SYMPOSIUM: INTRODUCTION TO INTERNATIONAL FAMILY LAW
BRISBANE, AUSTRALIA 20 FEBRUARY 2024

Burning Issues in International Family Law

Session Materials Pack
What is HOT in Marriage and Divorce in Cross Border Disputes?

• Recognition of cohabitation unions?
• Recognition of same sex marriages?
• Implications in cross border disputes?

Tuesday 20 February 2024
09:45 – 11:15

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Billy is a new generation of divorce lawyers and a strong believer that in this day and age, the term “family law” is no longer limited to divorce but also includes other areas such as guardianship and maintenance claims by certain qualified individuals.

Billy has contributed to a number of articles on family law for legal publications, such as The Hong Kong Lawyer and STEP Journal, and has conducted seminars focusing on family law. He is also a qualified collaborative practitioner and is a member of the Hong Kong Family Law Association.

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What is HOT in marriage and divorce in cross border disputes?

SINGAPORE

1

No recognition for cohabiting couples or same-sex couples

As with cohabiting couples, no rights to division of assets or maintenance between same-sex partners

- Even under Singapore's property law, presumption of advancement not extended to cohabiting couples: *Ng So Hang v Wong Sang Woo* [2018] SGHC 162

Unlike cohabiting couples who may seek orders for children's arrangements and children maintenance from Singapore Courts, same-sex couples cannot seek such orders

- Guardianship of Infants Act, Section 5: "*upon the application of either parent or of any guardian appointed under this Act*"
- *WLW v WLV* [2023] SGFC 11: Father ordered to pay child maintenance to Mother, even though parties were not married
- *UVM v UVN* [2019] SGFC 56: Parties ordered to attend counselling with the DSSA for co-parenting, even though they were not married

Until 3 January 2023, Section 377A of Singapore's Penal Code criminalizing sexual acts between men was still in force.

CHIA WONG
CHAMBERS
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Constitutional challenges to Section 377A, leading to its repeal

- Right to adopt granted to a father in a long-term same-sex relationship: *UKM v Attorney-General* [2019] 3 SLR 874 (HC)
- Various constitutional challenges to Section 377A filed in 2018 and 2019 culminated in Chief Justice Sundaresh Menon holding that Section 377A is unenforceable in its entirety : *Tan Seng Kee v Attorney-General and other appeals* [2022] SGCA 16.
- Parliament's two-pronged approach: repealing 377A and protecting the heterosexual definition of marriage against legal challenge by amending the Constitution, taking such decisions out of the hands of the Court.

Minister for Home Affairs, Mr K Shanmugam
Singapore Parl Debates, 28 Nov 2022

If you look at what has happened in India. The courts first said that their version, their section 377 was not unconstitutional. And then, within a few years, they said – well, it is unconstitutional. And now, earlier this year, they have said – the definition of marriage should be broader than a purely heterosexual marriage. This is a similar system and similar broad common law principles. One can say and one can discern that there are different approaches that the Singapore Courts take vis-à-vis the Indian courts.

Minister of Parliament,
Mr Dennis Tan Lip Fong
Singapore Parl Debates, 29 Nov 2022

I also heard much feedback from residents and Singaporeans of their concerns on the repeal. ... With the repeal, some will press for more changes in law and policy after the repeal, like what is seen in other countries, for example, in Australia and the US.

Minister for Social and Family Development, Mr Masagos Zulkifli
Singapore Parl Debates, 28 Nov 2022

In the US for instance, controversial issues such as abortion are litigated and relitigated in the courts. When the courts decide, things change overnight, with drastic social repercussions that polarise society.

Hong Kong's top court urges new laws for same-sex couples to cover basic social needs,
The Straits Times, 6 September 2023

The decision [of the Hong Kong Court of Final Appeal] could also influence Asian financial hubs from Tokyo to Singapore to draft more inclusive laws as a drawcard for the diverse, global talent that multinational corporations from banks to technology giants are seeking to hire and retain.

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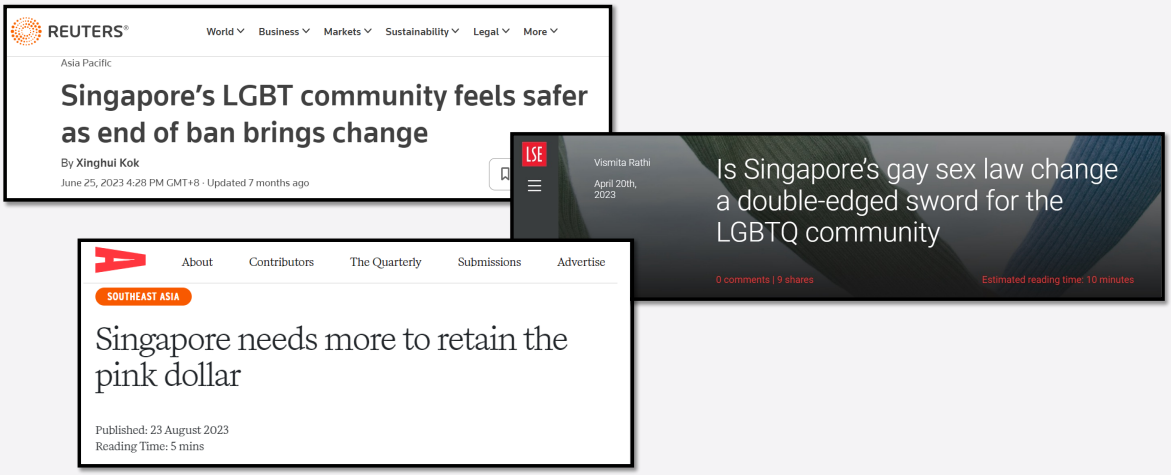
Sentiments of same-sex couples in Singapore post-repeal



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Implications

Unequivocal executive declaration that there would be no administrative benefits for same-sex couples even if validly married abroad

- Deputy Prime Minister Lawrence Wong's express statement that the repeal "*will not change national policies that rely on the current definition of marriage, such as public housing, education, adoption rules, advertising standards and film classification*": The Straits Times, 22 August 2022.

Cemented the fact that there would be no recourse through the Courts for:-

- Adoption, guardianship, or children maintenance
  - *UKM v Attorney-General* [2019] 3 SLR 874 (HC) at [249]: "*Our decision is a decision on the particular facts of this case, and should not be taken as an endorsement of what the appellant and his partner set out to do*".
  - Minister Desmond Lee indicated that the Ministry of Social and Family Development would review adoption laws and policies to see if they should be further amended and strengthened following *UKM v Attorney-General*: *The Straits Times,* 20 December 2018.
  - No right to guardianship: *VET v VEU* [2020] 4 SLR 1120 (HC), same couple in *UKM v Attorney-General* [2019] 3 SLR 874 (HC)
- Ex-spousal maintenance: *UHA v UHB and another appeal* [2020] 3 SLR 666 (HCF)
- Division of assets: *Wei Ho-Hung v Lyu Jun* [2022] 2 SLR 1066 (HC, Appellate Division)

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Further implications

In their haste to guard against same-sex couples, Singapore's policies also impact non-LGBTQ persons who do not fit into the traditional family unit in Singapore

- Administrative benefits, such as housing and immigration rights, only afforded to heterosexual couples within marriage
- Guardianship orders only made if there is a dispute: *VCX v VCY* [2019] SGFC 130
- Guardianship orders will not be made for long term caregivers if parents are fit to care for the child, because parental rights within a marriage trumps all: *UMF v UMG and UMH* [2018] SGHCF 20.

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Takeaways on what this means for same-sex couples, married or otherwise, looking to relocate to Singapore

1. One partner may consider adopting and/or obtaining sole custody orders abroad before coming to Singapore.

2. The 'other' partner may nonetheless have no recourse under the Guardianship of Infants Act or the Hague Convention on the Civil Aspects of International Child Abduction, unlike the unmarried heterosexual couple in *UKS v UKR* [2022] SGHCF 21.

3. Financial relief consequent upon a foreign divorce of a same-sex couple may not be available under Chapter 4 of Singapore's Women's Charter. Parties may have to enter into financial agreements between themselves to obtain relief through the Courts, like the cohabiting couple in *Song Sze Wei v Ang Jhing Hun* [2021] SGDC 153.

Thank you

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What is Hot in Marriage and Divorce in Cross-Border Disputes

THE INDIAN PERSPECTIVE

By: Ms. Geeta Luthra, Senior Advocate
Fellow, IAFL

1

COHABITATION UNION

RECOGNITION

While the Parliament, by introducing the phrase 'relationship in the nature of marriage' under the Domestic Violence Act, has acknowledged the prevalence of such relationships, formal recognition of such relationships is yet to materialize.

In the case of ***Badri Prasad vs. Dy. Dictator of consolidation***, SC recognized a 50-year-old live-in relationship as a valid form of marriage.

RIGHT TO MAINTENANCE FOR WOMEN IN LIVE-IN RELATIONSHIPS

In 2008, the NCW and the Ministry of Women and Child Development recommended the inclusion of live-in female partners in the **right to maintenance** under Section 125 of the Code of Criminal Procedure (CrPC).

This proposition was affirmed through ***Abhijit Bhikaseth Auti vs. State Of Maharashtra and Ors*** wherein the court observed that the definition of a shared household and domestic relationship under Section 2 (f) of DV act is very wide as it includes relationship between two persons who live or **have at any point of time,** lived together in a shared household when they are related by consanguinity, marriage, or through a relationship in the nature of a marriage.

LEGAL STATUS OF CHILDREN BORN OUT OF LIVE-IN RELATIONSHIPS

The legal status of children born out of cohabitation unions remains unclear, prompting the courts to provide interpretations through various judgments in recent years.

Courts have taken a pro-legitimacy stance, asserting that couples cohabiting for an extended period may be presumed to be legally married unless proven otherwise.

This finds it roots in provision **under S.114 of Indian Evidence Act** which basically states that the presumption would always be in favour of marriage, and the children will not be illegitimated or "bastardised"

2

PROPERTY AND INHERITANCE RIGHTS

V***idyadhari vs. Sukhrana Bai*** stands as a landmark judgment in which the court not only granted inheritance rights but also bestowed legal status upon a child born from a live-in relationship.

Sections 16(1) and 16(2) of Hindu Marriage Act play a pivotal role in this discourse. They explicitly declare children born out of live-in relationships as legitimate in the eyes of the law.

LEGITIMACY OF CHILDREN AND THEIR RIGHT TO INHERIT PROPERTY

The 2000 **Malimath Committee,** under the chairmanship of Mr. V.S. Malimath, in its report emphasized the need to include women living with a man as his wife for an extended period, *during the subsistence of their first marriage*, under S. 125, CrPC. **Maharashtra government** was the first state to follow the recommendations of Malimath Committee and in 2008, amend the provision under S.125 CrPC to include "living as his wife" in the definition of wife.

In ***Dimple Gupta v. Rajiv Gupta***, court affirmed the entitlement of illegitimate children born out of illicit relationships to inheritance and treated them at par with children from recognised marriages.

CHILD CUSTODY

The thumb rule for custody battles of minor children born out of live-in relationships, is drawn from Section 13 of the Hindu Minority and Guardianship Act 1956, which emphasises on the "best interests of the child" or "welfare of the child" as the paramount consideration.

In contrast, under Muslim law, there is no inherent obligation to maintain a child born out of a live-in relationship. The mother holds the primary right to custody, known as ***hizanat*****,** and cannot be deprived of this right unless evidence contradicts her suitability.

3

UCC, UTTARAKHAND

Provisions for Live-In Relationships and Same-Sex Relationships

On 06-02-2024, the Uttarakhand State Assembly tabled the State's Uniform Civil Code Bill in its Special Session. In a pioneering move, the Bill aims to introduce statutory representation for live-in relationships.

Recognition: 'Statement of Live-in Relationships' has to be submitted by the partners (man and woman), as under Section 3(4)(b) to the concerned Registrar. The Registrar shall examine the statements and conduct a summary inquiry to establish the validity of the relationship. Registrar has the authority to register relationship or reject it.

Section 380 [live-in relationships shall not be registered]: **a)** prohibited relationships, **b)** relationships where at least one person is already married/ in a live-in relationship, is a minor or where the consent has not been given freely.

Terimination: The partner(s) are required to submit a 'Statement of Termination of Live-in Relationships' [defined in Section 3(4)(e)] in case both or either of them decide to terminate the relationship.

Duty of Registrar: the Registrar must inform the parents/guardians of the partner (if they are under the age of 21 years) in case of receipt of 'Statement of Live-in Relationships' or 'Statement of Termination of Live-in Relationships.'

OTHER STATES: UP, Maharashtra, Goa, Haryana, Karnataka, Assam to implement UCC.

Gender Neutrality: Term 'partner' (denoting man and woman both) has been used throughout the provisions related to live-in relationships under Uniform Civil Code.

Maintenance: However, right to claim maintenance has still been reserved exclusively for women against men.

Legitimacy of children: The bill lacks specific provisions for the succession and inheritance of the children of live-in relationships. However, the Bill holds the children born of a live-in relationship to be legitimate (Section 379) and defines them (Section 3(4)(a)) in a similar manner to the children born out of wedlock (Section 3(1)(a)).

Same-sex relationships: Bill remains silent on the matter of same-sex relationships, and defines 'spouse' (with regards to marriage) [Section 3(4)(b)] and 'partner' (in the context of live-in relationships) in **heterosexual and heteronormative terms.**

4

RECOGNITION OF SAME-SEX UNIONS

Historically, the LGBTQ+ community has faced discrimination and even criminalization, with laws categorizing same-sex relationships as unlawful. However, the Indian courts have played a pivotal role in challenging these archaic norms.

