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With this thought, we hereby present to you

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IS IT FAIR? DISAPPROVING LEGAL RECOGNITION OF 'SAME-SEX MARRIAGE' IN INDIA

AUTHORED BY - KUMARI MAHADEV GAIKWAD¹

Abstract

There is strong support and opposition to same-sex marriage on social, political and religious grounds. Some jurisdictions allow full-fledged marriage between same-sex couples or recognise same-sex civil unions. Other jurisdictions criminalise homosexuality. India has a rich history in the context of same-sex relations. Although there are different voices, the analysis of ancient Indian texts and inscriptions shows a more advanced society than that established in post-colonial India. It was up to the British who drafted the Indian Penal Code to criminalise same-sex relationships. Section 377 which now stands repealed criminalized such relationships with imprisonment and fines, thereby creating an inhospitable environment for such people. With the advent of the 21st century and the global movement against discrimination and subjugation, India is facing a similar upheaval. Supreme Court of India decriminalized same-sex partnerships in the historic Navtej Johar case and established a solid platform for the community to progress its identity and rights with the privacy ruling. Still, some legislative bodies maintain their opposition to same-sex relationships despite the court's ruling. The paper discusses the legal issues surrounding the recognition of foreign same-sex marriages performed outside India as well as also explores the legal status of same-sex marriage in India.

Introduction

Social acceptance of the LGBTQ community has advanced significantly on a global scale. In India, the community has been saved by the judiciary after a protracted struggle. Section 377 of the Indian Penal Code, which has since been repealed, was one among the laws that persecuted sexual minorities under the English-based Indian legal system. The section that classified unnatural offences included the LGBTQ community and led to an atmosphere of violence, oppression, and terror from both the

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police and the broader public. The Supreme Court's ruling gave the community a legal basis and marked a significant advancement in the normalisation of the concept of sexual minorities in India. The transgender community is in a better position owing to their recognition as the third gender, though the legal enactment drafted for them has been subjected to much criticism. Sexual minorities have been systematically oppressed and forced to live in obscurity. There is a clear lack of understanding and discrimination which can be seen in many forms. This means that transgender people are not part of the social organisations and are deprived of jobs and employment. Same-sex couples are not guaranteed rights such as marriage, reproduction or adoption/ maintenance. However, even after decriminalisation, social rights continue to be denied, including the right of same-sex couples to marry, which has been litigated in India. This is the obvious next step to ensure a normal life for the community, but the continued opposition of the government makes this very difficult.

The issue of same-sex marriage raises serious questions about the traditional concept of family and whether it is contested under the domestic laws of various countries, and the same is true for India. Since, marriage is considered the basis of society, the laws and political regulations surrounding it are related to the cultural and religious ethics of the society.² Does this norm only represent a disdain for same-sex/gay marriage? Although marriage has a strong religious foundation, many countries have long separated the religious and secular aspects of marriage. Different countries have different legal and policy responses to same-sex relationships. The first is intolerance i.e., the government's attempt to suppress same-sex relationships by criminalising them. Most states still punish homosexuality, often criminalise it, and do not recognise same-sex marriage.³ The second response involves concerted efforts to decriminalise same-sex relationships, even when public opinion clearly does not support it, and it also has its shortcomings. The third is to recognise same-sex relationships and provide different degrees of recognition, from partnerships and civil unions to full-fledged marriages.

The Netherlands and Belgium were the first countries in the world to legalise same-sex marriage. South Africa was the first African country to include lesbian and gay rights as part of its constitution.

² C. Weisbrod, "Family, Church, And State: An Essay On Constitutionalism And Religious Authority" 26 *Journal Of Family Law* 754 (1988).

³ 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/fess_papers/1504](http://digitalcommons.law.yale.edu/fess_papers/1504).

Latin America is heavily influenced by religious norms, and same-sex marriage is prohibited due to the opposition by the Catholic Church. Except for Nepal and Taiwan, no other country in Asia recognizes same-sex marriage. Israel recognizes same-sex marriage outside its borders. In the sea of traditional families and marriage, the normative debate about allowing same-sex couples to form families through marriage and its possible consequences is a sensitive and controversial issue in India.

