeal of South Africa, Nov. 30, 2004) declared that "under the Constitution, the common law of marriage has been developed to include same-sex unions." *Available at*: http://www.worldlii.org/za/cases/ZASCA/2004/132.html. (last visited on Mar. 10, 2017).

religious norms, and opposition from the Catholic church has led to a prohibition on same-sex marriage.[16] In Asia, except Nepal and Taiwan, no country recognises same-sex marriage. Israel recognises same-sex marriage performed outside its borders.[17] The normative discussion on whether to allow same-sex people to form a family through marriage, and its possible consequences, on the traditional notion of family and marriage is a sensitive and contested issue in India.

This paper is divided into three parts. The first part briefly discusses the domestic legislative framework of marriages celebrated in India and an analysis whether same-sex marriage is permissible under the domestic legal framework. The second part analyses the legal issues of recognition of foreign same-sex marriage celebrated outside India involving foreign domicillaries. The third part while arguing for a liberal and less state-centric approach to marriage argues that recognition could be extended to foreign same-sex marriage on the basis of closest connection test.

II Legislative frameworks on marriages celebrated in India

In India, each religious community has different personal laws for marriage and divorce. This section discusses the various laws governing marriages celebrated in India and examines whether any of these Acts provide scope for recognition of same-sex marriage. The Acts discussed below include The Hindu Marriage Act, 1955, The Indian Christian Marriage Act, 1872, The Parsi Marriage and Divorce Act, 1936, The Special Marriage Act, 1954 and The Foreign Marriages Act, 1969.

The Hindu Marriage Act, 1955 applies to Hindus.[18] The conditions of a valid marriage between two Hindus are given under section 5 of the Act. Section 5 prescribes that:

(1) parties to the marriage do not have an existing living spouse;

(2) there is no lack of consent due to unsoundness of mind or because of a mental disorder, which makes a person unfit for procreation;

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16 J. M. Vaggione, "Sexual Rights and Religion: Same-sex Marriage and Lawmakers' Catholic Identity in Argentina" 65 *University of Miami Law Review* 935 (2011); J. Diez, *The Politics of Gay Marriage in Latin America: Argentina, Chile and Mexico* 112 (Cambridge University Press, 2015). Same-sex marriage has been banned in the Constitutions of Honduras (2005), El Salvador (2009), and the Dominican Republic (2009). Bolivia also permits marriage between opposite sex. In Costa Rica, same-sex unions have been declared invalid through judicial pronouncements.

17 T. Einhorn, "Same-Sex Family Unions in Israeli Law" 4(2) *Utrecht Law Review* 226 (2008). See generally, the case of mixed marriage *Funk-Schlesinger* v. *Minister of the Interior* (1963) HCJ 143/62, 17 PD 225,226.

18 The Hindu Marriage Act, 1955 provides a comprehensive definition to the term 'Hindu'. S. 2 defines Hindus as anyone who is a Hindu, Sikh, Jain or Buddhist by religion or who follows any of its forms or developments (such as Brahmo Samaj, Arya Samaj *etc*).

(3) the minimum age for a bridegroom is 21 and for a bride 18 years;

(4) the parties cannot be within the specified prohibited degrees of relationship or *sapinda* relationship,[19] unless the custom or usage permits such a marriage.[20]

The Act is couched in a gender neutral language prescribing that marriage can take place between two Hindus, however, by specifying the age of both the bride and the bridegroom, the Act indicates that for a valid marriage there should be a bride and bridegroom *i.e,* a heterosexual marriage. This argument has been challenged on the ground that same-sex couples can seek solemnization of marriage by characterizing themselves as bride and bride, groom and groom and even groom and bridegroom and hence usage of the term bride and bridegroom in the provision does not necessarily mean a heterosexual marriage. This argument is problematic as it is against the common meaning and notions of the term bride and bridegroom and difficult to justify under statutory interpretation. Whether it will be possible for a 21year and 18 year-old homosexual couple to claim themselves as bridegroom and bride respectively to satisfy the conditions of Hindu Marriage Act? Allowing such a proposition will defeat the intention of the legislation. Jurisdictions which have permitted same-sex marriages have explicitly permitted same-sex couples to contract marriage or have amended the definition of marriage in their laws to include same-sex marriages.[21] Further legislative intentions are to be gathered from the overall reading of all the provisions of the Act and not a particular provision in isolation. Section 13(2) of the Act provides for special grounds of divorce for wife. Section 13 (2)(iv) provides that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years.[22] Further, the provisions pertaining to permanent alimony and maintenance refer to the husband as 'he' and wife as 'she' clearly indicating a heterosexual marriage.[23] These provisions give a clear indication that the Act considers only heterosexual marriages and not homosexual marriages.

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19 *Id.,* the term '*sapindas*' is unique to Hindu law. Two persons are considered to be *sapindas*, when they have a common ancestor.

20 *Id*., s. 5. See P. Saxena, *Family Law Lectures: Family Law* 11 (Lexis Nexis, 3rd edition, 2011).

21 Netherlands while allowing same -sex marriage made amendment in their marriage legislations and prescribed that "A marriage can be contracted by two people of different or the same sex."

22 *Supra* note 18, s. 13(2).

23 *Id.,* s. 25(3) reads: "If the Court is satisfied that the party in whose favour an order has been made under this Section has re-married or, if such party is the wife, that she has not remained chaste or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just."

Arguments against same-sex marriages have relied on the capacity of procreation as an essential condition of the Act.[24] However, it is to be noted that the conditions under the Act, require that neither party must be suffering from mental disorder which makes the person unfit for procreation, clearly implying that this condition is applicable only in the case of mental illness and not of physical incapacity.[25] Further, the Act does not provide for divorce or nullification of marriage on the basis of infertility and this has been reiterated in judicial decisions.[26] Whether this provision can be extended to sustain the same-sex marriages seems doubtful. In one of the reported instances, one Tarulata became Tarunkumar through a sex change operation and married Lila in 1989. The father of Lila filed a petition before the Gujarat High Court seeking a declaration of nullity of marriage on the ground of inability of procreation. The high court issued a notice to the registrar of marriages and the doctor who performed the surgery asking them why the petition should not be admitted.[27]

Further, in the case of *X* v. *Hospital Z*, the court while interpreting marriage as part of 'right to privacy' under article 21 of the Constitution, observed that "marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes." The judgment shows the traditional concept of the marriage as constituting heterosexual union.[28] One of the ground under which the Hindu marriage may be annulled or declared nullity is the failure of consummation owing to the impotence of the respondent.[29] The standard for potency is penetration. Heterosexual penetration is the standard that legitimizes marriage with consummation as the corporeal yoke linking law and marriage to be invariably instantiated through vera copula or the true consummation of bodies in heterosexual penetration.[30] The case law under the Act are suggestive of the legislative intention of heterosexual penetration.[31]

The Indian Christian Marriage Act, 1872 regulates marriages between Christians. The essential requirements of this Act are similar to the Hindu Marriage Act.[32] The concept of marriage in Muslim law is a contract between the two parties, where there

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24 R. Vanita, *Love's Rite*: *Same-Sex Marriage in India and the West* 88 (Springer, 2015).