CURRENTLY

Same-sex / non-heterosexual / non-conforming couples or unions are not legally recognized in India. The Indian Legal System currently does not offer any protection to these couples however, there **is no prohibition or penalisation on same-sex unions.**

Though same sex-marriages or civil unions are not criminalized, they are also not legally recognized under the Indian Law, thereby depriving homosexual gender non-conforming couples from any rights which flow from a marriage and a family.

In 2014, the Supreme Court of India in **National Legal Services Authority (NALSA) v. Union of India *(AIR 2014 SC 1863)***, for the first time, while recognizing non-binary gender identities and upholding the fundamental rights of transgender persons in India, had interpreted the definition of 'sex' to be inclusive of both 'sexual orientation' and 'gender identity', which in essence extended the protection of Article 15 to the LGBTQ+ community.

In 2018, the Apex Court, in **Navtej Singh Johar v. Union of India *(AIR 2018 SC 4321)***, struck down S. 377 being unconstitutional thereby decriminalizing homosexuality and recognizing the rights of LGBTQ+ community but same-sex marriages were yet not recognized.

In April 2023 that a 5-Judges Constitutional Bench of the Supreme Court finally heard the issue of same-sex marriages in **Supriyo @ Supriya Chakraborty & Anr. v Union of India *(2023 INSC 920)***. While the LGBTQ+ community and the entire country awaited the decision, the Court, in October 2017, by a 3:2 judgment, held that it is not for the judiciary to enter into domain of recognizing or not-recognizing a certain form of marriage and it is for the Legislature to frame a law in this regard as marriage as an institution is intrinsically linked to societal norms, sanctions and values.

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SAME SEX UNION AND CROSS BORDER IMPLICATIONS

- It is pertinent to mention that after this judgement, several review petitions have been filed and are pending adjudication.

Vaibhav Jain and Anr. v. UoI and Ors.

FACTUAL BACKGROUND

The Petitioners' marriage, one of whom is an Indian citizen and the other, was an Overseas Citizen of India **("OCI")** card-holder, was solemnized in Columbia in 2017 after 12 years of a committed relationship. They also had a Jain ceremonial marriage in USA and a wedding reception in New Delhi. Both the petitioners used to visit the families in India frequently. However, during the Covid Pandemic, all foreigners were restricted from entering the country. Relaxations were brough to certain classes of OCI holders, such as those persons whose spouse was an Indian national. So, even though, P2 was P1's spouse, he could not travel to India as his marriage was not recognised under Indian law. They had applied for registration of the marriage under Section 17 of the Foreign Marriage Act 1969 (FMA). Although they fulfilled all the conditions, they were denied registrations because they were a same-sex couple. They were one of the petitioners in the marriage equality case in India. By the time, the petitions were heard, they had a beautiful 4-months old daughter (through surrogacy.)

Even though FMA is only an enabling legislation, the registration of the petitioners' marriage was refused only on the basis of their sexual orientation, which is manifestly arbitrary and unjust. It is noteworthy to mention that Section 17 only registers the marriage (a mere ministerial act), which is already valid as per the law of the foreign country.

PART I

6

SAME SEX UNION AND CROSS BORDER IMPLICATIONS

- It is pertinent to mention that after this judgement, several review petitions have been filed and are pending adjudication.

Vaibhav Jain and Anr. v. UoI and Ors.

VERDICT

The **SC** in its **minority** view categorically held that the right of an Indian citizen to enter into an abiding union with a foreign citizen of the same sex is preserved. However, the majority view held that the words "bride" and "bridegroom" mentioned in Section 4 of FMA implied that the provision is gendered in nature. The prayer to read the words "husband"/ "wife"/ "spouse" in a gender-neutral manner is unsustainable.

The **majority** held that the words of the Statute have to be read taking into account the fabric of concepts, rights and obligations, removing provisions from their setting and "purposively" construing some of them cannot be resorted to, even in the case of FMA.

On the day, the judgment was pronounced, one of the Petitioners (also a lawyer), proposed to his partner right in front of the Supreme Court building.

PART II

7

CROSS BORDER IMPLICATIONS

The ***219th Report of the Law Commission of India*** (submitted in March 2009) has pointed out the problem that many Indians with different personal laws have already migrated or are still migrating to other countries either to make permanent abode there or for temporary residence. Likewise, there is also a huge immigration from other countries to India. In such a situation, it is usual to come across cases where one national marries the national of other country or two nationals from one country contract marriage abroad. Cases in which parties solemnize marriage in India then settle their home abroad or are living separately in any other country also demand special mention.

Since India does not have a uniform law in governing the legal capacity to enter into a valid marriage, the marriage law varies from one religion to another. A marriage, to be legally valid, needs to be materially and formally valid. The material validity of a marriage invokes the question related to the legal capacity of parties to the marriage. The choice of law rule of India is that the legal capacity of a person domiciled in India will be governed by *lex domicilii*. Therefore, the *lex domicilii* of a person domiciled in India regarding legal capacity to marry is his/her personal law.

The conflict of Law is that branch of law of a State that deals with the cases involving any foreign element.
Element of a dispute can broadly be divided into two heads:

a) Parties to the dispute, and
b) Subject matter of the dispute.

When the parties to the dispute hail from the same country but the subject matter has been arisen as the legal rights and obligation of the parties are to be determined according to the substantive and procedural law of that Country. However, it is not so easy in case where at least one party belongs to different legal system or the cause of action partly/ wholly arises in any other country.

1. Whether the forum where the case has been instituted has jurisdiction to try the case or not (question as to Jurisdiction).

2. By reference to which law (both substantive and procedural) the issue involved in the suit will be characterized and determined (question as to choice of law rule).

These two questions along with the question regarding the recognition of foreign judgment, by the domestic court of the country where the parties want to execute the same constitute, are the subject matter of conflict of laws.

8

CHILD CUSTODY

Recent Indian statistics show that 25 million Indians, out of a population of over a billion Indians, are Non-Resident Indians, who have migrated to various jurisdictions and nurtured families, implying a surge in new family disputes.

Two major questions that arise here are –

1. What if one parent takes the child to another country, which country's laws will apply? (unlawful removal of child).
2. What if an international custody dispute actually materializes by virtue of parents being from different jurisdictions or residing in different jurisdictions? (international child custody issue)

The thumb rule under Indian as well as international law governing child custody disputes is that the "best interest of the child" would be of paramount consideration.

REMOVAL OF A CHILD

Dr Justice A.R. Lakshmanan, Judge, SC rightly opined, *"Statistics show that divorce and custody cases are on the rise. The practice of international child abduction has its roots in these inter-parental custody battles*".

Overseas Child Custody disputes are complex due as every country has its own family laws that are in operation. However, there is a common convention that has been ratified by most countries till now – Hague Convention of 1980 on the Civil Aspects of International Child Abduction.

Indian is not yet a signatory to the ***Hague Convention of 1980 on the Civil Aspects of International Child Abduction***. As such, remedies are often sought from the existent domestic laws. The constitutional remedy of the writ of Habeas Corpus under **Article 226** as well as **Article 32** is often used by the parents against the spouse allegedly abducting the child to India.

ENFORCEMENT OF FOREIGN ORDERS

S.13 of Civil Procedure Code states the essentials for a foreign decree to be enforced in the courts of India. Further, in cases of custody of a child or marital disputes, the SC has stated that the doctrine of "judicial comity" or "comity of the court" shall come into play. **The Doctrine of Comity** states that the decrees made by the courts are to be recognized outside their jurisdiction unless it is against the public policy of that state.

Indian Courts have a consistent stance on the matter of child custody that:

1. If a parent illegally removes the child from that country to India to gain an advantage will not help his or her case.
2. Jurisdiction or inconsistency with Indian Laws as a ground for non-execution of a decree made by a foreign court shall not be maintainable.
3. The husband is liable to make necessary arrangements to get the decree from such a foreign court if the wife is not residing in India.

9

XYZ v. STATE OF MAHARASHTRA

In this case, the father was a UK citizen, residing in the US and had recently moved to Singapore with his wife and minor daughter with the intention to permanently reside.

The mother unlawfully removed the minor child, in retaliation to the on-going marital dispute.

Held: The HC rejected the petition for habeas corpus preferred by the father owing to the complexity of cross border facts. Was not inclined to disturb the status quo.

The matter is currently pending before the SC as the HC ignored the Comity of Courts.

MY EXPERIENCE

ABC v. UOI AND ORS.

This is a case of habeas corpus, wherein the Petitioner wife had sought safe haven in India, along with her minor daughter of 5 years, to escape the physical and mental cruelty perpetrated by her husband.

Held: The HC allowed the repatriation of the minor child to an abusive and violent father. Strictly interpreting the principles of "comity of courts" and "court of intimate contact".

Special Leave Petition has been admitted before SC, to reconsider the HC decision.

10

THANK YOU

11

What is HOT in Marriage and Divorce in Cross Border Disputes in Australia?

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1

Australia: Marriages, de facto and same sex relationships

Jurisdictional Background:

Australia is a federation of a Commonwealth Government and six state and two territory governments.

The Commonwealth Government's sources of legal powers are:

1. The Commonwealth of Constitution Act (1900),
2. From "referrals of powers" from the states and territories.

2

The States and territories powers

To make laws for the "peace, welfare and good government" of the individual states and territories.

These powers are subject to a provision that Commonwealth laws prevail over the State laws if there is a conflict between those laws.

3

The Marriage Power

The Commonwealth Government has the power under the Constitution to make laws in respect of "marriages": s51(xxi)

Case law adopted the meaning of marriage to be:

"…the voluntary union for life of one man and one woman to the exclusion of all others": Lord Penzance in Hyde and Hyde 1866 LR1 P&D 130

Primary laws are:

- The Marriage Act (1961)
- The Family Law Act (1975)
- The Child Support Act (1989)

4

De facto relationships

De Facto relationships developments:

- Originally not recognised as giving rise to any cause of action
- Trust law used to try and provide some fairness in property matters; children and maintenance dealt with separately.
- States recognised the relationships and passed laws e.g. NSW De Facto Relationship Act 1984
  - live together as a couple who are not married
  - Similar but not same provisions as for married couple
  - Heterosexual couples only

5

De Facto relationships

- 2007: the states and territories (other than two) referred their powers concerning de facto relationships to the Commonwealth
- Since 2007, de facto relationships covered by the Family Law Act (1975)
- Some geographical requirements and minor differences
- Applies to both parenting and property disputes

6

Same Sex relationships

- Not recognised as a "marriage" within *Hyde* definition
- Not recognised as a "*de facto relationship*" within state legislation
- Only remedies were in contract or equity principles
- 2014: Plebiscite by Postal Survey
  - "Should the law be changed to allow same sex couples to marry?"
  - "Yes" 61.6%; "no" 38.4%
- Amendments made to Marriage Act and family Law Act to bring same sex marriages into the mainstream.

7

Summary

- Australian law uncontroversially recognises the same provisions for parenting and financial orders for all relationships, whether married, de facto or same sex.
- The Commonwealth laws cover these primary aspects.
- Some residual state/territory laws:
  - Adoption
  - Surrogacy
  - Change of name

8

Overseas Provisions

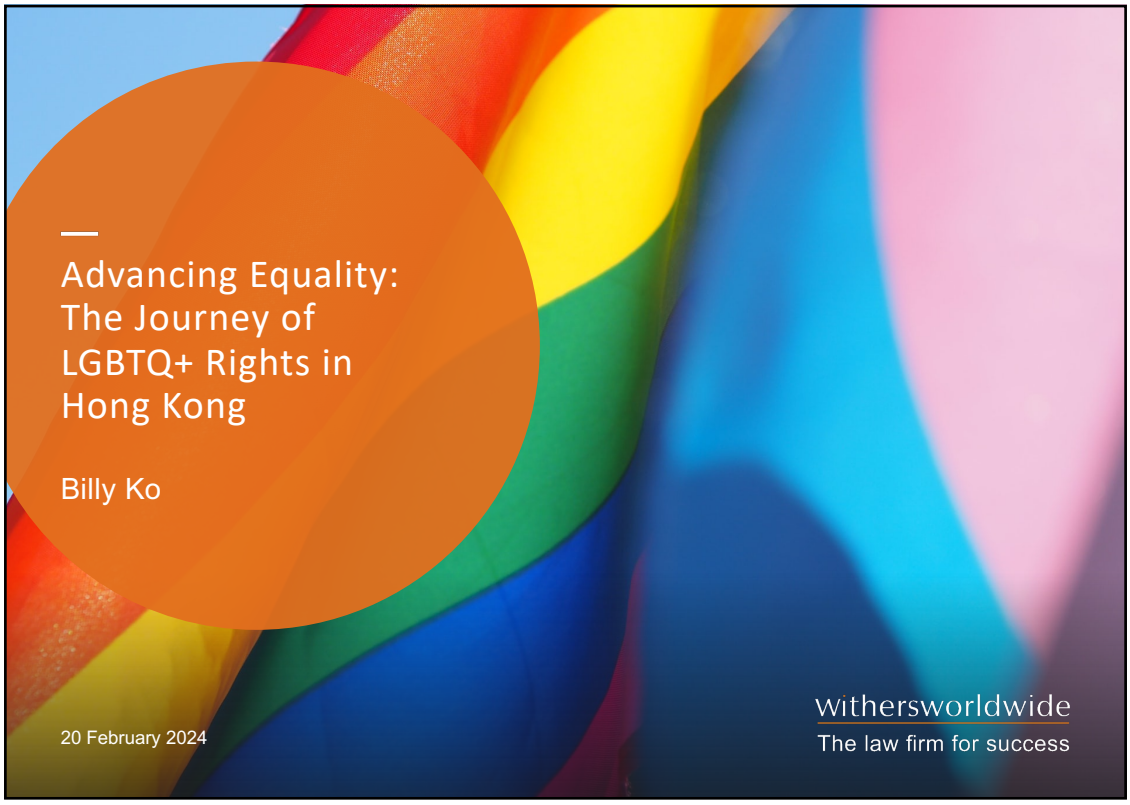
- Recognition and enforcement of overseas orders is a Commonwealth function, exercised by the Federal and Family Court of Australia
- Hague Convention matters dealt with by FCFCOA
- Rights of inheritance and general property rights are governed by State laws, but recognising the Commonwelath definitions concerning relationships

9

Family Violence

- 2023/4 amendments to the Family Law Act:
  - emphasize the need to protect children and parents from family violence when making orders concerning children, especially concerning ongoing contact between those parents
  - Incorporate family violence as consideration in determining property disputes

10



1

The Story of Jimmy Sham

Against all Odds

- CFA asked to adjudicate on 3 grounds:
  - Whether the exclusion of same-sex couples from institution of marriage constitutes a violation to the right of equality.
  - Whether laws of Hong Kong do not allow same-sex couples to marry and provide any alternative means of recognition
  - Whether the laws in Hong Kong constitute a violation of the right to equality.