History

The United States legalized same-sex marriage on June 26, 2015, and the United States Supreme Court upheld the right to same-sex marriage.⁴ With the passage of the Marriage (Same-Sex Couples) Act in 2013, the UK and several other European countries liberalised their laws on same-sex marriage, setting an example for the US to follow. Laws regarding same-sex relationships vary widely in Europe, but societies in each country generally accept same-sex relationships and recognise various degrees of them, from partnerships to civil unions to full-fledged marriages.⁵ At the same time, the Supreme Court of India has refused to give legal status to same-sex marriage but granted same-sex couples the right to adopt children.

The fluidity of gender for humans and the *Yakshas* is a concept known in ancient India. From ancient epics and scriptures to medieval prose, poetry, art and architecture, homosexuality can be traced back to Indian history. There are several examples of the presence of homosexuality and acceptance of homoeroticism in India.

Valmiki's Ramayana tells us that when Lord Hanuman returned from Lanka after seeing Goddess Sita, he saw a rakshasa woman kissing and embracing another woman.⁶ Krittivasa Ramayana tells the story of King Bhagiratha, who was born of two women. The text says that King Dilip had two wives and died without an heir. After that, Lord Shiva appeared in the dream of the queen and told them that if they make love to each other, they will give birth to a child. The widowed queen did as ordered and one of them became pregnant and eventually gave birth to King Bhagiratha. He is the famous

⁴ Obergefell v. Hodges, 135 S.Ct. 2584.

⁵ 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).

⁶Desk ITW, "Homosexuality in Ancient India: 10 Instances" (India Today, July 10, 2018) <<https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>> accessed December 1, 2023.

king who brought the river Ganga from heaven to earth.⁷

In the Mahabharata, there is a story about Shikhandini or Shikandi who caused the death of Deveratt Bhishma. She was born as the daughter of King Drupad but grew up as a man. Later in his life, he entered the battlefield of Kurukshetra and enlisted with the help of yaksha to become a man to defeat Bhishma.

The Matsya Purana has an interesting story about Lord Vishnu's conversion to the beautiful woman 'Mohini'. With the intention of deceiving the demons, the gods drank all the *amrut* (holy water). Then, Lord Shiva saw Mohini and fell in love with her and their union led to the birth of Lord Ayyappa.

The ninth chapter of the Kamasutra by Vatsyayana discusses oral sex, known as *Auparashtika*, homosexuality and sexuality among transgender people.⁸ The *Purushayita* section also mentions a *svairini*, self-willed and independent woman who is involved in sexual relations with other women. The book also refers to same-sex men. This text calls these people *Tritiya-Prakriti* or the third nature. Then, Kamasutra recognises eight types of marriage. For example, the term '*gandharva vivah*' can also be known as to include gay marriage or lesbian marriage. It literally translates to cohabitation or union without parental consent. The Rig Veda always refers to the story of Varun and Mitra, called Mitra-Varun. Same-sex couples are considered representatives of the two halves of the month. Shatapatha Brahmana says:

"On the night of the new moon, Mitra implants his seed in Varuna, and when the moon later wanes, that waning is produced from his seed. Varuna is similarly said to implant his seed in Mitra on a full moon night for the purpose of securing his future waxing."⁹

Other literature in Indian mythology speaks of same-sex love, but does not approve them. For example, Narada Purana, Manusmriti and Arthashastra prescribe punishment for such behavior.

⁷ Saif Rasul Khan, "SAME-SEX RELATIONSHIPS AND MARRIAGE IN INDIA: THE PATH FORWARD". https://law.unimelb.edu.au/__data/assets/pdf_file/0010/3967444/Khan_Saif-Rasul.pdf, accessed on November 20, 2023.

⁸ In the chapter titled, 'Auparishtaka', gay men have been referenced in context of oral sex. Homosexual men assumed a passive role and were referred to as 'mukhebhaga' or 'asekya'.

⁹ Deepanshi Mehrotra, "The Pre-Colonial History of Homosexuality in India: Why Love is Not Western", <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/>, accessed on December 2, 2023.

However, it does prove that homosexuality existed at that time.¹⁰

Muslim literature

The founder of the Mughal Empire himself was not attracted to one race. In Babur's Memoirs, Baburnama, Babur describes his attraction to a boy named Baburi in Kabul. Babur wrote a poem in his memory:

“May none be as I, humbled and wretched and lovesick;
No beloved as though art to me, cruel and careless.”

