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RECOGNITION OF FOREIGN SAME-SEX MARRIAGE IN INDIA

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ABSTRACT

The issue of recognition of foreign same-sex marriages in India? It has both strong support and opposition on social, political, and religious grounds. Same-sex marriage is legally performed in many countries, such as the Netherlands, which has legalized homosexual relations. However, in India, whether such same-sex marriages performed abroad are legally recognized or refused remains a significant legal question? When marriages performed in foreign countries are recognized, such recognition affects inheritance, adoption, maintenance, divorce jurisdiction, and property rights. This research paper examines the legal framework governing the recognition of foreign marriages under Indian law, particularly the Foreign Marriage Act, 1969, the Special Marriage Act, 1954, and principles of private international law. In India, a foreign marriage may be recognized if it is legally valid where it was celebrated, according to the principle of *lex loci celebrationis*. The study also evaluates the public policy exception, which allows Indian courts to refuse recognition of foreign judgments or legal relationships that are contrary to domestic law. The paper further discusses constitutional equality under Articles 14, 15, and 21, and analyzes Supreme Court case studies such as *Navtej Singh Johar v. Union of India* and *Supriyo v. Union of India*. While the Court declined to legalize same-sex marriage, it recognized the rights and dignity of LGBTQ+ individuals. The paper concludes that jurisdiction, choice of law, recognition, and enforcement are important to protect fundamental rights and prevent discrimination in cross-border marital recognition.

Keywords: Same-Sex Marriage, Foreign Marriage Recognition, LGBTQ+ Rights, Private International Law, Public Policy Exception, Constitutional Equality, Cross-Border Marriages, Fundamental Rights.

INTRODUCTION:

When considering a transformative constitution, several judicial decisions acknowledge principles such as autonomy and privacy within the context of marriage. One can interpret these legal precedents as supporting the right to marriage equality. The Special Marriages Act also represents another aspect of marriage equality. Nevertheless, despite being articulated in gender-neutral terms, none of India's marriage laws explicitly recognize unions beyond heterosexual couples. The significant ruling in *Navtej Singh Johar v Union of India*¹ invalidated laws penalizing consensual sexual conduct between individuals of the same sex. However, in the Indian context, marriage is seldom viewed through the lenses of autonomy, privacy, and personal expression. Instead, marriage in India reflects community expectations shaped by religion, societal norms, and influential moral advocates dictating who may be accepted or excluded.

Currently there exists the quotidian divide between the gradual recognition of same sex unions (if not marriages) by the Courts and the ongoing 'public policy' of the government. Not being statutorily defined, yet profoundly ubiquitous, the 65th Law Commission Report expressed the word "public policy" to mean, "public policy is not concerned with what law ought to be, but with the current perception of the community."²

The traditional choice of law rules extrapolated from the First Restatement on Marriage are usually followed in India. The Courts in India have been largely reliant on the English common law principles on choice of law. Moreover, there hasn't been much jurisprudence where the courts have had to adjudicate on foreign marriages and their recognition in India even within the confines of heteronormative relationships. The rules of domiciliaries are also couched in heteronormative understanding, given that a wife's domicile is that of her husband's.

Where domestic laws do not permit same-sex marriages, the overriding doctrine of public policy takes precedence over the accepted principles of foreign marriage recognition of dual domicile and *lex loci* rule. No laws recognize same sex marriages, either expressly or tacitly, however, the transformative Constitution of this land contemplates same sex marriages. It is unclear where public policy should be located in the constitutional imagination or the existing

¹ *Navtej Singh Johar v Union of India*, 10. SCC 1 (SC: 2018).

² SCC 786 (SC: 2014); *Shafin Jahan v Asokan KM*, 16. SCC 368 (SC: 2018). Report on Recognition of Foreign Divorces, 65th Law Commission of India (April, 1997).

laws.