- The Court of Final Appeal indicated a **need** for an **alternative framework** for same-sex couples.

Sham Tsz Kit (岑子杰) v Secretary of Justice [2023] HKCFA 28

- *"the Government is in violation of its positive obligation under Article 14 of the Hong Kong Bill of Rights to establish an alternative framework for legal recognition of same-sex partnerships"* [260 (b)(ii)(i)]

2

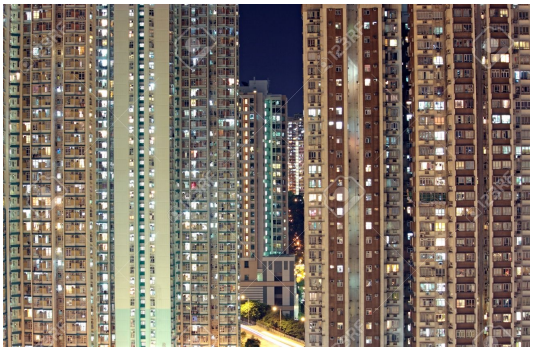
Advancing the law (1): Spousal benefits

Parental rights, Tax, Immigration, Inheritance, After-death arrangements

Parental Rights:	It is now possible to apply to the court to formalize the parental rights of a non-biological partner.
Employee / Tax benefits:	By unanimous decision, the Court of Final Appeal judges ruled that employment-related spousal benefits such as medical coverage and joint tax assessment should be extended to same-sex couples who married overseas.
Immigration:	***QT*** brings significant change as same-sex couples married from overseas are now allowed dependent visas.
Inheritance:	Differential treatment between same-sex couples and heterosexual couples is deemed unlawful discrimination.
After-death arrangements:	No distinction between same-sex and opposite-sex spouses for the term "spouse" under the Coroners' Ordinance.

Advancing the law (2): Public Housing

Home is for everyone

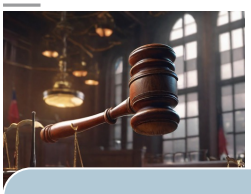


Nick Infringer v Housing Authority
Ng Hon Lam Edgar v Hong Kong Housing Authority **[2021] HKCFI 1812**
Both cases are notable because they addressed the interpretation of "spouses" to entail same-sex couples.
Consequently, Nick and his husband were able to apply for a public rental housing unit after being initially denied despite comfortably meeting the income requirement.
Edgar drew out the Housing Authority's discriminatory arguments and showed the city how same-sex couples are as equal as heterosexual couples can be.

Advancing the law (3): Gender

- No one is required to go through an invasive sex reassignment surgery ("SRS") to change the gender marker on their identity cards – ***Q and Henry Tse v Commissioner of Registration***
- Legal proceedings in the High Court await judgment as the potential for another landmark ruling may take place by permitting transgenders to access public toilets of their affirmed gender.

The Law at Present vs the Challenges to Advancement



The Law at Present:
- No cohabitation
- Recognition of same-sex marriage without enforcement

The Challenges:

Conflicting ideals between the PRC and Hong Kong may pose a challenge.

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The law firm for success

Thank you

7

THE VIEW FROM THE U.S.

MARLENE ESKIND MOSES

1

TO BE DISCUSSED

- 1. Does your jurisdiction recognize cohabitation unions? How did it come to do so/not do so?
- 2. Does your jurisdiction recognize same sex marriages? How did it come to do so/not do so?
- 3. What rights do such couples have in terms of children, asset division, maintenance from each other, and other rights and benefits afforded to married couples in terms of housing, immigration, taxes?
- 4. What's HOT?

2

NOT ALL RELATIONSHIPS ARE CREATED EQUAL

- A. Domestic Partnership
- Domestic partners can be understood as "nonmarital life partners." Some states, counties, and cities offer domestic partnerships as a legal status that an unmarried couple may enter to be afforded *some* of the rights and benefits given to married couples in that jurisdiction.
- Beyond this basic concept, the term domestic partnership is almost impossible to define concisely, as the requirements for entering into a domestic partnership, the rights afforded to domestic partners, and the legal duties of domestic partners vary in nearly every jurisdiction in which domestic partnerships exist.
- Nat'l Ctr. for Lesbian Rts., Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States (2020), https://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf [https://perma.cc/YQL8-2JZQ] (providing a state-by-state overview of relationship recognition).

3

NOT ALL RELATIONSHIPS ARE CREATED EQUAL

- B. Civil Union
- Many jurisdictions allow for unmarried couples to enter into a civil union--a legal status very similar to a domestic partnership. Often, civil unions are thought to give unmarried couples more legal rights and duties than domestic partnerships, but as the rights and duties of domestic partners vary so highly between jurisdictions, the comparison is not so straightforward.

4

NOT ALL RELATIONSHIPS ARE CREATED EQUAL

- DOMESTIC PARTNERSHIP OR CIVIL UNION?
- The important thing about domestic partnerships is that not all are created equal, and thus the parties will not be granted equivalent rights in different states.
- The rights of domestic partners vary from jurisdiction to jurisdiction and fall on a spectrum from not marriage-like to very marriage-like. On one extreme, California's current domestic partnership statute gives domestic partners the same "rights, protections and benefits" as married spouses. Other systems, such as Wisconsin's former domestic partnership registry, explicitly limit the rights of domestic partners as compared to those of legal spouses.

5

NOT ALL RELATIONSHIPS ARE CREATED EQUAL

- DOMESTIC PARTNERSHIP OR CIVIL UNION?
- The difference in domestic partnership regimes can have consequences. For example, on May 9th, 2018, a California Appeals court ruled that New Jersey domestic partnerships ("NJ D.P.'s") are not "substantially equivalent" to California Registered Domestic Partnerships ("CA RDP's"), rejecting a same-sex spouse's claim that the trial court in his divorce erred by declaring the date of the couple's union to be the date they legally wed in Connecticut in 2009 rather than the 2004 date they entered into their NJ D.P. In re G.C. & R, 23 Cal.App.5th 1, 232 Cal.Rptr.3d 484 (4th Dist. 2018).

6

NOT ALL RELATIONSHIPS ARE CREATED EQUAL

- RESOURCES:
- Douglas NeJaime, Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage, 102 Calif. L. Rev. 87, 91 (Feb. 2014).
- Heidi L. Brady, Robin Fretwell Wilson, The Precarious Status of Domestic Partnerships for the Elderly in a Post-Obergefell World, 24 Elder L.J. 49 (2016).
- Barbara Atwood, Naomi Cahn, Nonmarital Cohabitants: The U.S. Approach, 44 Hous. J. Int'l L. 191 (2022).
- Grace J. Anderson, The Continued Relevance of Domestic Partnerships in the Post-Obergefell United States, 41 Minn. J. L. & Ineq. 133 (Winter 2023).

7

A BRAVE NEW WORLD

- In June 2020 and March 2021, respectively, the cities of Sommerville, Massachusetts and Cambridge, Massachusetts passed ordinances allowing more than two people to register as domestic partners. The definition of a domestic partnership in Cambridge still requires these partners to be "in a relationship of mutual support, caring, and commitment and intend to remain in such a relationship" and to "consider themselves to be a family." The Cambridge ordinance was passed with input from the Polyamory Legal Advocacy Coalition, which stated in a later press release that this decision would help not only polyamorous couples and their families, but also "non-nuclear" families including multi-parent families, families where multiple generations live in the same household and assist with child rearing, and step-family relationships.
- Ellen Barry, A Massachusetts City Decides to Recognize Polyamorous Relationships, N.Y. Times (July 1, 2020), https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html [https://perma.cc/8XT6-CSZN]

8

THE GOLD STANDARD: MARRIAGE

- On June 26, 2015, the Supreme Court handed down *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584 (2015), wherein it held that same-sex marriage is a constitutional right protected by the Fourteenth Amendment.
- In *Pavan v. Smith*, 582 U.S. 563, 566, 137 S.Ct. 2075, 2078 (2017), the Supreme Court held that this means *all* the rights and responsibilities of marriage - in the Court's words, "the constellation of benefits" that marriage affords. Same-sex marriage is not a different species of marriage:

9

SAME-SEX MARRIAGE

- From *Pavan v. Smith*:
- "As we explained [in Obergefell], a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 576 U.S., at 675-676. Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificates." Id., at 670. That was no accident: Several of the plaintiffs in Obergefell challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. See DeBoer v. Snyder, 772 F.3d 388, 398–399 (C.A.6 2014). In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. See 576 U.S., at 675-676. That holding applies with equal force to § 20–18–401."

10

SAME-SEX MARRIAGE: THE UPSHOT FOR OTHER RELATIONSHIPS

- The case that achieved marriage equality for the LGBTQ+ community (Obergefell) became the impetus for the restriction and reversal of rights for domestic partners in several states.

- Kaiponanea T. Matsumura, A Right Not to Marry, 84 Fordham L. Rev. 1509 (2016) (summarizing state decisions to terminate domestic partnership statutes or convert domestic partnerships into marriages).

11

WHITHER DOMESTIC PARTNERSHIPS AND CIVIL UNIONS?

- States' and municipalities' differing responses to domestic partnership law post-*Obergefell* is the result of a difficult question: if domestic partnership statutes primarily exist to protect the rights of same-sex couples, and now same-sex couples in all states can choose to marry, should domestic partnerships still be an option for unmarried couples? States approached this issue in vastly different ways. For example, while Wisconsin ended its domestic partnership registry and Washington converted civil unions into legal marriages, California continued to see the use for domestic partnership statutes and ordinances even after same-sex partners' rights could be protected by marriage, and it expanded these statutes to encompass a variety of unmarried partners regardless of sexual orientation.

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DOMESTIC PARTNERSHIPS TODAY

- Under California's expansive domestic partnership regime, the laws passed require all employers to extend the same benefits to an employee's domestic partner as they would to an employee's spouse. These employer rights include (depending on the employer's policy for spouses) access to an employer's healthcare provider for domestic partners, a leave of absence upon the death of a partner, and/or sick leave to care for an injured or sick partner. The potential to access these rights and abilities could improve the financial situation of unmarried partners, and provide an unmarried partner with care and comfort upon grief, illness, and injury.

- Further protections upon the unexpected injury or death of a partner commonly included among domestic partnership statutes are medical visitation and decision-making rights, the right to inherit property from a deceased partner, and the right to sue on behalf of a deceased partner in an action for wrongful death. These rights give an unmarried partner, who may be closer to their partner than members of their family who would receive these rights without a domestic partnership in place, the ability to make decisions that are best for their partner and ensure financial stability in case of a tragedy.

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DOMESTIC PARTNERSHIPS TODAY

- In terms of child custody and childcare, many domestic partnership statutes assume that after a domestic partnership has been terminated by death or dissolution, the former partner has no special legal right to custody or care of the child.
- Cambridge's domestic partnership ordinance provides a domestic partner with access to the school records of their partner's children, access to personnel records regarding concerns about the child, and grants them the ability to remove the child from school in the event of an emergency or illness. However, the ordinance specifies that after a partnership is terminated, so too are these rights.
- Wisconsin's previous domestic partnership statute gave no mention to the rights of a domestic partner in regards to their partner's legal child, including any rights after the partnership has terminated.
- However, California--characteristically broad in its scope of rights afforded to domestic partners--states that the rights of former or surviving partners are the same in regard to their partner's child as those of former or surviving spouses.

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THE FUTURE: UCERA

- The Uniform Cohabitants' Economic Remedies Act (UCERA) was passed by the Uniform Law Commission in 2021. So far, it has been introduced only in Illinois.

- The underlying philosophy of the Act is that cohabitants should be treated the same as others in asserting contractual and equitable claims. This is stated directly in Section 4. "That Section makes clear that cohabitants' claims shall not be barred be-
- cause of a cohabiting or sexual relationship or because one cohabitant is married to someone else."

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THE FUTURE: UCERA

- Section 6 of the Act provides the basis for contractual claims. Agreements may be oral, express, or implied-in-fact. Contributions to the relationship, whether monetary or non-monetary, are sufficient consideration. Contractual claims may be asserted during and after cohabitation. Just as in the case of premarital, post-marital, or property settlement agreements, an agreement that adversely affects a child's right to support or limits a cohabitant's ability to pursue legal remedies as a victim of violence are void.

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THE FUTURE: UCERA

- Section 7 of the Act provides that a cohabitant may bring an equitable action against the other cohabitant based on that important concept of "contributions to the relationship." The Act does not create a new kind of claim in equity, but rather operates within the framework of unjust enrichment, constructive trust, and injunctive relief.
- Section 7 also provides that equitable claims accrue on termination of the cohabitation, whether by death, separation, or marriage between the cohabitants.
- Section 7 lists factors for courts to consider in adjudicating such a claim, including the nature and value of the contributions, the duration of the cohabitation, reasonable reliance on representations or conduct of the other cohabitant, and intent. UCERA requires a close examination of the circumstances of the parties' cohabitation in determining whether any division of property is appropriate.