There are certain Sufi poetry which exhibit homoerotic or same-sex references. For example, Sufi saint Bulleh Shah had preconceived notions about sexuality and religion and expressed it in his writings. His poems show the fluidity of sexuality and love of *murshid*, Shah Inayat.

The story of Sarmad Kashani is also famous. Later, he became a sufi saint and an Armenian merchant. While traveling to India for trade, he fell in love with an Indian boy named Abhai Chand. He quit his job and started living in Thatta as a student with Abhai Chand. Sarmad Kashani was eventually captured and beheaded by Aurangzeb.

Another Sufi saint, Shah Hussain, claimed his love for an Indian boy named Madho Lal in his work. Finally, Shah Hussain and Madho Lal were buried together in Lahore. Relics in some texts show the divine love that outlasted his existence.

Dutch traveler, Johan Stavorinus, wrote about male homosexuality among the Mughals in Bangladesh during his travels in East India. In his work he wrote:

"The sin of Sodom is not only universal in practice among them, but extends to a Besty and communication with brutes, and in particular, sheep. Women even abandon themselves to the commission of a natural crimes."

Apart from literary evidence, Indian history has many visual traces of homosexuality in India. These records are available across the country as art, photography, and sculpture.

¹⁰ *Ibid.*

One such chronicle is kept in Khajuraho temple. Khajuraho temple sculpture, built between 950 and 1050 by the Chandela Dynasty, women erotically embraced each other, and men exposed their genitals to the other men.¹¹ Scholars and historians interpret this as an acknowledgment of homosexuality and same-sex love at the time. This statue confirms the fluidity of male, female, and third genders.

The 13th century Sun Temple at Konark in Eastern Orisha also known as Surya Devalaya , displays similar images. The Sun Temple is dedicated to the Hindu Sun God, whose exterior is covered with sculptures depicting erotic scenes from the Kamasutra.¹²

Temples in Puri and Tanjore also display candid images of queer couples. The Rajrani temple in Bhubaneswar has a sculpture depicting two women having oral sex.

Paintings in Buddhist monastic caves at Ajanta and Ellora depict the life of Gautama Buddha. Sculptures and paintings show the high order of architecture. Importantly, among the images of the Buddha there are several other images depicting sensuality and erotic scenes. In this picture, men and women are involved in lovemaking with the same sex. These visuals challenge any belief which states that homosexuality does not exist in Indian culture.

Furthermore, this image of sexuality was shocking to the British colonists who wanted to control this overt display of sexuality. Thus, British colonists influenced Indian understanding of sexuality in addition to "perverse" sex. Among other things, they anglicised the moral lens of India.

Indian perspective on Same-sex marriage

There are many different ways to interpret the question of what marriage is. The Oxford English Dictionary defines marriage as "The condition of being a husband or wife; the relation between persons married to each other; matrimony" for the straightforward definition of marriage.¹³

¹¹ Pandey BV, "Why Legalising Gay Sex in India Is Not a Western Idea" (BBC News, December 31, 2018) <<https://www.bbc.com/news/world-asia-india-46620242>> accessed December 2, 2023.

¹² Nair SS, "Life360" (Life360, November 28, 2019) <<https://jomec.co.uk/life360-2019/uncategorised/religion-has-always-been-the-biggest-tool-to-create-taboo-in-india>> accessed December 2, 2023.

¹³ See Oxford English Dictionary (Online Ed.)

(accessible at <http://www.oed.com/view/Entry/114320?redirectedFrom=marriage#eid>) (accessed on December 7, 2023)

Nonetheless, the dictionary now notes—in small print—that the phrase is occasionally used to describe committed partnerships between people of the same sex.¹⁴

A relationship between a male and a female is defined as marriage under numerous different definitions that were looked at.¹⁵ This suggests that the meaning of marriage outside of the law has been developing slowly. It's problematic to see marriage in such a basic way. It is important to consider the concept of marriage in light of the social environment.¹⁶

When societal constructs like morality and religion are incorporated into the definition of what constitutes a marriage, the meaning of marriage also shifts. The basic definition of marriage falls short when all these aspects are taken into account. Contrary to common belief, a marriage is not a personal partnership. It's a social institution that's always changing, and opinions that don't align with the mainstream on marriage are suppressed.¹⁷ The religious attitudes on marriage are the most influential influence in how society views marriage out of all the other variables.