2. EXISTING LEGAL SITUATION HINDU MARRIAGE ACT 1955:

Section 5 provides for the valid conditions of a marriage between two Hindu parties. While clause 1 is couched in gender neutral language. Clause (3), while prescribing the minimum age, uses the words “bridegroom” and “bride” clearly intending heterosexual parties for a valid marriage. The language thus construed as binary gender and the expansion of their meaning to include people of the same sex will also not be justified under statutory interpretation. However, the Madras High Court in *Arunkumar v Inspector General of Registration*³ held that the word “bride” in section 5 of HMA also includes transwomen and intersex persons who identify as women. The court, following NALSA's interpretation of the word “sex” in Article 15 and reading the right of self-perceived gender identity under Article 21, noted that the word “bride” cannot be given a static and immutable meaning and it should be interpreted in light of the legal system established post NALSA. Therefore, the words “bride” and “bridegroom” may be extended to include trans women and men within its purview, but it nevertheless holds no capacity to include same sex persons to claim themselves as bridegroom and bride respectively. Such interpretation would also defeat the legislative intentions as gathered from several other sections in the Act, the provisions of the Act beyond doubt impart heterosexual couples as manifest, to name a few, in section 13(2)⁸ which provides special grounds for divorce to the wife. Provisions about alimony and maintenance use binary gender pronouns clarifying that the Act strictly conceives heterosexual marriages. Moreover, the Act provides for heterosexual penetration as indispensable for consummation of marriage. Hindu marriage may be annulled or declared nullity upon the failure of consummation owing to the impotence of the respondent. Therefore, the consummation of marriage also considers strictly heterosexual penetration as the standard that legitimizes marriage with consummation.

The Indian Christian Marriage Act, 1872:

Under section 609, it has been provided that the age of the “man” intending to marry shall not be under 21 and the age of the “woman” shall not be under 18, respectively. This clearly intends, on the same lines as that of the Hindu law, that the marriage shall be between man and woman.

³ *Arunkumar v Inspector General of Registration*, [2019] SCC Online Mad 8779 (India).

The Parsi Marriage and Divorce Act, 1936:

Under section 310, it has been provided that ages of the “male” shall not be under 21 and the “female” shall not be under 18, respectively.

The Special Marriage Act, 1954:

This Act permits Indian citizens the choice to marry by evading their religion or caste based constraints, without changing their religious affiliations. This Act also provides for similar conditions as under the Hindu Marriage Act, 1955.

The Foreign Marriages Act, 1969:

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. However, section 11⁴ provides that a marriage may be refused to be registered if the place of lex loci celebration prohibits it. A marriage solemnized under foreign law may be recognized as valid only if the law in force in the foreign country is similar to this Act.⁵ The validity of a foreign marriage is given under section 413 which again provides for the minimum age of “bridegroom” and “bride”.

None of the aforesaid Acts regard the possibility of same-sex marriages. In other jurisdictions, same sex marriages have been expressly provided for in their legislations. In India, even where there is no express bar on same sex marriages, the legislative intents of all the Acts make it amply clear that marriages are heterosexual.

This paper is a critical analysis of the public policy doctrine used as an exception to choice of law rules, explored in the context of foreign same sex marriages. This paper first explains the choice of law jurisprudence in India concerning marriages, the next part shall discuss the public policy exception in the context of same sex marriages, the conclusion will provide for a more refined choice of law approach which would allow the recognition of foreign same sex marriages in tune to the Constitution.

⁴Foreign Marriages Act, § 23 (1969).

⁵ Foreign Marriages Act, § 23 (1969).

RECOGNITION OF FOREIGN MARRIAGES IN INDIA: THE CHOICE OF LAW RULES

This section discusses the Indian private international regime on the recognition of foreign marriages. The first part discusses the adoption of the common law principles of *lex loci* and *lex domicile* in Indian jurisdictions. The second part discusses the legislative private international regime in recognizing foreign marriages vis-a-vis the Foreign Marriages Act of 1969.