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THE FUTURE: UCERA

- Because UCERA does not govern domestic partnerships, it does not include any rights to make medical decisions on behalf of a partner, visitation at a hospital or prison, or standing to sue for wrongful death of a partner. Contract-based claims and claims for equitable relief are more accessible under UCERA, so economic benefits could be easier to attain after a partnership ends.
- This economic relief occurs only upon a dispute between the cohabitants or upon the termination of the relationship, so partners are placed in a win-or-lose scenario to obtain relief. Providing economic benefits to partners during the course of a partnership through access to employer healthcare is not included in UCERA.
- Though UCERA is not contrary to the goals of unmarried partners in the United States, an additional act should be passed which establishes an opt-in status to enable unmarried partners to gain affirmative rights during the course of a partnership.

18

RESOURCES FOR UCERA

- Uniform Cohabitants' Economic Remedies Act, Unif. L. Comm'n https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5
- Laura W. Morgan, The Uniform Cohabitants' Economic Remedies Act (2021), 36 J. Amer. Acad. Matrim. Law. 129 (2023) [https://aaml.org/wp-content/uploads/5-MAT109.pdf]
- Barbara Atwood & Naomi Cahn, The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Unmarried Partners, ___ FAM . L.Q. ___ (forthcoming), https://papers.ssrn.com/sol3/pa-pers.cfm?abstract_id=4409696 (posted Apr. 7, 2023).

19

THE FUTURE OF SAME-SEX MARRIAGE IN THE UNITED STATES

- In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S.Ct. 2228 (2022), the Supreme Court held that the federal constitution does not provide a right to abortion, and authority to regulate abortion must be returned to the people and their elected representatives, overruling *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

20

THE FUTURE OF SAME-SEX MARRIAGE IN THE UNITED STATES

- In his concurrence, Justice Thomas threw out this bomb:

[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell.

Because any substantive due process decision is "demonstrably erroneous," Ramos v. Louisiana, 590 U.S. ——, ——, 140 S.Ct. 1390, 1424, 206 L.Ed.2d 583 (2020) (THOMAS, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, Gamble v. United States, 587 U.S. ——, ——, 139 S.Ct. 1960, 1984-1985, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.

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THE FUTURE OF SAME-SEX MARRIAGE IN THE UNITED STATES

- Justice Thomas is almost desperate to overturn *Obergefell*. Same-sex marriage would then be up to the states, and we know how that went.
- See Jasmine Aguilera, What Will Happen to Same-Sex Marriage Around the Country if *Obergefell* Falls, Time (Dec. 14, 2022, 10:26 AM), https://time.com/6240497/same-sex-marriage-rights-us-obergefell/.
- Sydney Jackson, *Dobbs's* Impact on LGBTQ+ Rights: Where Do We Go from Here?, 101 U. Det. Mercy L. Rev. 43 (Fall 2023).

22

THE FUTURE

- "Traditional" marriage is safe. But what does this all mean for cross-border recognition of non-marital relationships? For the time being, unless and until the Supreme Court overrules *Obergefell*, cross-border recognition of domestic partnerships should be the order of the day, to the extent as recognized in the country of origin, unless the relationship somehow is against public policy. With *Masterpiece Cakeshop*, though, and the Supreme Court's determination to roll back substantive due process, who knows what the future brings.

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LAWASIA SYMPOSIUM – 20TH FEBRUARY 2024

WHAT IS HOT IN MARRIAGE AND DIVORCE IN CROSS BORDER DISPUTES: INDIAN PERSPECTIVE

By: Geeta Luthra, Senior Advocate (Fellow – IAFL)

RECOGNITION OF COHABITATION UNIONS

Introduction

In recent years, the dynamics of intimate relationships has undergone profound changes globally, leading to an increased prevalence of cohabitation unions, and resistance to conform to the traditional notions of marriage. While society is adapting to new relationship dynamics, the Indian legal system is facing challenges in recognizing and addressing cohabitation unions within the contours of existing laws governing matrimonial relationships in India.

Despite this traditional outlook and deep rooted faith in the institution of marriage, the 21st Century has witnessed a surge in live-in relationships in India. This shift has compelled not only the society but also the Indian judiciary to accept unions outside of marriage and cast away their biases against such relationships.

In Hindu personal laws, explicit provisions addressing live-in relationships and the rights flowing from such relationships thereof are notably absent. The Indian legal landscape qua cohabitation unions is dependent on the interpretations by the judiciary through various judicial precedents, which I will be addressing later in my talk.

Recognition of cohabitation Unions

Legal recognition of a spousal relationship traditionally hinges on the solemnization of marriage, adhering to the legal requirements stipulated under the personal laws of the individual. However, recent judicial decisions and legislative measures have ushered in a different perspective, acknowledging intimate physical relationships even outside the wedlock marked by exclusivity, consistency, and longevity.

It is noteworthy that the Parliament, by introducing the phrase 'relationship in the nature of marriage' in the Domestic Violence Act, has acknowledged the prevalence of such relationships. However, the formal recognition of these relationships, as traditionally understood in the Indian context, is yet to materialize.

A Live-In Relationship is legally defined as an agreement where unmarried couples live together in a manner similar to a long-term marriage. In the case of ***Badri Prasad vs. Dy. Dictator of consolidation***[1], the Supreme Court recognized a 50-year-old live-in relationship as a valid form of marriage.

Additionally, the landmark case of ***S. Khushboo vs. Kanniammal***[2] affirmed that living together is a "right to life," establishing that while live-in relationships may be deemed immoral by conservative Indian society, they cannot be considered illegal.

While the practice of live-in relationships has not been traditionally well-received in Indian society, legal reforms, such as the decriminalization of Section 377 and amendment to Section 497 of the Indian Penal Code reflect a wave of societal

[1] Badri Prasad v. Dy. Director of Consolidation, (1978) 3 SCC 527.

[2] S. Khushboo v. Kanniammal, (2010) 5 SCC 600.

evolution. Despite initial resistance, these legal developments indicate a growing acceptance of non-traditional relationship structures.

In typical Indian marriages, religious and legal duties define the matrimonial bond between partners. Live-in relationships, initially considered void-ab-initio, gained legal validity in 1978, provided the requisites of marriage, including mental soundness, legal age, and consent, are satisfied. The definition and scope of live-in relationships remain unclear, but Indian courts have emphasized that a couple living together for a considerable period can be considered legally married unless proven otherwise.

The term 'live-in relationship' refers to relationships where there is no formal marriage under any law, yet the parties live together, present themselves as a couple to society, and exhibit stability and continuity. Courts, as seen in the ***Payal Sharma v. Superintendent, Nari Niketan case***[3], have stressed that living together without marriage may be viewed as immoral by society but is not illegal, highlighting the key distinction between law and morality.

In the landmark case of ***S. Khushboo v. Kanniammal***[4], the Supreme Court clarified that there is no law prohibiting live-in relationships or pre-marital sex. Live-in relationships are deemed permissible only for unmarried, consenting adults of different sexes.

In summary, despite conservative societal views, the apex court and high courts in India have shown a positive inclination towards protecting the emerging culture of live-in relationships, cautioning parties involved about the potential consequences of such non-legal unions. Live-in relationships have gained traction, particularly in urban metro cities, where individuals may prioritize testing compatibility before committing to a legal union or maintaining financial independence. Additionally, there have been instances of organizations arranging live-in relationships for widowed or divorced senior citizens to address issues of loneliness and neglect.

Right to maintenance for women in live-in relationships:

The legal landscape regarding the right of women qua maintenance in live-in relationships has evolved. In 2008, the National Commission of India for Women and the Ministry of Women and Child Development recommended the inclusion of live-in female partners in the right to maintenance under Section 125 of the Criminal Procedure Code, 1973. This proposition was affirmed through the judgment in the case of ***Abhijit Bhikaseth Auti vs. State Of Maharashtra and Others***[5] wherein the court observed that the definition of a matrimonial home and domestic relationship under Section 2 (f) of DV act is very wide as it includes relationship between two persons who live or have at any point of time, lived together in a shared household when they are related by consanguinity, marriage, or through a relationship in the

[3] Payal Sharma v. Superintendent, Nari Niketan Kalindri Vihar, 2001 SCC OnLine All 332.
[4] S. Khushboo v. Kanniammal, (2010) 5 SCC 600.
[5] Abhijit Bhikaseth Auti v. State of Maharashtra, 2008 SCC OnLine Bom 1388.

nature of a marriage. Thus, by way of expansive interpretation of the said definition, the Apex Court gave recognition to live in relationships.

The Protection of Women from Domestic Violence Act, 2005, marked a significant step in providing protection to partners in live-in relationships. The act recognizes females in informal or non-legal marriages, living with a male person in a manner resembling marriage, as akin to wives. Section 2(f) of the Act defines domestic relationships broadly, encompassing relationships that resemble the nature of marriage.

Delhi High Court in particular, have been the flagbearer in not only awarding maintenance to women residing in a live-in relationship but also giving right to women in live-in relationships to file domestic violence complaint against their partners.

The Delhi High Court, in ***Varsha Kapoor vs UOI & Ors***.[6], affirmed that females in relationships resembling marriage have the right to file domestic violence complaint not only against their male partners but also against relatives.

In the case of ***Koppisetti Subbharao Subramaniam vs. State of Andhra Pradesh***[7], the Supreme Court extended protection to women in live-in relationships by rejecting the argument that Section 498A (dealing with harassment for dowry) did not apply because the defendant was not married to the complainant. The court emphasized that the term 'dowry' should not be limited to formal marriages, and protection against harassment should extend to women in live-in relationships.

These legal developments reflect a progressive shift in recognizing and safeguarding the rights of women in live-in relationships, offering them avenues for maintenance and protection against harassment.

Legal Status of Children Born Out of Live-In Relationships

A Live-In Relationship is often characterized as a transient and flexible arrangement, lacking the legal obligations that come with traditional marriages. This form of cohabitation is viewed as a day-to-day contract that can be terminated unilaterally by either party, without the need for mutual consent. In a society like India, deeply rooted in traditional values, the concept of Live-In Relationships is still evolving and gaining acceptance among a broader section of the population. It challenges the conventional notion of marriage as the cornerstone of societal structure, presenting a more informal and dynamic alternative.

The legal status of children born as a result of such relationships remains unclear, prompting the courts to provide interpretations through various judgments in recent years. Courts have taken a liberal stance, asserting that couples cohabiting for an extended period may be presumed to be legally married unless proven otherwise. This perspective acknowledges the evolving nature of relationships and seeks to afford

[6] Varsha Kapoor v. Union of India, 2010 SCC OnLine Del 2213.
[7] Koppisetti Subbharao v. State of A.P., (2009) 12 SCC 33.1

legal recognition to those in long-term cohabitation, aligning with the changing societal dynamics.

One crucial aspect addressed by the courts is the rights of maintenance for women in live-in relationships. The determination of these rights is guided by the Protection of Women from Domestic Violence Act, 2005. Courts have emphasized that maintenance rights will be granted based on the individual facts of each case, ensuring a nuanced approach that considers the specific circumstances of the parties involved.

The legal framework recognizes the need for adaptation to contemporary relationship structures, as reflected in the courts' progressive interpretation of live-in relationships. The presumption of marriage in cases of long-term cohabitation signifies a departure from the traditional understanding of legal relationships, attempting to bridge the gap between societal norms and legal recognition. As Live-In Relationships continue to gain acceptance, the legal landscape is likely to evolve further to address the complexities arising from such unions, especially concerning the rights and status of children born within these arrangements.

Legitimacy of Children Born in Live-In Relationships and their Right to Inherit Property:

The foremost right for a child born is the right to legitimacy, forming the foundation for various other rights within the legal framework of our country.

Traditionally, only children born to married couples were legally entitled and recognized in society. Under Muslim law, marriage is considered a significant civil contract, and recognition is primarily given to children born within the bounds of a valid marriage. However, the legal landscape has evolved over time. The **Malimath Committee** set up in year 2000, under the chairmanship of Mr. V.S. Malimath, Former CJ of Karnataka, in its report emphasized the need to include women living with a man as his wife for an extended period, *during the subsistence of their first marriage*, under Section 125 of the Criminal Procedure Code (CrPC) i.e. right to maintenance to a married woman subsisting in a live in relationship. **Maharashtra government** was the first state to follow the recommendations of Malimath Committee and in 2008, amend the provision under S.125 CrPC to include "living as his wife" in the definition of wife under the said provision. This was the first attempt to recognise unions of cohabitation that were not tied by marriage ceremony.

Furthermore, Amendments were made to the Protection of Women from Domestic Violence Act, 2005, such as giving an exhaustive definition to the term "domestic relationship" to include women in live-in relationships, as discussed earlier.

In the case of ***Dimple Gupta v. Rajiv Gupta***[8], the court affirmed the entitlement of illegitimate children born out of illicit relationships to maintenance, emphasizing that they have the same rights as children from valid marriages.

[8] Dimple Gupta v. Rajiv Gupta, (2007) 10 SCC 30.

In ***SPS Balasubramanyam vs. Sruttayan***[9], the court presumed that if a man and a woman lived under one roof for an extended period, they were considered husband and wife, and children born to them were not deemed illegitimate.

Article 39(f) of the Constitution of India underlines the state's responsibility to provide children with adequate opportunities for normal development and safeguard their interests. Recent cases, like **Tulsi v D** have further clarified that children born from live-in relationships should not be considered illegitimate. However, a crucial precondition is that the parents must have cohabited for a significantly long time, and it should not be a transient "walk-in and walk-out" relationship, as noted by the Supreme Court in the 2010 judgment of ***Madan Mohan Singh and Ors v Rajni Kant & Anr.***[10]

In the case of **D. Velusamy v. D. Patchaiammal**[9],The Hon'ble Supreme Court of India has observed that, the relationship which is in the nature of marriage will be only recognized under the concept of live in relation. The Court has opined that merely spending few weekends or one-night stand would not make domestic relationship.