Religious Perspective:

Prescription of marital ceremonies and conduct codes is one of the most prevalent aspects of major religions. India's three main religions—Hinduism, Islam, and Christianity¹⁸—each have their own standards for marriage conduct and definitions. Not one of them specifically allows or even acknowledges same-sex marriage.

Hinduism defines marriage as the lifelong union of two people so that they might seek Dharma, Artha, Kama, and Moksha together. Hindu law recognises marriages, which often unite people of the opposing sex. There are a few examples of same-sex marriages that have taken place, but the marriages have

¹⁴ *Ibid.*

¹⁵ Marriage | the relationship that exists between a husband and a wife, <http://www.merriam-webster.com/dictionary/marriage> (last visited August 10th, 2015).

¹⁶ Talal Asad, 99. The Definition of Marriage, 60 MAN 73–74 (1960).

¹⁷ 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).

¹⁸ Ministry of Home Affairs, Census of India, Distribution of Population by Religions. Issued 2011. (Accessible at http://censusindia.gov.in/Ad_Campaign/drop_in_articles/04-Distribution_by_Religion.pdf) (accessed on December 7, 2023).

not been officially recognized by the authorities.¹⁹ Despite the fact that a number of dharmic books ban homosexuality, there are also a number of mythological stories that show homosexual experiences as natural and joyful.²⁰ There has been no express mention of same-sex marriage in the mythology by the Hindu religion.²¹ Although there is only acceptance of same-sex relationships in small pockets of modern Hindu societies, this has not stopped some priests from performing same-sex marriages, with some being performed as early as 2001.

Islamic law views marriage as a legal agreement, or "matrimonial contract," between two individuals. It is expected that the bride will freely consent to the marriage. Islamic marriages that are recognized by religion must be legally binding contracts. Even allowing people of the same sex to be in sexually active relationships is problematic in Islam. Muhammad is alleged to have advocated the death penalty for participants in same-sex relationships who are both active and passive.²² The moral or religious justification for this is that homosexual behavior undermines the harmony of God's creation and is, thus, a revolt against God.²³ As a result, it is assumed that people of the same sex cannot get married, and even if they were married, they could never consummate such a union.

There is no precise definition of marriage according to the Christian perspective. The bible contains multiple verses that seem to suggest marriage is a relationship between a man and a woman. One Bible text, for instance, says that husbands need to love their spouses in the same way that Jesus loved the church.²⁴ The majority of traditional Christian societies and churches do not accept same-sex unions, despite the fact that marriage has no set definition.²⁵ They think that only "traditional" weddings should be allowed.²⁶ Some far-right organizations even hold that an Old Testament text

¹⁹ Jyotsna Singh, Gay couple hold Hindu wedding, BBC, May 29, 2001, http://news.bbc.co.uk/2/hi/south_asia/1357249.stm (accessed on December 7, 2023).

²⁰ NANCY BONVILLAIN, *WOMEN AND MEN: CULTURAL CONSTRUCTS OF GENDER*, at 281 (Prentice Hall) (2001).

²¹ Rajiv Malik, Discussions on Dharma, *HINDUISM TODAY*, 2004, <http://www.hinduismtoday.com/modules/smartsection/item.php?itemid=1300> (last visited August 4th, 2015).

²² Jim Wafer, Muhammad and Male Homosexuality, in STEPHEN O. MURRAY & WILL ROSCOE, *ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY, AND LITERATURE*, at 89 (NYU Press) (1997)

²³ Wayne Dynes, *Encyclopaedia of Homosexuality* (New York) (1990).

²⁴ 5:25-32, Ephesians, KING JAMES BIBLE.

²⁵ Rory Mc Veigh & Maria-Elena D. Diaz, Voting to Ban Same-Sex Marriage: Interests, Values, and Communities, 74 *AM. SOCIOLOGICAL REV.* 891–915 (2009).