25 *Supra* note 18, s. 5.

26 *Alka Sarma* v. *Abhinesh Chandra Sarma,* AIR 1991 MP 201. See also, Sheikh Danish, "The Road to Decriminalization: Litigating India's Anti-Sodomy Law" 16(1)(3) *Yale Human Rights & Development Law Journal* 104-132 (2013).

27 *Id.* at 89.

28 *X* v. *Hospital Z* (1998) 8 SCC 296.

29 *Supra* note 18, s.12.

30 Srimati Basu, *The Trouble with Marriage: Feminists Confront Law and Violence in India* 74 (University of California Press, 2015).

31 *Ibid.*

32 *Supra* note 18*,* s. 25.

is an offer, an acceptance, and the *dower* as the consideration.[33] The Parsi Marriage and Divorce Act, 1936 governs Parsi marriages and prescribes the conditions of marriage, such as the age of the bridegroom and the bride.[34] The Special Marriage Act, 1954 was enacted to give Indian citizens the choice to marry beyond their religion or castes. This Act also provides for similar conditions as under the Hindu Marriage Act, 1955.[35] The Foreign Marriage Act, 1969 governs marriages where at least one of the parties is a citizen of India. Such a marriage can be celebrated abroad, and can later be registered under this Act.[36]

None of the above Acts consider the possibility of a homosexual marriage. Even if there is no express provision stating that the marriage must be heterosexual in nature, it is implied and the requirement under the Acts providing for the minimum age of the bride and the bridegroom and the special ground for divorce in the case of wife indicates that homosexual marriages are not acceptable in India under the existing laws. Section 2 of the Dissolution of Muslim Marriages Act, 1939 sets out that if the husband is suffering from a virulent venereal disease, in such case the woman shall be entitled to obtain a decree for dissolution of her marriage.[37] However, there are arguments, which suggest that these Acts do not expressly prohibit same-sex marriage and can be interpreted to include same-sex marriage.[38] They cite various media reports showing instances of same-sex marriages celebrated following religious ceremonies.[39] However, in the absence of a clear legal provision permitting same-sex marriage, such ceremonies and marriages will not have any legal sanction.

The real possibility of recognising same-sex marriage is by bringing an amendment to personal marriage laws to incorporate same-sex marriage. With regard to amendment in personal laws there is always a larger question of its acceptance on the basis of religious beliefs. An option which will not affect religious sentiments, is to seek amendments into the Special Marriage Act. The Special Marriage Act is a secular Act which provides for marriage between people from different religious groups through

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33 A. Ahmed, *Mohammedan Law* 14 (Central Law Agency, Allahabad, 2012).

34 Parsi Marriage and Divorce Act, 1936, s. 3 prescribes rules on consanguinity; ceremony in the form of '*Ashirvad*' by a priest, in the presence of two Parsi witnesses other than the priest; the bridegroom be at least 21 years of age, and the bride must be at least 18 years of age.

35 Special Marriage Act, 1954, s. 4.

36 Foreign Marriage Act, 1969, s. 4, specifies the conditions for a valid marriage and specifically prescribes the age for bride and bridegroom as at least 18 and 21 years respectively.

37 Dissolution of Muslim Marriages Act, 1939, s. 2.

38 N. Ravichandran, "Legal Recognition of Same-Sex Relationships in India" 5(1) *Journal of Indian Law & Society* 102 (2014).

39 *Id.* at 103.

a civil ceremony in the form of registration before a marriage officer.[40] However, the problem is that such a legal initiative is left to the will of the legislative body. In 2015, a private member bill proposing to legalise same-sex marriage was submitted, however, the bill could not be taken forward as it failed to gather enough support.[41]

In the case of *Naz Foundation* v. *NCT Delhi*,[42] the constitutionality of section 377 of the IPC was challenged before the Delhi High Court. The court observed that article 15 of the Constitution of India which prohibits discrimination on grounds of 'sex' is broad enough to include discrimination on the basis of 'sexual orientation'[43] and consequently held that section 377 of IPC is violative of constitutional provisions insofar it criminalises consensual sexual acts of adults in private. However, the judicial decisions suggest that personal laws cannot be tested on the touchstone of fundamental rights.[44] On appeal in *Suresh Kumar Koushal* v. *NAZ Foundation,*[45] the Supreme Court of India reversed the high court judgment and pronounced 'unnatural sex' as a 'perversity of mind' and declared section 377 IPC to be constitutional on the ground of public morality.[46] The court observed that section 377 is a pre-constitutional legislation and if it were violative of the fundamental rights guaranteed under the Constitution, then the Parliament would not have retained the section.[47] This case did not touch upon the issue of same-sex union in the form of marriage or partnership. The case only pertained to section 377 of IPC, which prohibits carnal intercourse/ sexual relations against law of nature. However, the case is indicative of the fact that, in India, same-sex marriage is not recognised. The implication is that even if one argues that section 377 of IPC does not prohibit same-sex marriage, the consummation of such marriage would attract prosecution under section 377 and will seriously affect the life of homosexual couple.[48] A curative petition is filed before the Supreme Court of India to relook into the matter and if the court actually decriminalizes section 377 of IPC, that

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40 *Id.* at 104.

41 A. Mandhani, "Shashi Tharoor submits private members bill to scrap S.377; Jaitley, Chidambaram and Bhushan opine SC must review Kaushal Judgment" (2015), *available at:* http://www.livelaw.in/shashi-tharoor-submits-private-members-bill-to-scrap-s-377-jaitley-chidambaram-and-bhushan-opine-sc-must-review-kaushal-judgment/accessed (last visited on Mar.3, 2017).

42 *Naz Foundation* v. *Government of NCT of Delhi,* 2009 (160) DLT 277.

43 *Ibid.*

44 *Supra* note 38 at 104.

45 *Suresh Kumar Koushal* v. *NAZ Foundation* (2014) 1 SCC 1.

46 *Ibid.* See also, s*upra* note 38 at 98.

