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Analysing the Conflict of Law with regard to Cross-Border Same-Sex Marriages under Private International Law

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The paper has extensively enunciated the dynamics of the "same-sex marriages" that are commenced in the cross-border scenario whereby it has addressed various instances of conflict of law arising out of such marriages under "Private International Law". Further, the paper has also dealt in length with the aspect of the dissolution of such marriages as a result of the death of any of the spouses or as a result of divorce. The authors of this paper have thus, in a way, revolutionize the regulation of same-sex marriages under private international law.

Keywords: *same-sex marriages, dissolution, uniform legislation, private international law.*

INTRODUCTION

In this "era of dynamicity", where law keeps on getting modified according to the needs and modernity of the individuals and where the "family law legislation" of various countries has even started protecting relationships of couples "outside their marriages", the need of "legal recognition of same-sex marriages" has still remained un-realized in various countries. The paper substantially addresses the conflict of law arising mainly in two cases i.e. a) In the case of "cross-border marriages" of partners of same-sex, where the country of one of the parties

has not legally recognised "same-sex marriages" and, b) In the case of "cross- border marriages" of partners with same-sex, where the country of both the parties have legally recognized such marriages. The authors of this paper, while addressing such cases, have analysed the ways in which these are dealt with in the field of "Private International Law".

APPLICATION OF PRVT.INTERNATIONAL LAW IN CASES OF"CROSS-BORDER SAME-SEX MARRIAGES"

The "forum state" or the state having the jurisdiction to try cases related to cross-border Same-Sex marriages must be the state in which "same-sex marriages" have got legal recognition or where same-sex relations are legally registered. It has been studied that the legal systems of most countries lack "substantive rules" pertaining to "registered partnerships". It would therefore be unsurprising to say that many "foreign countries" might not fully accept or accord complete effect to "registered alliance", which showcases the necessity for "Special Rules of Private Law" to come into effect that would deal with the possible antagonistic responses that the "registered alliance" might face far and wide out of their country. When a forum state discovers that the essential validity of same-sex marriages requires "Applicability of foreign law" as a "substantial condition" to be fulfilled, then various people would not be allowed to enter into "registered partnership" for same-sex marriages on the ground that foreign law does not accept such marriages. On the other hand, if a country's legal framework allows the registration of same-sex marriages, then it can include supplementary conditions for "nationality, domicile or residency" so as to avoid "tourism for marriage and its registration" as well as the possible antagonistic responses that the relationship might face elsewhere. The "dispute rules" can be put into application in order to decide on cases whose substantial issue is "whether the given partners can formalize and register their same-sex marriages" and such rules must stand as closely equivalent as possible to the "conflict rules" which are applied in cases dealing with the formalisation of "conventional marriages".[1]

[1] Martin George, 'Private International Law Aspects of Homosexual Couples: The Netherlands Report' (2007) 11 (1) Electronic Journal of Comparative Law <https://conflictoflaws.net/2007/private-international-law-aspects-of-homosexual-couples-the-netherlands-report/> accessed 10 March 2022

CONFLICT OF LAW IN CASES OF "SAME-SEX MARRIAGES" BETWEEN STATES WHO ARE WELCOMING TO SUCH MARRIAGES

Where the countries of both the partners have legally recognized "same-sex marriages", the partners don't face many difficulties in getting their marriages formalized. Generally, such countries do not formulate any separate rules and regulation for governing "same-sex marriages" and apply the same rules and regulation that governs "conventional marriages" as these countries consider same-sex marriages to come under the ambit of "regular marriages". Various countries, by and large, have no particular set of rules that exclusively deals with all the aspects of marriages at a go, and therefore "same-sex marriages" under the above head are subject to such "multiple rules" that are applied in accordance to "facts and circumstances" of each case. The difficulty arises when the country whose law is declared to be made applicable, is "unknown to Same-sex marriages". Suppose there are two Italian men, residing in Belgium, who get married there. If one of the spouses would decide to file a petition for divorce in the Belgium court of law, then the Belgium court would first consider applying Belgium laws as it is their "Habitual Residence" but the parties may request the court to apply Italian laws. But the Italian laws are unknown to "same-sex marriages" and this is the point of an issue where the court has to decide as to which law to be applied. Taking the same example, a similar conflict would arise in the case of death of one of the spouses, whereby the question of law before the court of law would be whether the surviving spouse can claim right over the property of the deceased spouse in Italy and for determining the existence of such a right, which law to be applied. If Italian law is applied, the problem that would arise is - that the laws of the said country may not be "Gender Neutral" and there would exist expressed categorization of partners as "Husband and wife". For solving the above problem, the forum state has to compare and examine the laws of both the states and check whether or not there exists adequate equivalence between both of them. Further, when such an issue arises in a state which has already recognized "same-sex marriages" (like that of Belgium in this case), the forum state has to apply "The law of Adaptation" whereby the "same-sex marriage" would be considered valid as a "normal marriage" and all the rights and liabilities (as assigned to the spouses who are under the governance of Italian laws) would be assigned to these

parties. The question as to whether or not the same will be accepted by the Italian Legal system stands open.