Legitimization of children born out of live-in relationships is fundamentally based on the legal principle that the children must not be bastardized and marginalised due to the circumstances of their birth, and that the presumption would always be in favour of innocence of the children. **[Ref: Section 114 of Indian Evidence Act 1872 (IEA)].**

Recognition of live in relationships can also be drawn from **Section 114 of IEA** which states that the court may presume the existence of certain facts on the basis of circumstances. With the application of this section, the court can easily draw the contention of 'presumption of marriage' in case of prolonged and continuous cohabitation between the parties as husband and wife. Whenever that is proved, live-in relationship will get the legal status and the female partner will get the status of wife.

Property and inheritance rights in Live-In Relationships

The right to property and the legitimacy of children born out of live-in relationships have been subjects of extensive legal scrutiny in India, particularly with respect to Hindu Succession Act of 1956. This legislation delineates the inheritance rights of legitimate children, including both sons and daughters, classified as Class-I heirs in joint family property. However, traditional Hindu law has posed challenges for illegitimate children, who were historically limited to inheriting property solely from their mother's side, with no recognition of the alleged father's lineage.

However, Indian courts have consistently maintained that children born out of live-in relationships should not be arbitrarily denied the right to inherit property, especially when there has been a reasonable period of cohabitation between the partners/parents giving rise to a relationship akin to marriage. A pivotal case, V***idyadhari vs.***

[9] S.P.S. Balasubramanyam v. Suruttayan, (1994) 1 SCC 460.
[10] Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

Sukhrana Bai[11], stands as a landmark judgment in which the court not only granted inheritance rights but also bestowed legal status upon a child born from a live-in relationship.

In the case of ***Bharata Matha & Ors. v. R. Vijaya Renganathan & Ors.***[12]**,** the Supreme Court also extended the right to inherit property to children born out of live in relationships, by upholding that such children may inherit property from their parents and that they must be granted legitimacy in the eyes of the law. However, it is interesting to note that one of the revered judges of Supreme Court of India- J. Ganguly, critiqued the said judgement and highlighted the legislative silence on whether the property in question should be ancestral or self-acquired. Nevertheless, courts have consistently asserted that the rights of such children to property should not be arbitrarily denied, aligning with constitutional principles.

Sections 16(1) and 16(2) of the Hindu Marriage Act (HMA), 1955, play a pivotal role in this discourse. They explicitly declare children born out of live-in relationships as legitimate in the eyes of the law. Any form of discrimination against these children or unequal treatment compared to their legitimately born counterparts would amount to a violation of the principles embedded in Section 16. Justice Ganguly emphasized that the legislative intent behind the HMA, 1955, and subsequent amendments is to eliminate distinctions between children born out of valid, void, or voidable marriages, advancing social reforms and conferring the social status of legitimacy on all innocent children.

The courts have consistently interpreted Section 16 to ensure that the legislation is viewed as beneficial and conducive to the social objectives of conferring legitimacy upon innocent children. Denying these children their inheritance rights would undermine the legislative intent and societal reforms envisioned by the Hindu Marriage Act 1955.

In conclusion, the legal recognition and rights of children born out of live-in relationships have undergone a transformative journey, reflecting a progressive shift in the legal landscape, emphasizing equality, and aligning with constitutional principles and societal reforms.

However, the very fact that the children born out of live in relationships are recognised by the Supreme Court and they have been extended the rights flowing from their birth such as right to property and inheritance, is testament to a pro- live-in relationship approach.

Child Custody in Live-In Relationships

Navigating the issue of child custody is a significant challenge for partners in live-in relationships, distinct from the legal frameworks applicable to married couples. The absence of specific provisions addressing this matter adds complexity to the situation.

[11] Vidhyadhari v. Sukhrana Bai, (2008) 2 SCC 238.
[12] Bharatha Matha v. R. Vijaya Renganathan, (2010) 11 SCC 483.

The only guiding principle, while adjudicating upon the custody battles of minor children born out of live-in relationships, is drawn from Section 13 of the Hindu Minority and Guardianship Act 1956, which emphasises on the "best interests of the child" or "welfare of the child" as the paramount consideration.

In the ***Shyamrao Maroti Korwate case***[13], the courts emphasized interpreting the term 'welfare' broadly. Additionally, Acts such as the Guardianship and Wards Act, 1890, are invoked and applied in tandem to determine custody in child-related cases, ensuring the proper appointment of a guardian for the minor.

In contrast, under Muslim law, there is no inherent obligation to maintain a child born out of a live-in relationship, unlike Hindu law. The mother holds the primary right to custody, known as hizanat, and cannot be deprived of this right unless evidence contradicts her suitability. This right can be asserted against the child's father or any other party.

It is imperative for the legal system to analyse and consider the impact of live-in relationships on children, recognizing this as a crucial aspect.

Practical challenges that may arise on our way forward in recognising cohabitation unions:

a) It would be difficult to ascertain as to when a particular relationship has ended and/or terminated in order to ascertain the legal repercussions of the same. Marriage is an institution which is objective in the sense that it can be determined conveniently that a marriage has been effected (for instance after performing Saptapadi in Hindu Law) and when the same is terminated by virtue of divorce. The same may not be as easily and conveniently ascertainable in case of live-in-relationships. Persons may end up creating a cycle of separating and coming back together and it would be difficult to ascertain the nature and even existence of the relationship at a given point of time, thus creating a scenario which is impractical and non-feasible inasmuch as legal proceedings and determination of rights is concerned. For instance, a person may want to seek relief under the DV Act, however it may not be clear that at the given instance of time the concerned relationship was ongoing or not. This position of law would create an absurdity.
b) Customs are recognised as a valid source and form of law. Inheritance in various religions is governed by the same and recognition of live in relationships by the courts of law, and consequentially the recognition of children born out of such otherwise illegal unions as legal heirs would tantamount to a violation of customary laws.
c) The institution of marriage has been created for certain purposes which are both practical and desirable, to dilute the same might lead to the collapse of **social structure in the longer run**. Courts of law must be cognizant of the future effects that a position of law that they are laying down may have and how it may affect the larger public interest.

[13] Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam, (2010) 10 SCC 314.

d) Live in relationships can lead to bigamy as was the scenario in the case of **Payal Katara v. Superintendent Nari Niketan Kandari Vihar Agra**. While the courts recognized the right of cohabitation of petitioner, the rights of the wife of the person with whom the Petitioner was cohabiting seemed to be bleak. The question that seeks an answer with the alleviation of live in relationship what the status of wife will be, if a person who is in live in relationship is already married as law also seeks to protect the right to live in partner under statutes like PWDV Act, 2005. Such situations can cause a drastic blow on the institution of marriage itself.

Uniform Civil Code of Uttarakhand, 2024

On 6th February 2024, the Uttarakhand State Assembly tabled the State's Uniform Civil Code Bill (hereinafter "UCC Bill" for brevity) in its Special Session. In a pioneering move, the Bill aims to introduce statutory representation for live-in relationships. Part 3 of the Bill (Sections 378- 389) deals with provisions related to live-in relationships, making their registration mandatory.

A '**Statement of Live-in Relationships**' [defined in Section 3(4)(d)] has to be submitted by the partners (man and woman), as under [Section 3(4)(b)] to the concerned Registrar. This will apply to the persons who are residents of Uttarakhand, or not, but are residing in the State, or the resident(s) of Uttarakhand residing outside the State. In the case of the latter, the concerned Registrar will be one within whose jurisdiction such resident ordinarily resides. Following this, the Registrar shall examine the statements and conduct a summary inquiry to establish the validity of the relationship. After satisfying himself of the validity, the Registrar may either issue a 'registration certificate', thereby effectively registering the relationship or refuse to register such relationship while prescribing the reasons thereof in writing.

While Section 380 lays down **conditions wherein a live-in shall not be registered**: prohibited relationships (excluding those permitted by custom and usages), relationships where at least one person is already married/ in a live-in relationship, is a minor or where the consent has not been given freely, the Code does not mention any specific grounds on which the Registrar may refuse to register the Statement (Section 381.) Such provisions have also ensured a complete ban on the ill practices of polygamy and child marriage.

The partner(s) are required to submit a '**Statement of Termination of Live-in Relationships**' [defined in Section 3(4)(e)] in case both or either of them decide to terminate the relationship. Section 384 further necessitates the Registrar to inform the other partner of such termination, in case only one partner approaches the Registrar to terminate the relationship. In the extension of his duty to inform, the Registrar must inform the parents/guardians of the partner (if they are under the age of 21 years) in case of receipt of 'Statement of Live-in Relationships' or 'Statement of Termination of Live-in Relationships.' Furthermore, he must forward the 'Statement of Live-in Relationships' to the officer-in-charge of the local police station for the record, or

otherwise inform him in case the relationship falls under the category of 'non-registrable' or if the contents of the statement are incorrect.

The **mandatory nature of the registration** of such relationships is further solidified by the Bill providing for penalising provisions in case of non-registration post one month of entering into the relationship or any false averments in the statements of live-in relationships. The punishment is more severe still if the parties have failed to register post a notice has been sent to them (either by the motion of the Registrar himself or on receipt of any complaint.)

The Bill also includes **provisions for the maintenance of live-in relationships** (Section 388.) Under this provision, the woman is entitled to claim maintenance from her partner in case he deserts her. The provisions of Chapter - 5, Part - I 'Incidental Proceedings' that govern the provisions of maintenance of married couples shall apply *mutatis mutandi* in the case of live-in relationships.

Gender Neutral: It is interesting to note that while the term 'partner' (denoting man and woman both) has been used throughout the provisions related to live-in relationships, making the Bill progressive due to its gender neutrality, an exception has been made in the provision related to maintenance wherein only the woman is entitled to claim maintenance and only the man has been made liable to pay maintenance.

While the **bill lacks specific provisions for the succession and inheritance** of the children of live-in relationships, it may be presumed that the law would be the same as is for the children born out of wedlock (considering that the Bill holds the children born of a live-in relationship to be legitimate (Section 379) and defines them (Section 3(4)(a)) in a similar manner to the children born out of wedlock (Section 3(1)(a)).

Silent on same-sex unions: Despite its progressive and unprecedented provisions, the Bill remains silent on the matter of same-sex relationships, and defines 'spouse' (with regards to marriage) [Section 3(4)(b)] and 'partner' (in the context of live-in relationships) [Section 3(4)(b)] in heterosexual and heteronormative terms.

S. No.	Case details	Facts of the Case	Ratio decidendi
1.	Badri Prasad v. Dy. Director of Consolidation, (1978) 3 SCC 527.	A man and a woman were living together as husband and wife for more than 50 years and the validity of their marriage was challenged. Court held that burden of proof not discharged to disprove marriage.	Strong presumption would arise in such a case regarding the validity of the marriage. Ceremonial processes need not be proved.
2.	S. Khushboo v. Kanniammal, (2010) 5 SCC 600.	The appellant was a well-known actress who gave an interview for a magazine where she stated that girls should be allowed by parents to have serious relationships and no educated man should expect a woman to be a virgin at the time of marriage. Sex is not only concerned with the body but also with the conscience. After such statements, as many as 23 criminal complaints were filed against her.	Upon due consideration the court found that there was no prima facie case against the appellant of commission of any offence. Court noted that although it is true that mainstream view in our society is that sexual conduct should take place only between marital partners, there is no statutory offense in willingly engaging in sexual relations outside marital settings.
3.	Payal Sharma v. Superintendent, Nari Niketan Kalindri Vihar, 2001 SCC OnLine All 332.	Petitioner filed Writ Petition Before Allahabad HC seeking to be at liberty. (Other facts not discussed in judgment)	Court held that since the Petitioner was a major which has been proved as per her high school certificate, she has the right to go anywhere and live with anyone. Man and woman can live together without marriage. Society may deem the same to be immoral but the same is not illegal.
4.	Abhijit Bhikaseth Auti v. State of Maharashtra, 2008 SCC OnLine Bom 1388.	The dispute was primarily regarding the Domestic Violence Act where the wife filed an application before judicial magistrate seeking protection from the husband committing any acts of domestic violence and also preventing the husband from alienating a flat which was jointly owned by them.	The court observed that the definition of a matrimonial home and domestic relationship under the DV act is very wide. This is in the context of the definition of domestic relationship under Section 2 (f) which means relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of a marriage.
5.	Varsha Kapoor v. Union of India,	The petitioner, mother-in-law of the	Court affirmed the position that females in relationships

	2010 SCC OnLine Del 2213.	respondent 4 instituted proceedings in the Court of Metropolitan Magistrate under Section 12 of the DV Act. In this application, the respondent No. 4 has impleaded her husband as respondent No. 1 and one Rakesh Dhawan as respondent No. 3. Her mother-in-law has been arrayed as the respondent No. 2 (the petitioner herein). Allegations of domestic violence perpetrated by her husband and mother-in-law are females in relationships resembling marriage have the legal authority to file complaints not only against their male partners but also against relatives causing trouble or domestic inconvenience.	resembling marriage have the legal authority to file complaints not only against their male partners but also against relatives causing trouble or domestic inconvenience.
6.	Koppisetti Subbharao v. State of A.P., (2009) 12 SCC 33.1	Validity of marriage challenged before High Court by the accused who sought the defence of invalid marriage to escape liability under Section 498-A.	Section 498-A (Dowry) can apply even where there is no valid marriage.
7.	Dimple Gupta v. Rajiv Gupta, (2007) 10 SCC 30	Maintenance was sought under Section 125 CrPC for illegitimate child.	Court granted the prayers and held that illegitimate children shall be entitled to maintenance under Section 125 of CrPC.
8.	S.P.S. Balasubramanyam v. Suruttayan, (1994) 1 SCC 460.	Suit filed against alienation of property by alleged illegitimate child as no right could accrue in his favour or in favour of his mother. Court held that presumption as to validity of marriage not rebutted as the same was not argued or separate issues not framed regarding the same. Court refused to express opinion in this regard.	If a man and woman live together for a long period of time, then a strong presumption as to their marriage arises. However, the same is rebuttable.
9.	Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.	The respondents had claimed to be the legal heirs of one Chandra Deo Singh along with the appellants and had sought their names to be included as heirs under the UP Consolidation of Holdings Act. The appellants refuted the same and contended that there was	Held that since the mother of appellants died in 1945 and afterwards the father was residing with the mother of respondents for a long period of time, there arises a presumption as to their marriage and legitimacy of the children. The

		no valid marriage b/w their mother and Chandra Deo Singh.	same can only be rebutted by unimpeachable evidence.
10.	Bharatha Matha v. R. Vijaya Renganathan, (2010) 11 SCC 483.	Dispute arose regarding the coparcenary property and it was alleged by the appellant that their brother had dies intestate without any heirs and their share of coparcenary property must accrue to them. It was alleged that the children that the brother had were out of an illegitimate relationship and could thus not succeed as Legal heirs.	Illegitimate children born out of live in relationship not entitled to coparcenary property. Where it is proved that a person A is married to another and there is no lack of access between both, burden of proof regarding validity of marriage with another woman is discharged and will be held to be invalid.
11.	Vidhyadhari v. Sukhrana Bai, (2008) 2 SCC 238.	Man had two wives. Question arose that who would be entitled to Succession Certificates and benefits accruing therefrom. Man had made nomination in favour of second wife to receive terminal benefits.	Held that though marriage b/w second wife and the man was invalid, children would be deemed to be legitimate for share in their father's employment dues. Principles of equity were applied and second wife was held entitled to the dues.