47 R. Berapalli, "Same Sex marriage in India: A Socio –Legal Analysis" 1(4) *International Journal of Legal Developments & Allied Issues* 130 (2015).

48 *Id.* at 134.

could open the possibility of legal amendments in the personal laws and Special Marriage Act permitting same-sex marriage.

In a situation where the current Indian domestic legal framework does not provide for same-sex marriage, one of the legal complications will be the approach of Indian legal systems with regard to recognition of foreign same-sex marriage celebrated outside India. The analysis is drawn from the statutory provisions and the conflict of laws practices of India.

III Recognition of foreign celebrated same-sex marriage in India

Whenever the question of recognition of foreign marriage is raised before the domestic legal system, the first substantial issue to be decided is the validity of marriage. This section will first look into the rules regulating the validity of foreign heterosexual marriage and then go on to analyse whether the same principles can be extended to the case of foreign same-sex marriage. On the question of validity of marriage, a distinction is followed, especially in common law regarding material and formal requirements.[49] Formal aspects imply that procedures and ceremonies are required for a valid marriage.[50] Questions of formal validity of marriage are generally governed by the law of the place of celebration (l*ex loci*).[51] Material aspects include capacity, consanguinity, religion *etc*.[52] Material questions of marriage in common law are governed by 'ante nuptial dual domicile theory'[53] and 'intended matrimonial home theory'.[54]

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49 C. M. V. Clarkson and J. Hill, *The Conflict of Law* 349 (Oxford University Press, 4th edn., 2011); A.V. Dicey, J.H. Morris *et.al.*, *Dicey Morris and Collins on the Conflict of Laws* 789 (Sweet & Maxwell, London, 14thedn. 2006).

50 Clarkson, *id.* at 348.

51 The Hague Convention, 1978 codifies rules on marriage quite clearly and recognises the principle of *Lex Loci Celebrationis*, for determining the formal validity of marriages in private international law. See art. 2, the formal requirements for marriages shall be governed by the law of the state of celebration. See R. H. Graveson, *Conflict of Laws* 251 (Sweet Maxwell, London, 1974).

52 *Id*. at 252.

53 T. Baty, "Capacity and Form of Marriage in the Conflict of Laws" 26(6) *Yale Law Journal* 448 (1917). In *Brook* v. *Brook* [1861] 9 HL Cas 193, the husband wished to marry the sister of his deceased wife, which was prohibited in England. Both were domiciled in England. The marriage was celebrated in Denmark, where there was no prohibition of such a marriage. The House of Lords held the marriage as void. Later cases saw some exceptions being envisaged in *Sottomayor* v. *De Barros* (No 2) [1879] 5 PD 94.

54 In *Radwan* v. *Radwan (No 2)* [1972] 3 AII ER 1026, the intended matrimonial theory was used to uphold the validity of a polygamous marriage. See *Lawrence* v. *Lawrence* (1985) 2 AII ER 733. See G. C. Cheshire, P.M. North *et.al.*, *Private International Law* 220 (Oxford University Press, Oxford, 1987).

As far as the question of validity of foreign heterosexual marriages are concerned, the courts have not resolved many cases. But it can be assumed that the Indian legal system generally follows English common law principles as evidenced from the opinion of publicists,[55] and observations made by judges in particular cases.[56] In *Noor Jahan Begum* v. *Eugene Tiscenko*,[57] the plaintiff wife, Noor Jahan, had married the defendant in Poland, they had last lived together in Rome, and subsequently, the plaintiff-wife had moved and was living in Calcutta, India in 1938. The court observed that:[58]

> [C]ertain principles of law relevant to the determination of this question are, in my opinion, firmly established in the realm of private international law: (1) The forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the lex loci contracts, that is, the law of the place where the marriage ceremony is performed; (2) on marriage the wife automatically acquires the domicile of her husband; (3) the status of spouses and their rights and obligations arising under the marriage contract are governed by the lex domicile, that is by the law of the country in which for the time being they are domiciled; (4) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract, and are governed by the lex domicile.

The decision indicates that the formal aspects of marriage are governed by the principle of *lex loci*, and the rights involved in marriage are governed by the law of domicile. This is the only case, where the validity of foreign heterosexual marriage was analysed before the Indian courts. However, in some of the cases involving domestic marriages. the conflict of laws principles were discussed and applied. As far as the material aspect of marriage is concerned, Somnat Iyer J in *Parwatawwa* v. *Channawwa*[59] observed:

> [W]hat emerges from this discussion is, that on the question as to what law should govern capacity for marriage, there are at least three streams of thought. One view is that it is the law of the place of celebration, which overlooks the distinction between formality and capacity. The

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55 B. K. Agarwal and V. Singh, *Private International Law in India* 47 (Kluwer Law International, 2010). See V. C. Govindaraj, *Conflicts of Laws in India* 20 (Oxford University Press, 2011).

56 See generally, Law Commission of India,193rd Report on Transnational Litigation: Conflict of Laws- Law of Limitation (June, 2005).

57 *Noor Jahan Begum* v. *Eugene Tiscenko*, AIR 1941 Cal. 582.

58 *Id*., at 584.

59 *Parwatawwa* v. *Channawwa*, AIR 1966 Mys 100, para 63.

> second is that it is the law of the domicile of each party before the marriage that is demonstrated by the later pronouncements to be a conservative and orthodox view. The third is that the law of the intended matrimonial home is what governs capacity, which has been explained as the best.

In this case, Channawwa, the plaintiff, was the second wife of Siddalingiah, and the validity of her marriage was challenged. It was shown that they got married in 1951 in the State of Bombay and after the marriage the plaintiff lived with the husband till his death in Hyderabad. At the time of the marriage, Siddalingiah was a permanent resident of Hyderabad, which permitted polygamous marriages, whereas the plaintiff was a permanent resident of Bombay where bigamous marriage between Hindus were prohibited by virtue of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946.[60] The court while observing that the enactment of the Constitution does not completely obliterate the application of state domicile, applied the 'intended matrimonial home theory' and the second marriage was held as valid for property succession.[61] However, the dictum cannot be taken as the final legal position on the material validity of marriage. The decision was dictated by the desire to do justice, as the application of dual domicile would have invalidated the marriage. In *Lakshmi Sanyal* v. *S. K. Dhar*,[62] the Supreme Court of India, while dealing with the issue of validity of marriage followed the law of the domicile of parties, to decide on the material validity of marriage and held that the capacity to marry and impediments to marriage would have to be resolved by referring to their personal laws.[63] These are the only decisions of the Indian courts, in which there have been judicial statements on the choice of law issues pertaining to validity of marriage. The stand of the Indian courts shows a preference towards dual domicile rule in case of material validity and *lex loci* rule in case of formal aspect of marriage.