²⁶ *Ibid.*

justifies the execution of gays by stone.²⁷

These instances demonstrate how mainstream faiths have been hesitant to recognize same-sex unions or even non-heteronormative sexual partnerships. From the lens of mainstream theology, it is not feasible for same-sex partners to get married.

There is some hope that the process of reframing religious ideas can help to solve this issue of societal perception. Hindu customs for the most part of history prohibited divorcees and widows from remarriage²⁸, as well as marriages between members of other castes²⁹. Most people in today's culture would disagree with these limitations. This is also seen in other religions. For instance, the Bible says that people should not wear mixed textiles³⁰ or consume shellfish³¹. It also says that people who violate the Sabbath should be stoned to death³². These days, most Christians don't adhere to such laws.

Not only is it possible for religion to evolve, but also for society perceptions in general. In the long term, it is entirely possible that the weight of public opinion will change in favour of same-sex marriages in the Indian context. This does mean that in the status quo, same-sex relationships face an uncertain reality.

Legal perspective:

Various Laws that Regulate Marriages in India:

Hindu Marriage Act, 1955 – This act applies to Hindus, Buddhists, Jains, and Sikhs and governs the marriage and divorce of couples belonging to these religions. The act provides for the conditions of a valid marriage, registration of marriages, and grounds for divorce.

²⁷ The Associated Press, Ex-Bob Jones President Apologizes for 1980 Anti-Gay Remarks, THE NEW YORK TIMES, March 23, 2015, <http://www.nytimes.com/aponline/2015/03/23/us/ap-us-rel-bob-jones-gays.html> (accessed on December 7, 2023); 18:22, Leviticus, KING JAMES BIBLE.

²⁸ C. T. Kannan, Intercaste Marriage in Bombay, 10 SOCIOLOGICAL BULLETIN 53–68 (1961); Jennifer S. Barber, Community Social Context and Individualistic Attitudes toward Marriage, 67 SOCIOLOGICAL QUARTERLY 236–256 (2004).

²⁹ M. Bhat & R. Kanbargi, Estimating the Incidence of Widow and Widower Re-Marriages in India from Census Data, 38 POPULATION STUDY 89–103 (1984); Sudhir Chandra, Conflicted Beliefs and Men's Consciousness about Women: Widow Marriage in Later Nineteenth Century Indian Literature, 22 ECONOMIC POLITICAL WEEKLY 55–62 (1987).

³⁰ 11:9-12, Leviticus, KING JAMES BIBLE.

³¹ 19:19, Leviticus, KING JAMES BIBLE.

³² 23:32, Leviticus, KING JAMES BIBLE.

Special Marriage Act, 1954 – This act applies to all citizens of India and allows couples of different religions and castes to marry each other without having to convert to each other's religion. The act provides for the solemnization of marriages by a marriage officer and registration of marriages.

Indian Christian Marriage Act, 1872 – This act applies to Christians in India and provides for the conditions of a valid marriage, registration of marriages, and divorce grounds.

Muslim Personal Law (Shariat) Application Act, 1937 – This act applies to Muslims in India and provides for the application of Muslim personal law in matters of marriage, divorce, and inheritance.

Parsi Marriage and Divorce Act, 1936 – This act applies to Parsis in India and provides for the conditions of a valid marriage, registration of marriages, and grounds for divorce.

Foreign Marriage Act, 1969 – This act provides for the registration of marriages of Indian citizens solemnized outside India.

Dowry Prohibition Act, 1961 – This act prohibits the giving or taking of dowry in marriages and provides for penalties for those who violate the law.

Protection of Women from Domestic Violence Act, 2005 – This act provides for the protection of women from domestic violence and abuse in marriages and relationships.

Child Marriage Restraint Act, 1929 – This act prohibits the marriage of children below the age of 18 years and provides for penalties for those who violate the law.

Further, attempting to amend the Special Marriage Act of 1954 (herein referred as SMA) to permit same-sex marriages is another strategy to prevent raising ethical eyebrows. The SMA is a lay law that facilitates marriages between individuals of different religious beliefs or who do not wish to have their own laws restricted. Rather of having a religious ceremony, the marriage officer documents the engagement. As it stands, the SMA appears to only apply to heterosexual couples because it stipulates that women must be 18 years old and men must be 21.