RECOGNITION OF SAME-SEX UNIONS

"The tendency of society is normally to impose, by other means than civil penalties, its own ideas and practices as rule of conduct on those who dissent from them, to fetter the development and, if possible, prevent the formation of any individuality not in harmony with its ways and compel all characters to fashion themselves upon the model of its own." **– John Stuart Mill**

Introduction

In India, accepting same-sex unions and LGBTQ+ rights has always been a tug-of-war between traditional values and recognition of fundamental rights. Rooted in longstanding religious and cultural beliefs, the historical view has often labelled such unions as unnatural, even subjecting them to legal penalties. This clash between cultural norms and changing legal perspectives paints a complicated picture, especially considering the deep-seated societal biases.

Historically, the LGBTQ+ community has faced discrimination and even criminalization, with laws categorizing same-sex relationships as unlawful. The belief that such relationships are unnatural has been ingrained in society, creating a significant barrier to acceptance. However, the Indian courts have played a pivotal role in challenging these norms. Despite the prevailing biases, the judiciary has taken concrete steps to recognize the constitutional rights of LGBTQ+ individuals. This departure from the status quo signals not just a legal shift but a societal transformation, challenging the idea of 'unnaturalness' and promoting a more inclusive notion of equality.

In this exploration, we'll navigate through the legal journey that has dismantled prejudices against LGBTQ+ individuals and same-sex couples. The courts, in their pursuit of justice, have acknowledged the rights and dignity of every individual, regardless of sexual orientation.

Current legal framework

Same-sex / non-heterosexual / non-conforming couples or unions are not legally recognized in India. The Indian Legal System currently does not offer any protection to these couples however, there is no prohibition or penalisation on same-sex unions as well. Though same sex-marriages or civil unions are not criminalized, they are also not legally recognized under the Indian Law, thereby depriving homosexual gender non-conforming couples from any rights which flow from a marriage and a family.

In 2014, the Supreme Court of India in **National Legal Services Authority (NALSA) v. Union of India *(AIR 2014 SC 1863)***, for the first time, while recognizing non-binary gender identities and upholding the fundamental rights of transgender persons in India, had interpreted the definition of 'sex' to be inclusive of both 'sexual orientation' and 'gender identity', which in essence extended the protection of Article 15 to the LGBTQ+ community.

The second step towards recognition of rights of LGBTQ+ community was taken when Section 377 of the Indian Penal Code was challenged. This archaic law criminalized homosexuality with imprisonment upto 10 years. In 2018, the Apex Court, in **Navtej Singh Johar v. Union of India *(AIR 2018 SC 4321),*** struck down S. 377 being unconstitutional thereby decriminalizing homosexuality and recognizing the rights of LGBTQ+ community but same-sex marriages were yet not recognized. As a consequence of Navtej Singh, several lawsuits were filed across the nation seeking equal marriage rights to same-sex couples as available to any heterosexual couple.

Thereafter, it was only in April 2023 that a 5-Judges Constitutional Bench of the Supreme Court finally heard the issue of same-sex marriages in **Supriyo @ Supriya Chakraborty & Anr. v Union of India *(2023 INSC 920)***. While the LGBTQ+ community and the entire country awaited the decision, the Court, in October 2017, by a 3:2 judgment, held that it is not for the judiciary to enter into domain of recognizing or not-recognizing a certain form of marriage and it is for the Legislature to frame a law in this regard as marriage as an institution is intrinsically linked to societal norms, sanctions and values.

Evolution of same-sex unions in India: Decriminalisation

Section 377, which criminalised any form of intercourse against the order of nature, was considered as one of the most 'draconian' provisions in the Indian legal system back in the time when consensual sexual intercourse between individuals of the same sex was also considered a criminal activity. The inherent nature of Section 377 constantly invited questions on its constitutional validity from scholars, activists, legal experts, and various stakeholders who critically examined its compatibility with the fundamental rights. A series of landmark legal judgements paved the way for the Apex Court to finally stop the criminal treatment of consensual same-sex relationships through **Navtej Singh Johar** in 2018.

First Challenge to S. 377 IPC

1. In ***Naz Foundation v. Government of NCT of Delhi[14] (Delhi HC),*** the Naz Foundation Trust, an NGO working with HIV/AIDS patients, challenged the constitutionality of Section 377 before the Delhi High Court on the grounds that Section 377 was outdated, misused used by the police, and hampered efforts to fight HIV/AIDS. They pointed out cases where HIV prevention workers got arrested for helping gay men, claiming they were breaking Section 377. The Delhi High Court made a historic ruling, saying Section 377 could not be used against consenting adults. The Court said it went against the right to privacy and personal freedom guaranteed by the Constitution. It also held that it was unfair to target and label gay people, breaking the equal protection guarantee and hurting human dignity. The judgment emphasized that Section 377 impeded public health efforts and violated rights under Articles 14, 15, 19, and 21 of the Constitution.

[14] Naz Foundation v. Government of NCT of Delhi, 160 Delhi Law Times 277.

2. When **Naz Foundation** was appealed before the Apex court in ***Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.***[15] ***(SC),*** the Supreme Court overturned the High Court decision to hold that only the Parliament could decide on the decriminalisation of homosexuality. The Court observed that Section 377 only criminalizes certain acts, not a particular class of people.

Second Challenge

3. In 2018, a fresh legal challenge to Section 377 IPC emerged, initiated by notable individuals from the LGBTQ+ communities. Simultaneously, existing curative petitions against the 2013 Supreme Court judgment in Suresh Koushal were pending. Recognizing the need for a comprehensive re-evaluation, a Constitutional Bench of the Apex Court heard the issue of homosexuality yet again and delivered a landmark verdict, by partially striking down Section 377 and thereby decriminalizing and legalizing consensual same-sex relations among adults. This ground breaking decision granted the much awaited legal recognition LGBTQ+ individuals. However, the Court retained the provisions in Section 377 that criminalize carnal intercourse amongst non-consensual acts and sexual acts involving animals.

4. The unanimous verdicts emphasized the infringement of fundamental rights while striking down Section 377. The Court determined that the provision constituted discrimination based on **sexual orientation** and/or **gender identity**, thereby contravening the constitutional assurances of **equality** outlined in Articles 14 and 15. Additionally, the Court held that Section 377 violated the rights to **life, dignity, and autonomy of personal choice** safeguarded under Article 21. Moreover, the judgment highlighted that the provision impeded LGBTQ individuals' ability to fully express their identity, thus violating the right to freedom of expression as delineated in Article 19(1)(a). The Court promoted the doctrines of dignity, equality and inclusiveness while prohibiting any discrimination on the basis of sexual orientation.

   Justice Nariman meticulously examined the historical backdrop of Section 377, asserting that its foundation in Victorian morality has become out-dated. In response, he even mandated the **widespread dissemination of the judgment**, aiming to eradicate enduring stigma faced by the LGBTQ+ community. Additionally, he called for the sensitization of government and police officials to foster a fair and understanding environment.

   Justice Chandrachud concentrated on the contemporary implications of Section 377, acknowledging its discriminatory impact on the identities of the LGBTQ+ community. He underscored the need not only to eliminate discrimination but also to proactively ensure equal protection and full citizenship rights for the community.

[15] Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors., CIVIL APPEAL 10972 OF 2013.

Marriage rights of Same-sex / Non-heterosexual / Gender Non-Conforming Couples

Marriage is a sacrament for majority of the country's population:

The Hindu concept of marriage is that it is a sanskara (tradition) and a religious sacrament, not a contract. It is a union of two souls which ties them for seven lifetimes. Marriages in India are essentially and majorly covered by personal laws of the parties which include Hindu Marriage Act, Parsi Marriage & Divorce Act, Indian Christian Marriage Act, Muslim personal law etc. Under all the personal laws, marriage has been perceived as a sacred / civil union of a man and a woman. The only secular enactment which deals with civil marriages / civil unions is Special Marriage Act, 1954 which allows people from different religions or same religions to have a civil registered marriage. Unfortunately, the SMA also recognises marriage between opposite-sex / heterosexual couples. Thus, the current statutory and personal laws in India pose a significant barrier to the recognition of same-sex marriages.

Socio-cultural factors:

India is a culturally and socially diverse country with a rich history of cultural and religious traditions. The cultural and religious beliefs of the Indian society have a significant impact on the attitudes towards homosexuality and same-sex marriages. India's conservative society, which is rooted in traditional gender roles, considers same-sex relationships taboo and unnatural. The socio-cultural stigma attached to homosexuality creates an environment of discrimination and marginalization for the LGBTQ+ community in the country. The current lack of legal recognition of same-sex marriages further reinforces this stigma.

Marriage has been an 'evolutionary' concept in India:

Just like majority of nations, concept of marriage, relationships and unions have evolved over time in India and the legal recognition thereof has not remained static in response to societal changes. The meaning of marriage has been expansive' and 'inclusive'. As early as in 1978, in **Badri Prasad v. Dy. Director of Consolidation *(1978) 3 SCC 527,*** the Apex Court recognized live-in couples and the concept of "de-facto marriage" to afford protection to a class of persons who were being treated unjustly. Similarly, inter-caste marriages and inter-religious marriages, once proscribed, have now received societal acceptance and legal sanction.

Steps towards recognition of same-sex marriages and incidental rights thereto:

Subsequent to the historic judgment of **Navtej Singh Johar** in 2018, Courts across India started getting flooded with petitions seeking recognition of same-sex marriages, adoption rights of same-sex couples, etc.

Efforts were made to challenge the hetero-normative legal framework, as exemplified by **Supriya Sule** who introduced a private member's bill namely Special Marriage (Amendment) Bill, 2022, which aimed to initiate a debate and take a step towards recognition of equal marriage rights for the LGBTQI+ community, a move pivotal for dismantling historical legal barriers that have limited such rights to the heterosexual population. However, this Bill did not materialise.

Subsequently, due to pendency of the issue of same-sex marriages across different courts, in 2023, the Supreme Court took the reins and decided to hear the issue, thereby conflicting decisions by the High Courts. The batch of petitions was heard by 5-judges Constitutional Bench where arguments were addressed over a number of days. This challenge was limited to the Special Marriage Act and Foreign Marriage Act and the Court refrained from delving into the personal laws at this stage. The Court also heard the issue of adoptions rights of same-sex unions in addition to marriage equality.

On 17th October 2023, **Supriyo @ Supriya Chakraborty & Anr. v Union of India,** the Bench unanimously rejected challenges to the exclusion of queer couples from recognition under the Special Marriage Act as well as the Foreign Marriage Act, holding that there exists no unqualified fundamental right to marry under the Indian Constitutional Scheme and that the SMA or FMA cannot be interpreted in a manner that can facilitate the recognition of non-heterosexual unions.

By a split verdict of 3:2, the majority even rejected the existence of a right to form a civil union akin to marriage, which was an alternative, interim remedy proposed by the minority judges. The majority also refused to strike down Regulation 5 (3) of the Adoption Regulations which excludes both unmarried and queer couples from the ambit of consideration as prospective adoptive parents. However, a huge positive outcome has been the unanimous acceptance of the right of transgender people to marry under secular as well as personal law.

Core findings of the Court:

- **Recognition of Abuse:** The Court has recognized the sheer extent of abuse, harassment, stigmatization and discrimination that is inflicted by state as well as powerful non-state actors on the members of the LGBTQI+ community. In fact, all opinions resoundingly concur on the point that that the abject violation of rights of the queer community, particularly the denial of the bouquet of benefits attached by the State to marriage, is a constitutional infirmity that demands some suitable remedial action.
- **Legislature & Public Deliberation:** The majority is quite deferential to the State in this regard as it has posited that it would be inappropriate for it to fundamentally alter the basic precepts of marriage since marriage is an institution that is based predominantly on socially determined foundations and such a task would be better left to the Legislature since such issues require poly-vocal consideration as well as extensive public consultation and deliberation.