THE LEX LOCI AND LEX DOMICILII CHOICE OF LAW RULES

Whenever the recognition of a foreign marriage is brought before the courts, the cynosure of the question essentially involves deciding the validity of the marriage. India has adopted the English common law on the issue. There are many approaches to the choice of law rules in deciding the validity of marriages, however, a predominant approach is one which maintains a distinction between formal and material requirements of a valid marriage. Formal requirements of marriage include such matters as whether a religious or a civil ceremony is necessary, while material requirements relate to capacity. Thus, although the parties may have gone through a ceremony which is formally valid by the *lex loci celebrationis* i.e., the law of the place where the celebration takes place, the marriage may still be void if the parties lacked the legal capacity to marry each other. The choice of law in determining the capacity of marriage is governed by two approaches: (i) ante-nuptial dual domicile theory and (ii) intended matrimonial home theory. The only decisive case law on the validity of a foreign marriage had been analysed in *Noor Jahan Begum v Eugene Tiscenko*¹⁴. The plaintiff- Noor Jahan had been married to the defendant in Poland, and last lived together in Rome and returned finally to Calcutta in 1938. The Court laid down certain elements that ought to be given due consideration in deciding the validity of a marriage:

- (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.

Therefore, insofar as the formal validity is concerned, the lex loci celebrationis is adopted; while, in matters of material formality, the law of domicile is important. In the case of *Parwatawva v Channawwa*¹⁵, the plaintiff- Channawwa, was the second wife of Siddalingaiah, 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, Siddalingaiah 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. The court had noted that there were three approaches to deciding what law should govern the capacity of marriage:

Lex Loci Celebrationis is for both formal and material requirements of a valid marriage;

Law of domicile of each party (dual domicile);

Law of intended matrimonial home. The law of the intended matrimonial home had been regarded as the best, since this doctrine would validate an otherwise invalid marriage in this case.

The court, thus, adopted the intended matrimonial home theory, and held that the second marriage was valid.

However, in *Lakshmi Sanyal v SK Dhar*⁶, the court adopted the law of domicile in adjudging the material validity of marriage in that the capacity has to be determined in accordance with the parties' personal laws.

THE FOREIGN MARRIAGES ACT 1969:

Section 23 of the Foreign Marriage Act, 1969 provides that the "Central Government. May declare that marriages celebrated under the law in force in such foreign countries shall be recognised by courts in India as valid."⁷ However, this legal characterization is subject to two

⁶ *Lakshmi Sanyal v. S.K. Dhar*, AIR 1972 Goa 2667(India).

⁷ Foreign Marriages Act, § 23 (1969).

conditions: the use of the word “may” connotes that the recognition of a foreign marriage is discretionary and; if the Central Government is satisfied that the law in force in any foreign country for solemnization of marriages contains provisions similar to those contained in the Foreign Marriage Act, 1969, the Government may, by notification in the official gazette declare that the marriages thus solemnized under the law of the foreign country be recognised by the Courts in India as valid.

The recognition of foreign marriages is subject to section 4 of the Act which contemplates the conditions necessary for the solemnization of a foreign marriage. Section 4 makes it clear that the Foreign Marriages Act only applies if at least either of the parties is an Indian citizen. Section 4 only refers exclusively to heterosexual parties in providing for the marriageable ages of the “bride” and “bridegroom” respectively. Moreover, this section also provides that a foreign marriage may be solemnized in a foreign country and must first adhere to the primary requirements laid there under.⁸The consequences following section 4 therefrom are:

- the Act does not apply where both parties are foreigners;
- the Act does not apply to same sex parties; and
- even a marriage solemnized in accordance with the relevant foreign law is not recognized unless it harmonizes with the provisions of the Act. Thus, a same sex marriage, where one of the parties is an Indian citizen and solemnized under a foreign law validating same sex marriages, will still not be recognized in India.

Although section 27⁹ of the Act provides that a foreign marriage valid under a foreign law cannot be denied recognition in India, in the case of *Mrs Gracy v PA Maithri*¹⁰ the Kerala High Court observed a restricted view of section 27 holding that, if a marriage were to be solemnized in foreign and with accordance to the concerned foreign law, it would have to strictly adhere to the procedural requirements of section 17, since it should be read with abundant caution in view of the object of the Act (emphasis added). The judgment also emphasizes that the overriding section 27 applies only to situations where at least one of the parties is Indian.