CONFLICT OF LAW IN CASES OF "SAME-SEX MARRIAGES" BETWEEN TWO STATES, ONE OF WHICH DOES NOT RECOGNIZE SUCH MARRIAGES

It is way more difficult for same-sex partners to get their marriage legally recognized, in cases where one of the partners' countries does not recognize or expressly prohibited "same-sex marriages". Here, the main question of law before the forum state is "whether or not the "same-sex marriage" be given formal recognition with complete effect", unlike the previous case where the concern was as to which law needs to be applied. In countries like Hungary, "same-sex marriages" are prohibited in all effects and for the same, there has been a constitutional amendment that has expressly declared such marriages to be illegal and un-recognized under the law of the country. Thus, in such countries, "same-sex marriages" won't be treated as "normal or conventional marriages" if at all, Hungary becomes the forum state to decide upon "Cross-Border same-sex marriages". Some countries like France may recognize certain repercussions of "same-sex marriages" which have been validly formalised outside the country(abroad). But at the same time, France does not recognize any of such marriages if even one of the "same-sex partners" holds the nationality of France. This is a sort of "partial recognition" which leaves the partners with much uncertainty and lack of prior knowledge as to which part of their marriage is accepted and which part is not. In cases pertaining to the above head, the forum state must apply the "Doctrine of Preliminary question" whereupon, the forum state must first address the issue as to "whether the marriage in question is legally in existence or not", before addressing any other important issue.

In many countries like Switzerland, Finland, and Germany, "same-sex marriages", rather than being legally recognized, are being demoted. If spouses of same-sex have formalized their marriage in a country (say Luxemburg), the same would be considered a "partnership", if the couples get settled in Germany. A similar position can be seen even under the "Civil Partnership Act" (English Law) whereby the relationship of a "same-sex marriage" legally concluded in the Netherland will be deemed to be a "civil partnership" Under English law.

Such approaches to "re-characterize relationships", possess an adverse effect on the functioning of the relationships. Thus, the relationship in these countries is solely governed by the "local law" of the land, with no reference made to the laws of the countries in which these marriages have been legally formalised.

DISSOLUTION OF SAME-SEX MARRIAGES UNDER PRIVATE INTERNATIONAL LAW

For marriages to dissolve there have been two ways, conventionally if the spouse dies or unconventionally if the parties to the marriage decide to dissolve the marriage and take divorce each other. And in the case of same-sex marriages, it is no indifference. For the dissolution of marriages between same-sex in the international forum, firstly one needs to understand that laws under the international law for the same are not lex fori that is no choice of law centric but revolves around the recognition of jurisdiction and judgements.[2] However, in some cases, the loci registration is, which means where the marriage of the same-sex couple has been registered or contracted, may have the legal authority to recognize the jurisdiction of the divorce application if at all no judge or states agree to take up the matter. Afterward, the necessary steps of a normal divorce procedure can be taken up and be decided.[3] In the Indian context, this subject has been a long-stranded debate which finally came out with flying colors in the national legislation limits but due to its time, immemorial heritage, and culture practically accept that same-sex marriage is an obstacle commonly faced by same-sex couples. Like all the age-old practices like dowry, child marriage, sati pratha, infanticide has been discarded, for the time being, similarly, this trend will take some time to stir up in society, and then it will settle down.

CONCLUSION

Since embarking on the journey of codifying laws, history provides various evidence of the importance of maintaining uniformity. Irrespective of the fact whether there is same-sex marriage or vice versa there should be uniform laws to refer to in the international arena,

[2] *Attorney-General v Refugee Council of New Zealand* [2004] 15 [KCLJ] 321

[3] Rakshita Data, 'Same-Sex Marriage in India and Private International Law' (2021) 4 (1) International Journal of Law Management & Humanities <https://www.ijlmh.com/same-sex-marriage-in-india-and-private-international-law/> accessed 14 March 2022

which will make things simpler and the procedure easier and hassle-free. After the acceptance of same-sex relationships, the trend of same-sex marriages has relatively increased, which itself calls for the formation of uniform laws so that it will be less ambiguous, not only for the same-sex couples but also for the authorities that are concerned to enact the same. When the marriage has broken down, the smooth administration of the law should facilitate the orderly settlement of the claims of the parties against each other and against third parties is the bare minimum that the authorities can provide for.