Since Indian law applies to the whole of the territory of India, same-sex marriage is not permitted in India and cannot take place within the territory of India whether involving Indian domiciliaries or foreigners. Situations may arise where Indian domiciliary couple, in order to escape the ban on the same-sex union in India, go abroad and contract marriage in jurisdictions where laws and regulations recognise such unions. India has not legislated on the evasion of domiciliary marriage. The Supreme Court has commented on the extraterritorial application of laws. It held that

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60 *Id.,* para 6.

61 *Id.*, para 66.

62 *Lakshmi Sanyal* v. *S.K. Dhar*, AIR 1972 Goa 2667.

63 *Ibid.* See *supra* note 57 at 305.

the Hindu Marriage Act, 1955, has an extra territorial application and will be applicable to all Hindus domiciled in India, meaning that the Hindu Marriage Act will be applicable to situations even where the a marriage has taken place outside India, provided parties to the marriage are domiciled in India at the time of marriage.[64] Further, such evasive marriages will not be recognised by the legal system where the marriage has been contracted. Recently, the UK court has refused to recognise the right of an Indian lesbian couple to stay in UK on the ground that their marriage was not recognized in India, the domicile of parties to the marriage.[65]

The problematic question is whether India could extend the dual domicile and *lex loci* rule to foreign celebrated same-sex marriage involving foreigners, when India's domestic laws of marriage do not explicitly allow such a marriage. Take the case of a same-sex marriage, which was legally celebrated in the Netherlands between persons domiciled in Netherlands. How will such a relationship be recognised in India?

The Foreign Marriage Act, 1969 provides that the "Central Government... may declare that marriages celebrated under the law in force in such foreign country shall be recognised by courts in India as valid."[66] Two conditions are noteworthy to this discussion. *First*, the incorporation of the term 'may' under section 23 denotes that act of recognition is discretionary. *Second*, the discretion is exercised only if the law, which is enforced in a foreign country, is similar to the laws under the Act for the solemnisation of marriages.[67] Because same-sex marriages have not been accorded recognition under the Act, section 23 cannot be applied. Section 17 of the Act deals with procedures for registration of foreign marriages.[68] However, the section requires that such marriages can only be registered, if they fulfil the conditions prescribed under section 4 of the Act.[69] Section 4 specifically provides for the age of marriage for bride and bridegroom. This clearly indicates a legal position that supports only a heterosexual union. Further, a literal reading of section 27 of the Foreign Marriage Act, 1969 would indicate that a marriage valid under foreign law is treated as valid in Indian law.[70] However, in *Mrs*

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64 *Sondur Gopal* v. *SondurRajini* (2013) 7 SCC 426.

65 B. Chawla, "Lesbian Couple from India Cannot Stay in UK Because Their Marriage Is Not Legal in India" May 16, 2016, *available at:* http://www.vagabomb.com/Lesbian-Couple-from-India-Cannot-Stay-in-UK-Because-Their-Marriage-Is-Not-Legal-in-India/accessed (last visited on Mar 1, 2017)

66 Foreign Marriage Act, 1969, s. 23.

67 *Id*., s. 23.

68 *Id*., s. 17.

69 *Id.,* s. 4.

70 *Id.,* s. 27.

Gracy v. *P.A. Maithri*,[71] the High Court of Kerala examined the scope of the Foreign Marriage Act and held thus:

> [T]he Act covers recognition of marriages celebrated under the law of the foreign country where the marriage is performed, and the certification thereof under Section 23 read with Section 24 of the Act and (4) marriages celebrated in a foreign country otherwise than under the provisions of the Act…We shall straight away refer to the objects and reasons in respect of Section 27. It stated, 'this clause, saving marriages celebrated under other laws, has been inserted by way of abundant caution.' Section 27 provides that the Foreign Marriage Act, 1969 does not prohibit marriages between parties, be both Indian citizens or one be an Indian citizen, being celebrated otherwise than under the provisions of the Act.

The judgment makes it clear that the Act only discusses situations where at least one of the parties to the marriage is an Indian. The Foreign Marriage Act does not govern the validity of a marriage between two foreigners. India currently has no legislation governing the recognition and validity of foreign marriages. In the absence of an explicit legislative provision, the entire question of recognition of foreign same-sex marriage will be based on the conflict of laws rules on recognition of validity of marriages. If the practice by other jurisdictions are any indication, when the domestic laws do not permit same-sex marriage, countries often invoke the concept of public policy on the basis of which the forum could refuse to recognise the foreign marriages even if the marriage fulfils the accepted principles of 'dual domicile' and '*lex loci*' rule, as far as the validity of marriages are concerned.

Under the conflict of laws, recognition of foreign laws and executive actions are subject to the overriding control of public policy, and this changes the entire landscape of same-sex marriage recognition.[72] Public policy is the set of values – social, economic and moral, that form the very strength and thread of society. Public policy is subjective and each nation with its set of experiences, has different views and interpretations of this term.[73] Classically, public policy performs an overriding role and bars the application of the foreign law on the ground that such a law conflicts with the fundamental

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71 *Mrs Gracy* v. *P.A. Mathiri*, AIR 2005 Ker. 314, para 3 and 8.

72 B. Cox, "Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?" 16 *Quinnipiac Law Review* 62 (1996).

73 L. L. Hogue, "Symposium, State Common-Law Choice-Of-Law Doctrine and Same Sex "Marriage": How Will States Enforce the Public Policy Exception?" 32 *Creighton Law Review* 32(1988).

standards of the society.[74] The problem in respect of the recognition of marriage is the basic disagreement on the nature and concept of marriage between two sovereign legal systems which compete over choice of law issues. The sovereign right permits both the states to prescribe conditions for marriage suitable to their own social, religious and cultural situations.[75] The problem is that the prominence assigned to the law of the domicile of parties or intended matrimonial home results in disturbing the legal prescription of the other concerned state where recognition is sought.[76] However, an absolute refusal to recognise a valid foreign marriage leads to a situation where comity of nations takes a back seat and nullifies the policies of the state, which has sanctioned the same-sex marriage.[77]

'Public policy' is not a term used in the Constitution of India,[78] and has not been clearly defined in any statute. In the absence of a statutory definition, the courts have judicially defined the term 'public policy'.[79] The 65th report of the Law Commission of India, which deliberated on the role of public policy in the context of recognition of foreign divorces have acknowledged the prominent role played by the doctrine, in balancing competing interests.[80] The commission's report emphasised that courts in India can refuse to recognise a foreign divorce if it is against the public policy of the forum. The report notes, with approval, the distinction drawn by Winfield between what laws ought to be and public policy. The report further states that public policy is not concerned with what law ought to be, but with the current perception of the community.[81] However, the report gave no indication of the possible parameters of the public policy doctrine and left it to the discretion of the judiciary to interpret on a case-to-case basis.