However, the minority gave the right to form civil union while casting a corresponding duty on the State to recognize the same.

- **Equal Adoption Rights – Majority left it to Parliament:** The majority noted that it would be improper for the judiciary to intervene in such matters of multipolar concerns and perceptions and it is on Parliament to recognize and remedy such concerns. The minority, on the other hand, held that there is ample evidence to demonstrate that non-heterosexual / same-sex / gender non-conforming couples are equally equipped in raising children and providing them with an environment for holistic development. On this basis, they found the impugned Regulation 5 (3) violative of the Constitution.
- **Transgenders granted recognition under SMA:** the Court has notably held that trans-persons in 'heterosexual' relationships would be entitled to seek the recognition of their marriages under the SMA.
- **Directions issued for safeguarding rights:** A set of comprehensive directions aiming to safeguard the rights of LGBTQ+ community:
    - Mandating that there is no discrimination against queer persons in accessing goods and services which are publicly available.
    - Establishing hotline numbers for queer persons to contact when they face harassment
    - Setting up and publicizing availability of safe-houses in all districts to provide shelter for any member of queer community facing harassment.
    - Ensuring that inter-sex children are not subjected to surgical or any other interventions at an age where they do not possess the capacity to comprehend the consequences.
    - Formulating guidelines under the Mental Healthcare Act to reduce the high prevalence of suicides and attempted suicides among the queer community.

SAME SEX UNION AND CROSS BORDER IMPLICATIONS

Vaibhav Jain and Anr. v. Union of India and Ors.:

The petitioners' marriage, one of whom is an Indian citizen and the other, was an OCI card-holder, was solemnized in Columbia, USA in 2017 after 12 years of a committed relationship. They also had a Jain ceremonial marriage in USA and a wedding reception in New Delhi. Both the petitioners used to visit the families in India frequently. However, during the Covid Pandemic, all foreigners, including OCI card holders were restricted from entering the country. Relaxations were brough to certain classes of OCI holders, such as those persons whose spouse was an Indian national. SO, even though, the petitioner No.2 was an OCI card holder and P1's spouse, he could not travel to India as his marriage was not recognised under Indian law. They had applied for registration of the marriage under Section 17 of the Foreign Marriage Act 1969 (FMA). Although they fulfilled all the conditions, they were denied registrations because they were a same-sex couple.

They were one of the petitioners in the marriage equality case in India. By the time, the petitions were heard, they had a beautiful 4-months old daughter (through surrogacy.)

Even though FMA is only an enabling legislation (not-obligatory for an Indian citizen entering into marriage outside India to have it registered under FMA), the registration of the petitioners' marriage was refused only on the basis of their sexual orientation, which is manifestly arbitrary and unjust. It is noteworthy to mention that Section 17 **only** registers the marriage (a mere ministerial act), which is already valid as per the law of the foreign country.

Held: The Hon'ble Supreme Court in its minority view categorically held that the right of an Indian citizen to enter into an abiding union with a foreign citizen of the same sex is preserved. However, the majority view held that the words "bride" and "bridegroom" mentioned in Section 4 of FMA implied that the provision is gendered in nature. The prayer to read the words "husband"/ "wife"/ "spouse" in a gender-neutral manner is unsustainable. The majority further held that the words of the Statute have to be read taking into account the fabric of concepts, rights and obligations, removing provisions from their setting and "purposively" construing some of them cannot be resorted to, even in the case of FMA.

Takeaways from the marriage equality judgment:

The Court has drawn a salient distinction between the social institution of marriage and the bouquet of rights/ benefits that emerge as a consequence of the marital relationship.

The Court has refrained from interfering into the social institution itself, for panoply of reasons including the non-involvement of the state in its creation, institutional limitations, etc. However, across the board, the Bench has explicitly identified the discriminatory impact of denying queer individuals the material benefits that emanate out of marriage.

Therefore, despite the denial of an omnibus claim for marriage equality, it is clear that there will be constitutional avenues available, even after this judgment, for challenging the exclusion of queer people from the enjoyment of these tangible benefits.

It is pertinent to mention that after this judgement, several review petitions have been filed and are pending adjudication.

CROSS BORDER IMPLICATIONS

Navigating international family law can be a complicated and challenging process, especially when it comes to cross-border issues including divorce, child custody, adoption etc. With the increasing movement of individuals and families across national borders, it is not uncommon for family law disputes to arise between international couples. Since each country has its own laws and regulations regarding family law matters, identifying the jurisdiction for a specific case can pose challenges.

Introduction

The ***219th Report of the Law Commission of India*** (submitted in March 2009) has pointed out the problem that many Indians with different personal laws have already migrated or are still migrating to other countries either to make permanent abode there or for temporary residence. Likewise, there is also a huge immigration from other countries to India. In such a situation, it is usual to come across cases where one national marries the national of other country or two nationals from one country contract marriage abroad. Cases in which parties solemnize marriage in India then settle their home abroad or are living separately in any other country also demand special mention. Difficulty arises when there is any dispute between two individuals hailing from different legal systems. A large number of legal issues have been brought forward because of matrimonial disputes both in domestic scenario and in private international law. The issue of maintenance and the issue relating to the status of children have always been involved in any matrimonial suit. In addition to these issues, several other issues are also involved in matrimonial disputes involving foreign element. For examples, jurisdiction of the court, execution of foreign judgment, validity of marriage within the country where the matrimonial suit has been instituted etc. are rest of crucial concerns. Problem regarding conflict of marriage laws at the international level arises due to the application of territorial laws and the solution of the problem is largely dependent upon the law laid down by the sovereigns involved.

Conflict of Laws in India

In India, various communities, distinct from each other, have retained their own traditions and personal laws to govern the family matter. Due to this fact, it is almost improbable to formulate a uniform policy framework in governing parties to the marriage. The source of Indian conflict of Laws is largely statutes and decisions of the courts. Several attempts have been made by the Indian Law Commission to provide report on the Indian conflict of Laws rules in different areas of disputes. In India, the very foundation of the C*ode of Civil Procedure 1908*, *Indian Penal Code 1860*, *The Indian Succession Act 1925*, *The Divorce Act 1869*, and *The Contract Act 1872* have been laid on the basis of the English law. Hence, in case of Indian Private International law, the influence of Common law is found.

It is pointed out by T.S. Rama Rao that while the draftsman of these Codes has mainly followed English law, they deviated to some extent from it where they found that the English law would not suit to Indian context. Since India does not have a uniform law in governing the legal capacity to enter into a valid marriage, the marriage law varies

from one religion to another. A marriage, to be legally valid, needs to be materially and formally valid. The material validity of a marriage invokes the question related to the legal capacity of parties to the marriage. The choice of law rule of India is that the legal capacity of a person domiciled in India will be governed by *lex domicilii.* Therefore, the *lex domicilii* of a person domiciled in India regarding legal capacity to marry is his/her personal law.

Issues which arise in cross-border disputes

The conflict of Law is that branch of law of a State that deals with the cases involving any foreign element.

Element of a dispute can broadly be divided into two heads:

a) Parties to the dispute, and

b) Subject matter of the dispute.

When the parties to the dispute hail from the same country but the subject matter has been arisen as the legal rights and obligation of the parties are to be determined according to the substantive and procedural law of that Country. However, it is not so easy in case where at least one party belongs to different legal system or the cause of action partly/ wholly arises in any other country.

The questions that arise in any suit involving foreign element are:

a) Whether the forum where the case has been instituted has jurisdiction to try the case or not (question as to Jurisdiction).

b) By reference to which law (both substantive and procedural) the issue involved in the suit will be characterized and determined (question as to choice of law rule).

These two questions along with the question regarding the recognition of foreign judgment, by the domestic court of the country where the parties want to execute the same constitute, are the subject matter of conflict of laws.

Jurisdiction of Indian Courts in Cross-Border Implications

To start with the issue of jurisdiction, the major question that arises in conflict of laws is why does someone file a matrimonial suit in a foreign court? The following can be the answers:

i.) The parties might have migrated to another country from the country where the marriage has been celebrated, and/or,
ii.) Parties may live separately in other countries and either of them has filed the suit before the court nearest to him/her for the sake of convenience.

Jurisdiction is co-extensive with sovereignty as the sovereign assumes its jurisdiction over all the persons & property situated within its territory. Difficulty to the exercise of jurisdiction by a court does not arise till the cause of action arises within the

territorial limit of the court. However, the difficulty arises when the cause of action arises outside the territorial jurisdiction of the court where the suit has been instituted or either of the parties is outside the territorial jurisdiction of the court. This is the typical conflict of laws situation. In private international law the question arises that what link, if any, is required by the court to exercises its jurisdiction over the cause of action or the parties to the suit involving foreign element.

The jurisdictional limits of municipal courts are based on the territorial theory ***'Quid quid est in territorio, est etiam de territorio'*** i.e., a sovereign exercise its jurisdiction over everything, every person within its territory. Section 20 of the Civil Procedure Code, 1908 has provided a general rule that any suit can be instituted before the court within whose jurisdiction the defendant, at the time of the institution of the suit, resides or carries on business or works for gain. However, when none of these three conditions are applicable to the defendant, that is when the question of territorial jurisdiction of courts becomes tricky.

Some examples where courts dealt with the issue of jurisdiction:

1.) In the case of ***Mrs. Sucheta Dilip Ghate v. Dilip Shantaram Ghate***[16] the Bombay High Court observed that 'the Hindu Adoption and Maintenance Act, 1956 does not lay down provision for the jurisdiction of the court to which the application for maintenance to be presented. The provisions are beneficial in nature. A person in distress cannot be made to run from pillar to post. This view has been taken keeping in mind that the defendant may not submit to the jurisdiction of the court where the suit has been instituted or may keep on changing his residence therefore it is rationale to provide an exception to this rule.

2.) Similarly, in the case of ***Mrs. Indira Sonti v. Mr. Suryanarayan Murty Sonti***[17] , the marriage took place at Pittsburgh, U.S.A. The husband had never been to India even after his marriage. The wife after her marriage was subjected to cruelty and dowry demands. On refusing to bring the same she was sent back to her father, who was in India. The plaintiff after coming back to India filed a suit for maintenance before the Family Court, Wilmington, Delaware, USA. However, she was informed that the court cannot proceed with the suit for maintenance since there is no decree for separation filed by her husband. The plaintiff (wife) then filed the suit for maintenance before the Delhi High Court. The question of jurisdiction in this case arises for two reasons:

(i) The marriage has been solemnized outside India, &

(ii) Defendant-husband has never been to India.

The Delhi High Court, while answering the question as to jurisdiction, took into consideration of the observation made by the Division Bench of the Bombay High

[16] Sucheta Dilip Ghate v. Dilip Shantaram Ghate, 2003 SCC OnLine Bom 316.
[17] Indira Sonti v. Suryanarayan Murty Sonti, 2013 SCC OnLine Del 460.

Court in para 6 of ***Mrs. Sucheta Dilip Ghate v. Dilip Shantaram Ghate*.**[18] The Delhi High Court in Indira Sonti case has ordered the defendant for the payment of maintenance to the plaintiff.

3.) In ***Rajat Taneja v. Harmeeta Singh*[19],** the Delhi High Court again faced the question as to jurisdiction in a matrimonial suit involving foreign element. In this case the plaintiff and the defendant got married in New Delhi, India, according to the Sikh rituals. The wife moved to U.S.A. right after her marriage along with the husband since he was employed there. However, she had to leave her matrimonial home due to the cruelty inflicted on her and come back to India since she did not have resources to maintain herself in U.S.A. She then filed a suit for maintenance before the Delhi High Court. During the proceedings it came to the knowledge of Delhi High Court that the husband had already filed a suit against the wife before the court of Connecticut, U.S.A. The Hon'ble Justice Vikramjit Sen in this case observed that the court of U.S.A. does not have any jurisdiction in the suit since the plaintiff (i.e. the wife) did not submit to the jurisdiction of the court of U.S.A. In the contrary, the Delhi High Court has jurisdiction over the suit filed by the wife despite the fact that the defendant did not submit to the jurisdiction of Delhi High Court & nor was he a domicile of India for the reason that the place of celebration of the marriage was India and the couple tied the knot according to the Sikh rituals which inevitably brought the marriage under Hindu Marriage Act, 1955. Del HC ordered for the restrainment of the suit instituted in USA.

Interpretation of "Residence"

The word 'Residence' has been interpreted by the Court time and again as it is a question of fact. Meaning of the term 'residence' assumes extreme significance in Indian Matrimonial Law as the provisions of Protection of Women from Domestic Violence Act are greatly impacted by the same in terms of jurisdiction, shared household, cause of action, etc.

1.)In **Aditya Rastogi v.Anubhav Verma**[20], the wife had filed an Appeal under S. 19 Family Courts against the Family Court order dismissing the divorce proceedings instituted by her, due to lack of territorial jurisdiction. The Allahabad HC held that a casual visit to a place will not grant jurisdiction to the court to decide divorce. The Court said that the term 'resising' in S. 19 though not defined, clearly denotes more than a casual visit. Since the wife is residing in Australia, it has to be maintained that she is not residing with territorial jurisdiction of an Indian court.

[18] Sucheta Dilip Ghate v. Dilip Shantaram Ghate, 2003 SCC OnLine Bom 316.
[19] Rajat Taneja v. Harmeeta Singh, 2007 SCC OnLine Del 1008.
[20] 2023 SCC OnLine All 2187

2.)In **Kashmira Kale v. Kishor Mohan Kale**[21], the jurisdiction of the Family Court, Pune was under challenge before the Bombay High Court as the husband contended that the parties last resided together in Pune when they were in India while the wife contended that parties are domiciled in USA (not India) and hence outside the applicability of HMA. It was further the wife's case that Court of Oakland, Michigan, USA has already granted divorce which is conclusive between the parties. The Court held that jurisdiction of court u/S. 19 HMA would be where marriage was solemnised, where Respondent resided or where parties last resided together. The HC held that Family Court Pune lacked jurisdiction to entertain any proceeding as the parties resided for merely one day, after which they left for USA. Therefore, the Court in USA has territorial jurisdiction to decide divorce dispute.