However, it is not impossible for same-sex marriages to be accepted in the SMA system. The only way to amend Section 4(c) to allow a participant who is male to be older than 21 and if a female, 18 to include a specific provision that same-sex marriage is lawful. The modification of Section 4(c) is only necessary. In each case the SMA should be changed to give equal approval to the partnerships between persons of different faiths even if personal laws were updated to acknowledge same sex marriages.

Although the changes in question are easy to formulate and can not be said to hinder freedom of religion, they are bound to create vocal opposition. The SMA provision would be identical to those introduced in other countries to legalise same-sex marriages. Now, from the Netherlands in 2000 to Britain and the USA in 2015, 25 countries have enacted these rules.

Recognition of foreign Same-sex Marriages in India

The legitimacy of marriage is the first significant problem to be resolved whenever the issue of recognition of a foreign marriage is brought up before the domestic legal system. There is a differentiation made when it comes to the validity of marriage, particularly in common law with regard to formal and material conditions. Formal features suggest that ceremonies and procedures are necessary for a marriage to be deemed lawful. In most cases, the law of the location of the celebration governs issues pertaining to the formal validity of marriages (*Lex loci*). Qualities like as ability, ancestry, faith, etc. are material as per. "Intended matrimonial home theory"³³ and "ante nuptial dual domicile theory"³⁴ control common law succession issues.

The legitimacy of overseas heterosexual relationships has not been the subject of numerous legal cases. But based on the opinions of publicists³⁵ and the views of judges in specific cases³⁶, it can be

³³ T. Baty, "capacity and form of marriage in the conflict of laws" 26(6) *Yale law Journal*, 448(1917). In the case of *Brook v. Brook* (1861) 9 HL Cas 193, the husband wished to marry the sister of his diseased 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 a marriage as void. Later cases or some exceptions being envisaged in *Sottomayor v. De Barros* (No. 2) (1879) 5 PD 94.

³⁴ In *Radwan v. Radwan* (No.2) (1972) 3 All ER 1026, the intended matrimonial story was used to uphold the validity of polygamous marriage.

³⁵ B K. Aggarwal and V. Singh, *Private International Law in India*, 47(*Clover Law International*, 2010). See V. C. Govindaraj, *Conflicts of Laws in Indian* 20 (*Oxford University Press*, 2011).

³⁶ See generally, Law Commission of India, 193rd Report on Transnational Litigation: Conflict of Laws-Law of Limitation (June, 2005).

assumed that the Indian legal system typically adheres to English common law principles. The ruling rendered by the court in the *Noor Jehan Begum v. Eugene Tisenko*³⁷ case states that the law of residence governs the rights involved in marriage, while the principle of *lex loci* governs the formal features of marriage.

Given that Indian law is applicable throughout its entire territory, same-sex marriage is not allowed in India and cannot occur there whether that affects immigrants or Indian domestic workers. There may be instances where an Indian domiciliary couple travels overseas and gets married in a country where same-sex unions are legal under local laws in order to avoid being banned from doing so in India. India does not have any laws prohibiting domiciliary marriage evasion. On the extraterritorial application of laws, the Supreme Court has offered commentary. The Hindu Marriage Act of 1955 was ruled to have territorial application and to apply to all Hindus who are residents of India. This implies that the Hindu Marriage Act will apply in any situation, including when a marriage has taken place outside India, provided the parties to the marriage, a domiciled in India at the time of the marriage.³⁸ Further, such evasive marriages will not be recognised by the legal system where the marriage has been conducted outside India. Recently, 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 recognised in India, the domicile of parties to the marriage.³⁹

The contentious issue is whether India might apply the *lex loci* and dual domicile rules to internationally recognized same-sex unions when Indian marriage laws do not specifically permit such unions. Consider the instance of a same-sex union between Dutch citizens, which was actually lauded in the country. How would an arrangement like this be acknowledged in India? According to the Foreign Marriage Act, the "Central Government...may declare that what is the celebrated under the law in force in such foreign country shall be recognised by courts in India as valid."⁴⁰ It should be noted that there are two requirements: first, the word "may" in section 23 indicates that the act of recognition is optional; second, the discretion is only used if the laws governing marriage solemnised

³⁷ *Noor Jehan Begum v. Eugene Tisenko*, AIR 1941Cal. 582.