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74 A. Koppleman, "Same Sex Marriage Choice of Law and Public Policy" 76(5) *Texas Law Review* 938 (1998); R. S. Myers, "Same-Sex Marriage and the Public Policy Doctrine" 32 *Creighton Law Review* 51(1998).

75 *Supra note* 73 at 34.

76 *Ibid.*

77 B. Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Get Home?"*Wisconsin Law Review* 1065 (1994); Adam A. Candeub and M. Kuykendall, "Modernizing Marriage" 44 *University of Michigan Journal of Law Reform* 765 (2010).

78 The Constitution uses the term 'public morality' instead of 'public policy.' Public policy implies the basic principles applied by the government in formulating policies of governance. It is in turn shaped by the directive principles of state policy enumerated in part IV of the Indian Constitution.

79 B. K. Agarwal and V. Singh, *Private International Law in India* 52 (Kluwer Law International, 2010).

80 Law Commission of India, 65th Report on Recognition of Foreign Divorces, (April, 1997).

81 *Ibid.*

The difficulty lies in interpreting the situations where the application of foreign law would violate the public policy of the forum. In the context of marriage the issue will be the interpretation of marriage statutes, and, till date, there have been no judicial statements on this topic in India. Existing case law, from which an analogy could be drawn mostly relates to the validity of foreign divorce and is conflicting. In *Pires* v. *Pires*,[82] a foreign Catholic couple sought to enforce a foreign divorce decree in India but the application for the divorce decree to be enforced was rejected on the grounds of 'public policy'.[83] The reasoning behind the rejection was that Catholic marriage is considered to be a sacrament and consequently the marriage could not be dissolved. In this case, the court followed the simple proposition that a foreign divorce cannot be recognised, as it is different from the rules of the forum, as the rules of the forum existing at that time did not provide for divorce. There was no discussion on how different foreign law and domestic law must be, before the public policy doctrine is applied.[84] In the case of *Satya* v. *Teja*, a couple married under Indian law obtained a foreign divorce. The court, while deciding on the validity and recognition of the foreign divorce observed, "our notions of a genuine divorce and substantial justice and the distinctive principles of our public policy must determine the rules of our private international law."[85] With regard to the application of public policy, the court in another important decision observed:[86]

> [T]he rules of Private International Law in this country are not codified and are scattered in different enactments. The problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens in personal matters. The distinction between matters which concern personal and family affairs and those, which concern commercial relationships, civil wrongs etc. is well recognized in other countries and legal systems. The law in the former area tends to be primarily determined and influenced by social, moral and religious considerations, and public policy plays special and important role in shaping it. Hence, in almost all the countries the jurisdictional, procedural and substantive rules that are applied to disputes arising in this area are significantly different from those applied to claims in other areas. That is as it ought to be.

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82 *Pires* v *Pires*, AIR 1967 Goa 113.

83 *Ibid*.

84 *Ibid*.

85 *Satya* v. *Teja*, 1975 AIR 105, para 42.

86 *Y. Narasimha Rao* v. *Y. Venkata Lakshmi*, 1991 SCC (3) 451, para 9.

In *Satya's* case though the court highlighted the special and differential role played by public policy in the determination of family matters, it did not indicate any further. The court without analysing the difference between Indian domestic laws on divorce and provisions of the US divorce law disposed of the case on the ground that husband had committed fraud in establishing jurisdiction of the foreign forum and refused to recognise the divorce.[87] In the case of *Y Narasimha Rao* v. *Y Venkata Lakshmi*,[88] the Supreme Court addressed the larger issue of whether Indian courts should recognise foreign divorce. The general principle of private international law is that the law of the forum where the parties are domiciled/habitually residing at the time of the petition shall be the applicable law and the forum of that particular jurisdiction shall be the proper forum. But the court did not follow this principle and while relying on public policy, the court declared that only those foreign divorces would be recognised, where the decision of the foreign court is based on a ground available in the law under which the parties were married.[89] Where the parties were married under Indian laws, a foreign divorce could not be recognised unless the grounds for a foreign divorce are compatible with domestic laws.

There is no judicial pronouncement dealing with the recognition of a foreign marriage in India. The question is whether the Indian courts will follow the general principle of dual domicile rule to validate foreign same-sex marriage or will rely on the overriding principle of public policy to refuse recognition to foreign same-sex marriage since the Indian domestic laws on marriage do not recognise same-sex marriage. If the decisions on the validity of foreign divorces are any indication, the foreign same-sex marriage will have to stand the test of public policy.

Farshad Ghodoosi contextualises the application of public policy under three categories: public interest, public morality and public security.[90] The public interest category views the private arrangement of citizens as equal to public arrangements and attempts to strike a balance between the two.[91] The public morality category, however, attempts to safeguard the beliefs, identities and life of the society. In cases involving public morality, Ghodoosi believes that the courts should play a more active role and apply methods other than balancing.[92] John Stuart Mill was a prominent

87 L. Jhambolkar, "Recognition of Foreign Divorces Decrees in India: A Case for Contextual Interpretation" 33(3) The *Journal of Indian Law Institute* 433(1991).

88 *Supra* note 86.

89 *Ibid.*

90 F. Ghodoosi, "The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements" 94 *Nebraska Law Review* 726 (2015).

91 *Id.* at 727.

92 *Id.* at 728.

liberalist, who considered same-sex relationships were a matter of private morality, on which states should not have authority. He stated, "that rules of private morality concern the individual and his conscience alone. Private immorality is presumed to harm no one else, such as in cases of private drunkenness, private greed, lesbianism, and, in England, homosexuality between two consenting adults."[93] In the context of India it is doubtful whether the issue of same-sex marriage will be merely treated as a concern of private morality to be left to individual alone. The explicit ground on which the Supreme Court decided in favour of the retention of section 377 IPC was 'public morality'.[94] The decision indicates an active role for the judiciary in elaborating the contours of morality.