In the absence of any legislative framework formulated in recognizing foreign marriages, the

⁸ Id. § 4

⁹ Id., § 27 “Nothing in this Act shall in any way affect the validity of a marriage solemnized in a foreign country otherwise than under this Act.”

¹⁰ *Mrs Gracy v PA Maithri*, AIR 2005 Ker 314 (India).

position of foreign same sex marriages and their recognition in India depends on the conflict of laws rules on recognition of validity of marriages. Extrapolating on the practice of recognizing foreign same sex marriages in other jurisdictions, courts invoke the public policy exception to refuse recognition to foreign same sex marriages even where the marriages conform the *lex loci* and *lex domicili* principles.

PUBLIC POLICY IN THE CONSTITUTIONAL IMAGINATION?

Under the conflict of laws, the public policy of the forum is an overriding exception to excluding the recognition of foreign laws. It is mainly in connection with the recognition of foreign legal statutes, capacities and incapacities, the law of contract, questions of title to property that public policy can be at stake.¹¹ The public policy rule bears an approximation with the 'local law theory' couched in pragmatism and American realism; according to which the forum court never applies a foreign law, rather the domestic law is applied but not in its pure form, instead a domestic law is crafted so as to model it upon the appropriate foreign law rule.¹² However, the public policy is a strong imposition of a purely domestic law rule which has the effect of excluding a foreign law. The public policy exception essentially means that a rule of foreign law will not be applied if the outcome of the application of the rule violates the forum's public policy.¹³

The question for consideration under this section is that the Constitution and the judicial precedents set up in this country can evoke legitimate expectations of foreign same-sex couples to have their marriage recognized, then to what extent should the public policy exception be given predilection.

THE 'NEW PUBLIC POLICY' EVINced BY THE COURTS IN THE REALM OF INTIMATE RELATIONSHIPS

Article 10 of the Hague Convention is formulated in vague words in providing that contracting states may refuse to recognise a divorce or legal separation if such recognition is manifestly incompatible with their public policy. The Convention does not define public policy and the standard defined for public policy must be a 'manifest violation' of the same.

¹¹ 21. J G COLLIER, CONFLICT OF LAWS (Cambridge University Press 2001).

¹² Id.

¹³ Jan Jakob Bornheim, Same-Sex Marriages in Canadian Private International Law, 51 ALTA. L. REV. 77 (2013).

The contextual question is whether same-sex marriage is manifestly against the public policy of particular nations.¹⁴

‘Public policy’ is a term that is very ubiquitous but it has no statutory definition. Some judgments in India have made certain observations about the meaning of “public policy” but not in a private international law context arising out of matrimonial relationships. There are two conflicting positions which are referred to as the ‘narrow view’ and the ‘broad view’. The judicial trend in India has evolved from taking a narrow view to favouring the broader view of public policy.¹⁵ According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this area. In *Brojo Nath case*¹⁶ the Court held that “there has been no well recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy.” In *Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*¹⁷ The court observed, “The phrases ‘public policy’, ‘opposed to public policy’ or ‘contrary to public policy’ are incapable of precise definition. It is valued to meet the public good or the public interest. What is public good or in the public interest or what would be injurious or harmful to the public good or the public interest vary from time to time with the change of the circumstances. New concepts take the place of old ones. The transactions which were considered at one time as against public policy were held by the courts to be in public interest and were found to be enforceable.”¹⁸ The court commented on the scope and variability of public policy. It also observed that the court has a duty to invent new public policy keeping in consonance with public interest and declare such rules which are derogatory to the Constitution to be opposed to public policy. Additionally, in the same case, the court also observed that public policy must further societal progress and aim at bringing about social change to set up an egalitarian social order through the rule of law. Thus, where no precedent exists, the court can always be guided by that light and the guidance thus shed by the trinity of our Constitution.¹⁹ In *Board of Control for Cricket in India v. Cricket Association of Bihar*²⁰, the Court observed the following: “To sum up: public policy is not a static concept. It varies

¹⁴ Stellina Jolly, et. al., Recognition of Foreign Same-Sex Marriage in India, 53 JOURNAL OF INDIAN LAW INSTITUTE, 302-326 (2017).