³⁸ *Sodur Gopal v. Sondur Rajini* (2013) 7 SCC 426.

³⁹ B. Chawla, "Lesbian Couple From India Cannot Stay In UK Because Their Marriage Is Not Legal In India" May 16, 2016.

⁴⁰ Foreign Marriage Act, 1969, s. 23.

in other countries are comparable to those governing marriages in Asia. Since same-sex marriages are not recognized by law under the Act, section 23 is not applicable. The act's Section 17 addresses the process for registering marriages abroad. Nevertheless, the clause stipulates that these marriages may only be legally recognized if they meet the requirements outlined in section 4 of the Act.⁴¹ Act's Section 4 specifies the age at which the bride and groom must marry, which clearly indicates that it only supports a heterosexual union.

Moreover, a cursory examination of Section 27 of the Foreign Marriage Act, 1969 suggests that a marriage deemed lawful in another country may be deemed lawful in India.⁴² The High Court of Kerala, however, looked into the application of the Foreign Marriage Act and clarified that it only covers circumstances in which at least one of the parties to the marriage is Indian in the case of *Mrs. Gracie v. P. A. Maithiri*⁴³. The legality of a marriage between two foreign nationals is not governed by the Foreign Marriage Act. There is presently no law in India that can control the acceptance and legality of marriage between foreigners. Without a specific legislative provision, the whole issue of accepting international same-sex marriage will be based on the conflict of laws, rules or recognition of validity of marriages.

If the practices of other jurisdictions are any guide, countries invoke the concept of public policy when their domestic laws prohibit same-sex marriage. Based on this, the forum could refuse to recognise foreigners same-sex marriage, even if the marriage satisfies the accepted principles of "dual domicile" and "*lex loci*" rule, as far as marriage validity is concerned.

The entire landscape of same-sex marriage recognition is altered by the conflict of laws, which subjects recognition of foreign laws and administrative actions to the supreme authority of public policy.⁴⁴ Public policy is subjective, and every country has unique experiences, therefore opinions and understandings of the system vary.⁴⁵ Traditionally, public policy sets limits and plays a dominant

⁴¹ *Id.*, s. 4.

⁴² *Id.*, s. 27.

⁴³ *Mrs. Gracy v. P. A. Maithiri*, AIR 2005 Ker. 314, para 3 and 8.

⁴⁴ B. Cox, "Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does it Really Exist?" 16 *Quinnipiac Law Review* 62(1996).

⁴⁵ 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(1998).

role in the application of foreign law on the ground that such law conflicts with the fundamental standards of the society.⁴⁶ The fundamental difference between two sovereign legal systems that dispute over matters of choice of law regarding the nature and notion of marriage is the obstacle to the recognition of marriage. The right to sovereignty allows all the states and makes each state free to set marriage requirements that are appropriate for their unique social, religious, and cultural contexts.⁴⁷ The issue is that the importance placed on the law of the parties' intended marital residence or place of residence leads to interference with the other state's legal prescription if recognition is sought.⁴⁸ On the other hand, a total rejection of the idea that marriage is legitimate, there are instances in which the policies of the state that have approved same-sex marriage are superseded by the comity of nations.⁴⁹ Nevertheless, the Law Commission of India's 65th report did not specify any potential parameters for the public policy doctrine, leaving it up to the judiciary's interpretation on a case-by-case basis. Interpreting the circumstances in which the application of foreign law might conflict with Indian national policy is challenging. The interpretation of marriage statutes as they stand will be the matter at hand in the context of marriage. In India, there have been no court rulings on this subject.

No court decision addressing the acceptance of a foreign marriage exists in India. The question is whether the Indian courts will follow the general principle of dual domicile rule to validate foreign same sex marriage all 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.

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. Even though the section 377 of Indian penal code has been repealed in the case of *Navtej Singh Johar and Ors. v. Union of India*⁵⁰, but the Supreme Court has still rejected to legally recognise same-sex marriages, in the case of *Supriyo Chakraborty and*

⁴⁶ A. Koppleman "Same Sex Marriage Choice do Law and Public Policy" 76(5) *Texas Law Review* 938 (1998).