In the context of India, one of the prominent arguments against the legalisation of same-sex marriage is premised on the violation of public policy. The support for the proposition is drawn from section 377 of IPC. However, the need is to understand that section 377 is a colonial pre–independence legal provision enacted in 1860. There have been marked changes in societal and legal perception on sexual relations. In a landmark judgment of *National Legal Services Authority (NALSA)* v. *Union of India,*[95] the Supreme Court recognised the rights of transgender and pronounced that they are entitled to enjoy all the fundamental rights enshrined in the Indian Constitution. Following which Government of India drafted the Transgender Persons (Protection of Rights) Bill, 2016[96] which if passed will eventually clarify the current laws which identifies only the genders of 'man' and 'woman'. The Delhi High Court decision on section 377 is an indication of the changes in perception. Even though the Supreme Court of India reversed the decision, it has admitted a curative petition, which is a rare discretionary corrective mechanism. At the political level also one can witness discernible changes towards accommodating the concerns of homosexual community. Government did not file appeal against the Delhi High Court decision in *Naz Foundation*, the appeal was filed by religious organisations. In 2015, a private member bill to legalise same-sex marriage was submitted, however the bill could not be taken forward as it failed to gather enough support.[97]

Many of the national political parties had incorporated decriminalization of section 377 IPC in their election manifesto. If the curative petition fails to get through,

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93 AO. Alegimenlen, "Same-Sex Marriage: Nigeria at the Middle of Western Politics" 3(1) *Oromia Law Journal* 261, 272 (2014).

94 Koushal, *supra* note 6.

95 *National Legal Services Authority* v. *Union of India* (2014) 5 SCC 438.

96 Transgender Persons (Protection of Rights) Bill, 2016, *available at:* http://www.prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2016-4360/ (last visited on Mar. 10, 2017).

97 *Supra* note 41.

the next step may be to pressurise the government for a legal amendment. These developments are clear indication that social and political position on same-sex marriage is changing. However, till the time there is an express legal recognition of same-sex marriage, the fear of public policy looms large as far as the recognition of foreign same-sex marriage is concerned. The NALSA judgment has given the third gender status to transgenders.[98] The judgment recognises the transgender persons' right to decide their self identified gender and directed the Central and state governments to grant legal recognition to their gender identity such as male, female or as third gender.[99] The judgment thus confirms the right of transgenders to enter into marital relationships.[100] However, this judgment will not be applicable to same-sex couples as the judgment clearly states that for the purpose of the judgment, the term transgender is to have a restrictive interpretation and do not include the terms like gay, lesbian, bisexual, though commonly included by the descriptor 'transgender'.[101]

Application of public policy to refuse a foreign same-sex marriage leads to a situation where a marriage that is recognised in one jurisdiction is considered invalid in another jurisdiction.[102] The situation is particularly unsatisfactory for the couples. Indian law does not currently extend immigration benefits to same-sex partners. The visa rules do not allow the same-sex partner to be granted a spousal or dependent visa to join their partner, who has entered India for employment. The partner could, at best, only receive a tourist visa, for a maximum of 180 days.[103] India also voted against a UN General Assembly initiative to recognise same-sex marriage for its officials and diplomats.[104] In other words, India will not even recognise the same-sex marriage of foreign diplomats.

India's lack of recognition of same-sex partners could impact economic benefits, under the Employment Provident Fund Scheme, 1952 and Workmen's Compensation Act, 1923, which stipulate that benefits are only given to people related by blood or marriage. Section 2(d) of the Workmen's Compensation Act, 1923 provides

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98 *Supra* note 95, para101.

99 *Id*., para 129.

100 Y. Naik, *Homosexuality in the Jurisprudence of the Supreme Court of India* 186 (Springer 2017).

101 *Supra* note 95, para 107.

102 A. Koppleman, "Against Blanket Interstate Non-recognition of Same-Sex Marriage" 17(1) *Yale Journal of law & Feminism* 217 (2005).

103 Vikram, 'For same-sex expat couples, India offers no happy ending' Oct. 4, 2015, *available at:* http://blogs.economictimes.indiatimes.com/onmyplate/for-same-sex-expat-couples-india-offers-no-happy ending/ (last visited on Mar. 4, 2017).

104 Suhasini Haider, "India Vote at U.N. not Anti-Gay Explains Government" *The Hindu,* Mar. 26, 2015.

compensation only to the widow or widower and other blood relations.[105] Under this Act, it is impossible for same-sex couples to claim any compensation on behalf of their deceased partners.

The judicial position on the recognition of polygamous marriage in jurisdictions which allow monogamous marriages can assist in understanding the legal position of foreign same-sex marriage in India. Initially, many jurisdictions rejected immigrants' polygamous marriages.[106] States primarily relied on the concept of public policy and morality and the fear of its impact on the forum state to refuse recognition to polygamous marriages contracted outside their jurisdictions[107] Over-time, the states realised that the immigrants had their own cultures and religions, and consequently, recognised polygamous unions.[108] In *Re Dalip Singh Bir's Estate*, an Indian national in a polygamous marriage with two wives in India, died intestate in California. The court held that for the purpose of succession, an exception could be granted on the law concerning polygamous marriage.[109]

This approach is in consonance with the public policy of the state that has a very significant relationship with the spouses and their marriage. Here, an analogy could be drawn regarding the public policy recognised in the Second Restatement of Conflict of Laws.[110] Second restatement principles require that a court must consider the question of applying the exception of 'strong public policy' to recognise marriages conducted by a state that has the most significant relationship to the spouses and their marriage, when the marriage was solemnized.[111] The position of second restatement employs the test of public policy to protect the genuine interest of the state in regulating

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105 Workmen's Compensation Act, 1923, s. 2 (d), the term 'dependant' is confined to a widow, children, and in some cases brother and sisters and grandchildren.

106 D. L. Chambers, "Polygamy and Same-Sex Marriage" 26 (1) *Hofstra Law Review*. 63 (2011); H. Y. Levin "Resolving Interstate Conflicts over Same-Sex Non-Marriage" 63 *Florida Law Review* 74 (2011).

107 Chambers, *ibid*.

108 Private International Law Act, 1995 (UK), s. 5-8 validates polygamous marriages if valid by the law of the place of celebration and by each party's personal law. In *Cheni* v. *Cheni* [1962] 3 All E.R. 873, an Egyptian marriage between an uncle and niece was held to be valid even though English domestic laws would not have permitted such a union.

109 188 P.2d 499 (Cal. Dist. Ct. App. 1948). See H. H. Kay, "Same-Sex Divorce in the Conflict of Laws" 15 *Kings College Law Journal* 92 (2004).

110 Restatement (Second) Of Conflict Of Laws, 1971, s. 283(1) provides that "the validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in sec 6."