¹⁵ In *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959 SC 781,

¹⁶ *Central Inland Water Transportation v Brojo Nath case*, (1986) 3 SCC 156.

¹⁷ *27. Delhi Transport Corpn. v. D.T.C. Mazdoor Congress*, 1991 SCC (L&S) 1213 at page 747.

¹⁸ *Id.* at para 284.

¹⁹ *id.* at para 292. 10

²⁰ *Board of Control for Cricket in India v. Cricket Association of Bihar*, (2015) 3 SCC 251.

with time and from generation to generation. But what is in public good and public interest cannot be opposed to public policy and vice versa. Fundamental Policy of Law would also constitute a facet of public policy. This would imply that all those principles of law that ensure justice, fair play and bring transparency and objectivity and promote probity in the discharge of public functions would also constitute public policy. Conversely, any deviation, abrogation, frustration or negation of the salutary principles of justice, fairness, good conscience, equity and objectivity will be opposed to public policy.”²¹ In view of the aforesaid case laws, tracing the judicial trend a tacit case for marriage equality can be made which may firmly establish itself as the new public policy evinced by the courts in the realm of intimate and private relationships. And this public policy which the judiciary in India has given rise to, draws its basis from the Constitutional principles reaffirmed in landmark case laws²²[policies intersticed within Articles 14, 19(1)(a) and 21] and extended to the realm of privacy in intimate relationships.²³It is noteworthy to produce hereunder the observations of Sutherland: “has stated that the most reliable source of public policy is to be found in the federal and State constitutions. Since constitutions are the superior law of the land, and because one of their outstanding features is flexibility and capacity to meet changing conditions, constitutional policy provides a valuable aid in determining the legitimate boundaries of statutory meaning. Thus public policy having its inception in constitutions may accomplish either a restricted or extended interpretation of the literal expression of a statute. A statute is always presumed to be constitutional and where necessary a constitutional meaning will be inferred to preserve validity. Likewise, where a statute tends to extend or preserve a constitutional principle, reference to analogous constitutional provisions may be of great value in shaping the statute to accord with the statutory aim or objective.”²⁴ Thus, it may be said with reasonable confidence that the ‘new public policy’ evinced by the Supreme Court can establish in our constitutional imagination²⁵ a legitimate expectation for foreign same sex couples to have their marriage

²¹ Id. at para 96.

²² E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; Ramana case, (1979) 3 SCC 489; Olga Tellis case, (1985) 3 SCC 545; etc.

²³ .Sexual orientation is part of privacy and is constitutionally protected. NAZ Foundation v Govt. of NCT Delhi 160. DLT 277 (Del HC: 2009); NALSA v Union of India, 5. SCC 438 (SC: 2014); K S Puttaswamy v Union of India, 10. SCC 1 (SC: 2017); Navtej Singh Johar v Union of India, 10. SCC 1 (SC: 2018). Right to marriage is a component of right to life and right to equality under Articles 14 and 21 respectively. Lata Singh v State of UP, 5. SCC 475 (SC: 2006); Re: Indian Woman Gang Raped on Orders of Village Court, 4. SCC 786 (SC: 2014); Shafin Jahan v Asokan KM, 16. SCC 368 (SC: 2018). The Madras High Court in Arunkumar v Inspector General of Registration, [2019] SCC Online Mad 8779 held that the word “bride” in section 5 of HMA also includes transwomen and intersex persons who identify as women.

²⁴ Supra, n. 27.