⁴⁷ 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(1998).

⁴⁸ *Ibid.*

⁴⁹ 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); Adama A. Candeub And M. Kuykendall, "Modernising Marriage" 44 *University Of Michigan, Journal Of Law Reform* 765 (2010).

⁵⁰ 2018 INSC 790.

*Anr. v. Union of India*⁵¹, while providing adoption rights to the same-sex couples.

When public policy is applied to prohibit a foreign same-sex marriage, it might result in a situation where a marriage that is legal in one country is deemed void in another. For the spouses, the situation is not satisfactory.⁵² Same-sex partners are not currently eligible for immigration benefits. The same person cannot travel to India on a dependant or spousal visa to accompany a spouse who has been employed there due to visa regulations. The partners might only be granted a tourist visa, valid for a maximum of 180 days, at most.⁵³ Additionally, India voted against a resolution proposed by the UN General Assembly to allow same-sex unions for its diplomats and staff.⁵⁴ Put another way, India will not even acknowledge foreign diplomats who marry members of the same sex.

The world is changing quickly, and social media and other reasons like globalization are fostering greater interaction between societies. India has already embraced the civil concept of marriage with the passage of the Special Marriage Act, and there is growing popular pressure to allow same-sex unions. However, it makes legal, social, and political sense to recognize international same-sex marriage until the necessary legislative measures are made to authorize same-sex marriage domestically. Despite opposition, the government has not yet taken this action.⁵⁵ Indian society wouldn't suffer if same-sex marriages between foreigners were accepted.

The Way Ahead

The urgent need is for a clear legislative enactment that addresses the various legal rights that must be upheld and maintained and provides states in India with advice and clear instructions on how to carry out the law. This ought to cover the Indian Special Marriage Act of 1954's marriage rights as well. The Yogyakarta Principles and Yogyakarta Plus 10 may have served as the basis and source of inspiration for this statute. This was Indonesia's first significant legal document produced by a working group. This incredibly productive document is built on the fundamental ideas of equality and freedom and tackles community concerns from a human rights viewpoint.

⁵¹ W. P. (C) 1011/2022.

⁵² *Supra* note 45.

⁵³ 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/>.

⁵⁴ Sushasini Haider, "India Vote at U.N. non-Anti-Gay Explains Government" *The Hindu*, March 26, 2015.

⁵⁵ *Supra* note 48.

Interaction with the LGBTQ community represents the next viable alternative, one that is sorely required in the Indian context. The first step in this should be more frank and inclusive conversations about sex and sexuality in families and communities. It is essential that the community participates in mainstream activities. Privacy ought to be valued and safeguarded. The identity of a lesbian or gay person has no bearing on society. It is an individual's sexual preference, and as the Puttaswamy ruling correctly noted, "equality demands that sexual orientation of each individual be protected on an even platform." Programs for sensitization and training are therefore required. The first myth that needs to be dispelled is the idea that it's a matter of choice rather than of biology. There are a lot of these false beliefs in the community, and appropriate programs are needed to dispel them.

As part of sex education, information should be distributed at all levels, beginning in the classroom. It ought to be imparted in an honest manner, free from judgment or humiliation. Law enforcement and the police are another important industry. There have been instances of abuse and violence committed by Indian police against the community, and they are not known to be particularly sensitive.

Conclusion

It's time to accept that there is a group of people among us who identify as non-heterosexual and that their sexual preference is just one facet of who they are. They share the same humanity as all heterosexual people. The goal should be social participation with an eye toward inclusivity. It is important to normalise this and do away with the concept of shame. One's choice of sexual partner should not be taken personally; it is a matter of personal preference. In addition to establishing consistency in the legal protection of social, economic, and cultural rights, a well-drafted law can also be a very useful tool for ensuring justice. Their voice will be crucially given by a legislative enactment that will enable them to question incidents of abuse, assault, and prejudice. Finally, though marriage may be a 'core' part of personal laws, marriage equality should not be held to violate religious freedom based on the application of the 'essential religious practices' test. In any case, the Hindu Marriage Act and the Special Marriage Act are capable of being interpreted to permit same- sex marriage.

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