111 *Ibid*.

the lives of people living in or connected by nationality to the forum.[112] This position attempts to accommodate the principle of universality as much as possible and encourages granting recognition to foreign marriages[113] and could be applied to the Indian situation. Yuval Merin argues for this approach in the recognition of marriages. She considers that conflict of policies on marriage should be resolved in favour of the validity of marriage, bearing in mind that the reasonable expectations of the parties should be protected.[114] Considerations of convenience, simplicity and efficiency also support the application of the law with which the parties involved are most familiar.[115]

Such a proposition would be in agreement with the doctrine of legitimate expectation and reasonable classification.[116] The doctrine of legitimate expectation and reasonable classification has been widely used and debated in Indian courts with respect to article 14 of the Constitution, which provides equality before law and 'equal protection of laws'.[117] The term 'equal protection of laws' denotes absence of class legislation. Permissible and reasonable classification between persons, however, is permitted.[118] The distinction between citizens and foreigners and the use of different parameters to decide the validity of their matrimonial relations could easily be justified by this doctrine of reasonable classification. Reasonable classification between foreigners and locals could be contested on the basis of another distinction: heterosexual and homosexual relations. Incidentally, in the case of *Koushal,* the Supreme Court of India relied on the intelligible differentiation of heterosexual and homosexual relations.[119] Usually, the courts will not apply a foreign law, if the results would be contrary to public policy of the forum, because the courts fear unrest from the society, if they do so. But by not applying the foreign law to the relevant parties, the purpose of the conflict of laws is defeated.

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112 *Supra* note 76, Koppleman at 945.

113 *Supra* note 72 at 64.

114 Y. Merin, "Anglo-American Choice of Law and the Recognition of Foreign same Sex Marriage in Israel –on Religious Norms and Secular Reforms" 36 (2) *Brooklyn Journal of International Law* 533 (2011).

115 *Ibid.*

116 For a thorough understanding of the concept, please refer to *Charanjit Lal Choudhary* v. *The Union of India*, AIR 1951 SC41, *Rustom Cavasjee Cooper* v. *The Union of India*, AIR 1970 SC 564, *E. P. Royappa* v. *State of Tamil Nadu*, AIR1974 SC 555, *Bennett Coleman & Co.* v. *Union of India* , AIR 1973 SC 106, *Maneka Gandhi* v. *The Union of India*, AIR 1978 SC 574.

117 Constitution of India, 1950, art. 14.

118 V. K. Sircar, "The Old and New Doctrines of Equality: A Critical Study of Nexus Tests and Doctrine of Non-Arbitrariness" 3 *Supreme Court Cases Journal* 1 (1991)

119 *Supra* note 6 at 98.

Article 10 of the Hague Convention expressly provides that contracting states may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy.[120] Two points become relevant: there is no definition of public policy and the measure of yardstick is 'manifest violation'. The contextual question is whether same-sex marriage is manifestly against the public policy of particular nations. The world is changing rapidly, and societies are coming closer, because of increased interaction through such factors as globalisation and social media. Through the introduction of Special Marriage Act, India has already adopted the civil concept of marriage, and there is a growing public demand in India to permit same sex marriage. However, till the time relevant legislative measures are undertaken to permit same-sex marriage domestically, it makes legal, social and political sense to recognise foreign same sex marriage, a position the government has not taken so far.[121] Acceptance of foreign same-sex marriage would not result in a negative influence on Indian society.[122]

IV Liberal and less state-centric approaches to same-sex marriage

Historically, marriages were influenced by religious tenets and social facts. Lawrence Stone traces the history of marriage especially in the context of England, and explains that marriage was initially a personal activity, regulated by family interests and the state did not attempt to regulate marriage in a coordinated manner.[123] Over time, the understanding of marriage and family relations changed and it became legally accepted and acknowledged that states would take a conspicuous role in regulating matrimonial matters.[124] One of the prominent cases where state interest in regulating marital relations was articulated clearly is *Pennoyer* v. *Neff,* where the court observed

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120 Convention on the Recognition of Divorces and Legal Separations, 1970, art. 10 reads: "The Contracting States may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy ('*Ordre public*')."

121 *Supra* note 72 at 66.

122 The basis of this argument is that the society, as a whole, evolves by becoming tolerant to the varied cultures and their practices, for example, when polygamy was first sought to be legalised in Britain, it was not readily accepted but later it was allowed for Muslim immigrants and this has not adversely affected the family system in Britain. For a polygamous marriage to be considered valid in the UK, the parties must be domiciled in a country where polygamous marriage is permitted and must have entered into the marriage in a country, which permits polygamy.

123 B. H. Hix, "State Interest, and Marriage: The Theoretical Perspective*"* 32 *Hofstra Law Review* 94 (2004).

124 M. Eichner, "Marriage, and the Elephant: The Liberal Democratic States Regulation of Intimate Relationships between Adults" 30 *Harvard Journal of Law & Gender* 26 (2007).

that the state has "absolute right to prescribe the conditions upon which the marriage relation between its citizens shall be created and the causes for which it may be dissolved."[125] State interest in regulating marriage was closely associated with the societal empathy about marriage as the appropriate institution for the procreation and rearing of children.[126] Other concerns which motivated states to assume a prominent role in regulating marriage include the conviction that marriage is the social foundation of a stable society.[127] Along with the state's active role, jurisdictions also show a preference towards granting the parties their autonomy in regulating intimate family relationships.[128]

Customs and personal laws have governed marriages in India. Successive governments however, have taken initiatives to regulate marital relations and curb practices considered as regressive such as polygamy[129] and child marriages.

The Prohibition of Child Marriage Act, 2006 was enacted to restrain child marriages. Although the Act puts in place a mechanism to check the growing numbers of such marriages, if a child marriage is solemnized, it is considered legally voidable at the instance of the parties to the child marriage. This has drawn criticism from all quarters as the provision makes the Act ineffective. But the government did a balancing act; it understood that undue intervention with the customs of the society's personal relationships, especially marriage, might lead to the public protesting strongly. The emerging principle, therefore, is that, as far as possible, the sanctity of marriage is maintained, retention of marriage is the norm; and declaration of invalidity of marriage is the exception.[130] The Delhi High Court, in the case of *Court on its Own Motion (Lajja Devi)* v. *State*, opined that the marriage contracted with a woman under 18 years or a man under 21 years of age would not be a void marriage but voidable one, which would become valid if no steps are taken by the 'child' concerned, under section 3 of

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125 *Pennoyer* v. *Neff*, 95 U.S. 714 (1878); *Simms* v. *Simms* 175 US 162(1899).