²⁵ Martin Loughlin, The Constitutional Imagination, 78 MODERN LAW REVIEW, 1-25 (2015): The constitutional imagination refers “...to the way we have been able to conceive the relationship between thought,

recognized.

Some more recent instances of the courts in India taking LGBTQ+ affirmative stances also exist. Justice Venkatesh of the Madras High Court had admitted to trying his best to understand the LGBTQ+ community and look past his own biases. In this case a lesbian couple had fled and their parents filed a missing persons report. The court had directed them to a LGBTQ+ affirmative psychologist and required a report to be submitted after which the case would be heard further. The case has now been decided, and the court has now dispensed guidelines for educational institutions, the judiciary, police and prison authorities and health practitioners to follow to provide protection and safe spaces for LGBTQ+ individuals.³⁶ Justice Mukta Gupta of Delhi High Court had granted police protection to a lesbian woman who was forcibly married to a man by her family and that steps be taken to initiate a divorce. Similarly, the Allahabad High Court had also granted police protection to two lesbian women in a live-in relationship as they were facing threats by their family members.

However, the government's "public policy" has been counteracted to the judiciary's LGBTQ+ affirmative attitude. This is strongly evidenced from the government's response to the ongoing petition challenging the validity of the Foreign Marriage Act, Special Marriage Act and the Hindu Marriage Act to allow recognition of marriages between LGBTQ+ couples. It is also worthwhile to recall that Indian law does not currently extend immigration benefits to same-sex partners. According to the visa rules, a same sex partner cannot be granted a spousal or dependent visa to join their partner resident in India for the purposes of employment.²⁶ Only a tourist visa for 180 days may be granted. India also voted against a UN General Assembly initiative to recognise same-sex marriage for its officials and diplomats. In other words, India will not even recognise the same-sex marriage of foreign diplomats.

This is the everyday difference that was the main focus of the research problem, and it's hard to figure out how to deal with public policy unless it's based on the country's constitution. The uncertain state of same-sex public policy is clearly shown by an author's observation: "Conflict of laws is involved in a way that can't be fully understood just by looking at the usual legal rules and policies of the field. This is because same-sex marriage exists in a state of uncertainty and change, where borders are not clear, confusing, and not completely crossed." Same-sex

text and action in the constitution of modern political authority."

²⁶ Supra, n.24.

marriage is not officially recognized by law, nor is it completely ignored, and it exists in the space between what culture and law do not fully accept. Indeed, cases where same-sex marriages move across borders create a special situation that leads to this in-between state. This is when conflicts between different legal systems come into play as marriages attempt to cross national boundaries. The courts might be using conflicts of laws like a border patrol, stopping legal movement, but they can't stop it from spreading into people's thoughts and ideas on the other side, which happens because of each legal challenge."²⁷

THE DISTINCTION BETWEEN THE PURE DOMESTIC LAW AND PRIVATE INTERNATIONAL LAW CONTEXTS OF “PUBLIC POLICY”

The meaning of public policy in the realm of private international law²⁸ has been extensively explored in the context of enforcing foreign arbitral awards. In *Renusagar Power Co Ltd v General Electric Co*²⁹, citing English common law authorities, the Court observed that a distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.³⁰ In the same case, another distinction of public policy has been observed as either being of an overriding nature and therefore enforceable in all actions, or it may be local in the sense that it represents some feature of internal policy. The internal policy must be confined to cases governed by the domestic law and it should not be extended to a case governed by foreign law. In order to ascertain whether the rule is all-pervading or merely local, it must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it and the local conditions.³¹ In *Renusagar*, the court extending on all the relevant International Conventions concerning foreign arbitral awards, held that the words “public policy” appearing in section 7(1)(b)(ii) of the Foreign Awards Act must be construed narrowly. In this regard, the court observed the following: “Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression

²⁷ Brenda Cossman, *Betwixt and between Recognition: Migrating Same-Sex Marriages and the Turn toward the Private*, 71 *LAW & CONTEMP. PROBS.* 153 (2008).

²⁸ *Id.*

²⁹ *Renusagar Power Co Ltd v General Electric Co*, 1994 Supp (1) SCC 644 at page 678.

³⁰ *Id.*

³¹ *Id.* at para 53, page 679.

“public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

³²The position in *Renusagar* has been reiterated in subsequent cases such as *Smita Conductors Ltd. v. Euro Alloys Ltd.*³³; *Shri Lal Mahal Ltd. v. Progetto Grano SpA*³⁴; and *ONGC Ltd. v. Saw Pipes Ltd*³⁵.

Extrapolating on the aforesaid judgments in the context of foreign arbitral awards, it can be argued that the distinction of the words “public policy” in the pure domestic and the private international law contexts respectively, a narrower application being afforded to the public policy exception should be extended to the case of foreign same sex marriages, specially in view of judicial precedents that are beginning to lean towards imparting constitutionality to individual autonomy in intimate spheres of relationship. The legal scholarship in private international law draws parallels between the recognition of foreign polygamous marriages to that of same sex marriages. In India, the judicial position on recognition of polygamous marriages is evidenced by only one case law on the subject- *Re Dalip Singh Bir's Estate*³⁶. In this case, an Indian national was married to two wives who died intestate in California. The Court granted an exception for the purposes of succession. States had initially fervently denied recognition to foreign polygamous marriages of immigrants claiming the public policy exception, however, over time States have come to realize that immigrants have their own culture.³⁷

CONCLUSION

Non-recognition of same-sex legal marriages has multiple ramifications which end up causing inconvenience and prejudice to the parties. There are three types of cases so far: dissolution, legal incidents, and precedential recognition. Dissolution cases occur when parties are married in a jurisdiction that recognizes same sex marriage but are now domiciled in India

³² Id. at para 66, page 682.

³³ *Smita Conductors Ltd. v. Euro Alloys Ltd.*, (2001) 7 SCC 728 at page 737.

³⁴ *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433 at page 446.

³⁵ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

³⁶ 48.88 P.2d 499 (Cal. Dist. Ct. App. 1948).

³⁷ *Supra*, n. 24.

and seek to dissolve their marriage. In the second case, foreign parties wish to get the legal incidents of their marriage enforced in India to obtain any right attached to marriage. In the third scenario, foreign parties are seeking recognition of their marriage for the purposes of all rights and responsibilities associated with marriage. The problem with India's public policy exception is that a definite public policy cannot be identified. While it is possible to do so in our cultural and constitutional imagination, in the absence of a cogent legislative framework expressly recognizing it, foreign same sex couples may get their marriages recognized on the basis of their legitimate expectations from the judiciary since the decriminalization of homosexuality and a proactive freedom of marriage stance by the Indian judiciary. Also since the public policy distinction in the private international realm is to be construed narrowly, it is possible by invoking the principles of reasonable classification to recognize foreign same sex marriages in India, even if they are not recognized domestically. The Canadian understanding of the public policy doctrine may be adopted in India to give recognition to marriages of foreign same sex couples. The Canadian approach creates a distinction between the 'ordre public interne' (or internally mandatory law) and the 'ordre public internationale.' According to this, not every foreign law which breaches the internal public policy of the forum breaches the order public internationale. For a foreign law to be unenforceable on grounds of public policy, the breach of internal public policy must also be a breach of certain fundamental principles, such as the ones that are enshrined in international treaties.³⁸ When looking at this, it's important to understand India's uncertain and transitional approach to public policies regarding same-sex marriages. This should be considered in the context of Article 16 of the Universal Declaration of Human Rights, which states that "Men and women of full age, without any limitations based on race, nationality, or religion, have the right to marry and to establish a family." They are entitled to equal rights during marriage, at the time of marriage, and at its dissolution. The article also imposes an obligation on states "to take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse...and establishing a civil or other register in which all marriages will be recorded."

³⁸ Jan Jakob Bornheim, Same-Sex Marriages in Canadian Private International Law, 51 ALTA. L. REV. 77 (2013).

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