126 In *Adams* v. *Howerton,* 673 F.2d 1036, 1043 9th Cir. 1982 (male couples sought recognition of their marriage, but it was refused on the ground that homosexual couples can never procreate). See L. D. Borten, "Sex, Procreation, and the State Interest in Marriage" 102(4) *Columbia Law Review* 1091 (2002); W. C. Duncan, "The State Interests in Marriage" 2(1) *Ave Maria Law Review* 155 (2004).

127 L. J. Weitzman, "Legal Regulation of Marriage: Tradition and Change: A Proposal for Individual Contracts and Contracts instead of Marriage" 62 *California Law Review* 1241-1242 (1974).

128 C. Powell, "Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality" 84 *Fordham Law Review* 70 (2015).

129 M. N. Srinivasan, *Commentary on Hindu Marriage Act, 1955* 43 (Eastern Book Company, Lucknow, 2013). *Supra* note 18, s. 5 lays down that a marriage may be celebrated between two Hindus, only if the parties to the marriage has no spouse living at the time of the marriage.

130 See generally, "Saraswathi Ammal v. Dhanakoti Ammal", 1975 47 *MLJ* 614, *Manish Singh* v. *State*, AIR 2006 Delhi 37; *T. Sivakumar* v. *The Inspector of Police*, AIR 2012 Madras 62.

the Prohibition of Child Marriages Act, 2002, seeking declaration of the marriage as void.[131]

At the same time, the policies in India also demonstrate a preference towards granting autonomy for the regulation of intimate family relationships. For example, no-fault divorce has been recognised[132] and the concept of 'live–in' (defacto marriage) relationships[133] have been accepted. In *Svetlana Kazankina* v. *Union of India*, Delhi High Court has ordered the Government of India to frame a policy on the visa details of foreigners in live in relationships. This was intended to provide foreign couples in live-in relationships the same level of protection ascribed to Indian citizens in live–in relationships.[134] Another example of the state non-intervention is its continued silence on the issue of marital rape. Forceful sexual relations by a husband with his wife are not treated as rape, which is another example of the reluctance of state to interfere with the private life of individuals.[135] This reluctance of the state to interfere in matrimonial relationships is in agreement with the arguments raised by Martha Fineman. Fineman states that the state should be neutral about intimate relationships, and intimate relations between adults should be regulated in the same way as other relations between adults, by rules of contract and property.[136] The complete neutrality could be problematic especially given the fact that the relationships are determined by power and agency in social relationships and absolute neutrality may interfere with the state's ability to initiate protective measures for the weaker sections and to curb violence in intimate relationships. The legislative practices across jurisdictions suggest a combination approach where instances of state interference and neutrality are followed.[137]

The Indian legislative attitude to marriage shows divergent practices, where on one hand, the state attempts to remain neutral in regulating intimate relationships, on

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131 *The Court on its Own Motion (Lajja Devi)* v. *State*, W.P. (Crl.) No.338/2008.

132 Hindu Marriage Act, s. 13-B provides for divorce by mutual consent

133 Live-in relationships in the nature of marriage are recognised under the Prevention of Domestic Violence Act, 2005. In the case of *D Velusamy* v. *D Patchaiammal* (2010) 10 SCC 469, the Supreme Court laid down the tests to determine in which situations a live-in relationship qualifies as a live-in relationship in the nature of marriage.

134 *Svetlana Kazankina* v. *Union of India*, W.P.(C) No.635/2013 & CM No.1204/2013.

135 IPC, 1860, s. 375 provides for the ingredients of the offense of rape, but the only exception to this offense is when a man indulges in sexual intercourse with his wife. For a detailed note on marital rape see generally, Law Commission of India, 172nd Report on Review of Rape Laws (March, 2000).

136 M. A. Fineman, *The Neutered Mother, the Sexual and Family and other Twentieth Century Tragedies* 225-229 (Routledge, 1995).

137 *Supra* note 130.

the other hand, courts have interfered in personal and customary practices of communities and enacted legislative provisions even against community protests. The majority community had opposed the prohibition of polygamy at that time of enactment of the Hindu Marriage Act 1955. However, the religious opposition did not prevent the government from proceeding with reformative legislation. There are internal as well as external pressure and human rights arguments supporting same sex marriages and India may well seek to maintain its international reputation through pursuing same-sex marriage legislation at the national level. The path to achieving marriage equality in India will depend in part on how this internal and external pressure evolves as a pressing debate. With regard to same sex marriages, the current legal position in India is prohibitive and legal amendments need to be incorporated to permit same sex marriages.

V Conclusion

Personal laws based on one's religion govern Indian marriages. These laws presume heterosexual marriages. A major obstacle to the validity of same-sex union is section 377 of the IPC , which criminalises sexual relationships considered against the law of nature. Although there are very few reported cases where section 377 of the IPC has been applied, the sanction acts as a stumbling block for same sex couples. In this legal scenario, the validity of foreign same sex marriage contracted abroad involving foreign domiciliary is debatable. The question of validity of heterosexual marriage is generally been determined by the principle of 'dual domicile' and *'lex loci'* rules. The limited number of cases which has been decided by the judiciary in India, shows a preference to the 'dual domicile' and '*lex loci*' rule. The judicial trend in other jurisdictions suggests that the countries have invoked the doctrine of public policy to refuse recognition to foreign same sex marriage when their domestic laws do not permit such same sex marriages. The question of the recognition of same-sex marriage is thus, left to the discretionary interpretation of public policy. In the absence of a clear statutory provision defining public policy, the courts have defined the term on a case-by-case basis, depending on the context.

There is almost a judicial vacuum on the determinants of public policy with regard to the validity of foreign marriage. Existing judgments on public policy are confined to question of validity and recognition of foreign divorce decrees and suggest a clear reliance on public policy where the judiciary has refused to recognise foreign divorce. The judicial trend in other jurisdictions suggests that the application of public policy is generally kept to a minimum in matters involving foreign law. Jurisdictional policies are generally geared to validate a marriage, which has been validly contracted in different jurisdictions and to confer legal status on the parties involved. Till the time domestic legislative provisions has been undertaken with regard to same sex marriage,

the doctrine of legitimate expectation and reasonable classification through judicial precedents could be resorted to, while recognising foreign same- sex marriages. However, this proposition seems difficult while considering the overarching principles of public policy. Nevertheless such a differentiation will be in consonance with the application of the principle of universality under which a marriage, which is contracted validly, will be considered valid everywhere. States need to balance their legitimate interests in controlling the conduct of their citizens and providing freedom and adaptability in laws to encourage its status as a nation promoting comity.

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