3.)In ***Christopher Neelkantam v. Annie Neelkantam***, the Rajasthan High Court observed that it has jurisdiction over the petition for divorce filed by an Indian domiciled Christian. The petitioner, an Indian domiciled Christian, solemnized marriage with an English domiciled woman in London. She refused to come to India. The husband left England, came to India then filed a petition for divorce under the Special Marriage Act, 1954. The Court observed that it has jurisdiction to try the suit since the Special Marriage Act, 1954 has stipulated that Indian Court can exercise jurisdiction if the petitioner is domiciled in India.

4.)In ***Union of India v. Dudh Nath***[22] , the Supreme Court considered the meaning of the terms 'domicile' and 'residence'. It has observed that 'etymologically the terms residence and domicile carry the same meaning in as much as both refer to the permanent home. However, in private international law, the term 'domicile' carries a little different sense and carries many facets. '**Domicile**' may also take many colors; it may be domicile of origin, domicile of choice, domicile by operation of law or domicile of dependence. '**Residence**' means where a person is located temporarily. When an individual's residence is coupled with intention to stay permanently it is called domicile. A person can have only one domicile but several residences. Despite being one of the common legal countries, India exercises its jurisdiction on the basis of residence of the defendant. The duration of the stay of a person within the territory of a court has not been mandated to exercise the jurisdiction. Therefore, mere presence of the defendant within the jurisdiction of the court where the suit has been instituted is enough.

India despite being a common legal country takes into account the residence of the defendant in order exercise its jurisdiction over the same. Since domicile indicates the intention of an individual to reside at a place permanently, it is quite difficult to exercise jurisdiction on the basis of domicile. Therefore, India deviates from the *lex domicilii* rule while exercising jurisdiction in cross-border litigation. However, this

[21] 2010 (2) AIR BOM R 660
[22] Union of India v. Dudh Nath Prasad, (2000) 2 SCC 20.

deviation is justified since it enables the Indian courts to widen its jurisdiction & exercise it to most of the cross-border cases instituted before it.

Child Custody

Recent Indian statistics show that 25 million Indians, out of a population of over a billion Indians, are Non-Resident Indian's, who have migrated to various jurisdictions and nurtured families, which also implies a surge in new family disputes. In contrast, India has also witnessed foreign nationals deciding to settle in India permanently. These cross-border relationships has carved out a niche in international family disputes.

While the cases of overseas child custody disputes are largely regulated by the State and federal law, it is many a times very difficult to determine which country actually has jurisdiction over them and what laws should apply. Two major questions that arise here are –

1.What if one parent takes the child to another country, which country's laws will apply? (unlawful removal of child).

2.What if an international custody dispute actually materializes by virtue of parents being from different jurisdictions or residing in different jurisdictions? (international child custody issue)

As we know, the thumb rule under Indian as well as international law governing child custody disputes is that the "best interest of the child" would be of paramount consideration. The Indian law through various judicial precedents has narrowed down various indicators of best interests of the child, which are as follows:

- The ethical upbringing of the child (Roots)
- Better education and lifestyle.
- Self-keeping of the child
- The economic well-being of the child.
- Better future prospects
- Superior citizenship.

Overseas Child Custody disputes are complex due as every country has its own family laws that are in operation. However, there is a common convention that has been ratified by most countries till now – Hague Convention of 1980 on the Civil Aspects of International Child Abduction. To date, 96 members are signatory countries to the Hague convention. India is not a signatory to the Hague Convention.

Removal of a Child

Dr Justice A.R. Lakshmanan, Judge, Supreme Court rightly opined, *"Statistics show that divorce and custody cases are on the rise. The practice of international child*

abduction has its roots in these inter-parental custody battles". Here, it is pivotal to understand what exactly constitutes international child abduction.

This concept of child removal has been defined under *Section 3* of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction as

> *"The removal or the retention of a child is to be considered wrongful where:*
>
> *(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."*

This definition is not applicable to India, as it is not a signatory to the *Hague Convention of 1980 on the Civil Aspects of International Child Abduction*. Also, no parallel legislation has been enacted as for now to define child removal or deal with the issues it concerns. As such, the judiciary has taken on the burden and has adhered to judicial innovation while deciding matters on a case-to-case basis. However, this only works as a temporary solution to the ever-escalating problem, lacking uniformity and consistency. As such, the need of the hour is to reach out for a more permanent and comprehensive resolution of these issues.

The Indian Experience

As mentioned earlier, Indian is not yet a signatory to the ***Hague Convention of 1980 on the Civil Aspects of International Child Abduction***. As such, remedies are often sought from the existent domestic laws. The constitutional remedy of the writ of Habeas Corpus under **Article 226** as well as **Article 32** is often used by the parents against the spouse allegedly abducting the child to India. Due to its extra ordinary nature, it is often the quickest remedy available to the parents.

Further, recourse can be sought through the provisions of the *Hindu Minority and Guardianship Act 1956* which has extra-territorial operation by seeking guardianship rights for their own child. Much like the, the perspective applied while contesting of such issues in court is quite outdated, the process being a long adversarial fight for superior rights of parties and often ignorant of the real issue of welfare of the child. More often, the parents approach the Indian courts for enforcement of a foreign court order of custody, mainly because they find it easier and quicker to import a foreign court judgment to India on the basis of alien law which has no parallel in the Indian jurisdiction. As a result, while the Indian courts do their best in interpreting these judgments harmoniously with the Indian laws, the results are often inconsistent and lack uniformity, thus hindering development of private international law in India. **[USE WITH CAUTION]**

The ideal approach in such cases should be to consider the welfare of the child as the paramount objective. The term welfare is an all-encompassing one. According to Lindley LJ,

> *"the welfare of a child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in the widest sense. The moral and religious welfare must be considered as well as its physical well-being nor can the ties of affection be disregarded."*

Fortunately, the recent judicial developments paint a positive picture in this regard. In the case of **Kulwinder Dhaliwal v. State of Punjab** , which was one such dispute dealing with inter-parental custody of the child, on a writ of Habeas Corpus, the court respected the orders of the Ontario Superior Court of Justice giving custody of the minors to the petitioner, and the children were directed to be handed over to the petitioner with liberty to take them to Canada.

In ***Gurmeet Kaur Batth v. State of Punjab***, the High Court held that it can exercise jurisdiction vested in it under Article 226 of the Constitution of India by issue of the writ of Habeas Corpus in cases of International Inter-parental Child Abduction. The Canadian court order in favour of the petitioner mother was relied upon and enforced.

In ***Vikram Vir Vohra v. Shalini Bhalla***, the Supreme Court of India upheld the ultimate consideration of betterment of the child and held that that child custody orders are interlocutory in nature and can be altered for the welfare of the child. Consequently, the Supreme Court permitted the mother to take her minor son, aged about ten years old, to Australia in accordance with the wishes of the child to stay with the mother, upholding the welfare of the child as a paramount consideration.

Hence, more and more courts, while dealing with issues of inter-parental custody have interpreted the laws in order to uphold the ultimate objective of protecting the interests of the child. The courts dealing with the foreign court orders have displayed remarkable creativity and have refused to enforce them mechanically. Instead, efforts have been made to consider the merits of the case and then delivering a decision which balance out the Indian legal considerations, while acting in the most fair and equitable manner possible to render substantial justice to the parties. However, as mentioned earlier, the judicial development of this area, being devoid of any legislative guiding light to rely upon, has been inconsistent. As such, the aforementioned positive decisions have been often contrasted by a few negative ones.

In another matter reported as ***Ranbir Singh v. Satinder Kaur Mann***[23], the petitioner father residing in Malaysia filed a Habeas Corpus petition for custody of his children, relying on an order passed by the Malaysian High Court. However, the High Court in India dismissed the petition holding that the matter could be re-activated before the appropriate forum with regard to the custody of the children on the basis of evidence to be adduced by the parties. This could be detrimental to the interests of the child because of the long procedural battle that the normal civil proceedings would entail.

[23] Ranbir Singh v. Satinder Kaur Mann, 2006.

Thus, in the backdrop of ever-increasing cases on this issue, the need of the hour is a consistent and uniform legal position, with the welfare of the children as its paramount objective. One option that can be exercised by India in this regard is signing the 1980 Hague Convention.

Enforcement of Foreign Orders in India

Enforcing foreign court orders in another country can be a difficult, complicated and time-consuming process. Section 13 of the Code of Civil Procedure, 1908 states the essentials for a foreign decree to be enforced in the courts of India. Further, in cases of custody of a child or marital disputes, the Supreme Court has stated that the doctrine of "judicial comity" or "comity of the court" shall come into play.

The Doctrine of Comity states that the decrees made by the courts are to be recognized outside their jurisdiction unless it is against the public policy of that state. It is followed as this doctrine strives to achieve a very basic goal of law that is the orderly, consistent, and final resolution of disputes. This way the Indian Courts can decide the cases related to the custody of a child of foreign nationality enforceable in his or her respective nation. The Doctrine works both ways and binds Indian Courts as well to obey the decisions given by the courts of foreign nations.

As per the definition of ***Black Law's Dictionary***, "*Judicial Comity*" also known as "the comity of courts" could be defined as the principle according to which the court of one jurisdiction recognizes the validity of a court of another jurisdiction out of respect and deference of law. This doctrine is upheld in cases where child custody is the subject matter.

It is settled position of law that a case decided by the Court of a foreign nation cannot be set aside solely on the grounds that those laws are inconsistent or in contravention to the laws of India. If the matrimonial couple gained the citizenship of some other country and got married in that country as per Hindu rites and custom, the court of that country has complete jurisdiction to decide their case.

Indian Courts have a consistent stance on the matter of child custody that:

i.) If a parent illegally removes the child from that country to India to gain an advantage will not help his or her case.

ii.) Jurisdiction or inconsistency with Indian Laws as a ground for non-execution of a decree made by a foreign court shall not be maintainable.

iii.) The husband is liable to make necessary travel and accommodation arrangements to get the decree from such a foreign court if the wife is not residing in India.

Examples / Case laws:

1.)In the case of ***Sanjeev Majoo v Ruchi Majoo***[24]**,** the husband alleged that his wife has illegally abducted their child from California, USA and has been residing in

[24] Sanjeev Majoo v Ruchi Majoo, 2011 (6) SCC 479.

India ever since without his consent. He was able to produce the decree made by the Supreme Court of California ordering the custody of the child to him. They were both residents of India but were residing in their matrimonial home in America. She came to India for a vacation but never returned to their home in America. Ruchi was able to obtain an interim custody decree from the Additional District Court of New Delhi. The order was however set aside on the ground that the case did not lie in the Court's jurisdiction as Section 9 GW Act states that the jurisdiction in deciding the case of custody of a child shall be the District Court of the place where the child ordinarily resides (which was USA in this case).

2.)In the case of ***Arathi Bandi vs. Bandi Jagadrakshaka Rao***[25], the Supreme Court responded to appeals made in the form of a special leave petition against the order given by the High Court of Andhra Pradesh, Hyderabad. A writ was issued by the Court in the nature of Habeas Corpus directing the petitioner to return and summon in the U.S. Court as they have the jurisdiction over the case.
In this case, the husband and wife obtained USA citizenship and also got married in the USA as per their religious rites and customs. They applied for divorce in USA court as per their national laws in which the husband was granted custody of the child by the USA court. However, the wife took the child and came to India. In India, she applied for custody of the child. On arriving in India the Indian Police took the child from the husband and handed the child over to the wife.
It was observed that the welfare of the child is to be given paramount consideration while deciding upon the case of custody of a child. If in the initial proceedings the custody is given to one spouse until permanent custody is decided, that spouse shall continue to keep the child as to legal and proper custody. The Court held that considering the welfare and happiness of the child, the act of removing a child from its native country and being taken to the country where his or her native language is not spoken would amount to distress on his mental health. If the child is cut off from his social customs and environment to which he is already customized and interruption to his or her education, it would be regarded as an act causing psychological disturbance to the child. Therefore, the child was repatriated to USA.

3.)In the case of ***Shilpa Aggarwal vs. Aviral Mittal***[26], the Supreme Court decided upon the matter of litigation of marital dispute or matter of child custody already pending in a foreign court. It was observed by the court that most NRI mothers wish to return home and seek legal support from local sympathetic courts. In this case, the custody of a girl was the subject matter, who was born in Britain and also had British citizenship while her parents had Indian citizenship. As a complete bar on this practice, the Supreme Court said that Indian Courts cannot settle the dispute of such subject matter which is already pending in foreign courts and are yet to be decided.

[25] Arathi Bandi v. Bandi Jagadrakshaka Rao, (2013) 15 SCC 790
[26] Shilpa Aggarwal (2) v. Aviral Mittal, (2010) 3 SCC 169

4.)In ***XYZ v. State of Maharashtra***, the HC rejected the petition for habeas corpus preferred by the father who was a UK citizen, residing in USA and had recently shifted to Singapore with the wife and the minor daughter. The mother unlawfully removed the minor daughter from the jurisdiction of Singapore, and the HC was not inclined to disturb the custody of the minor daughter in light of such complex cross border dispute. [The matter is pending before SC- HC ignored Comity of courts, intimate contact principle etc.].

5.) In ***ABC v. Union of India & Ors,*** another case that I am representing before SC, the HC took a strict and technical view by going to the extent of allowing repatriation of the minor child, to a father who was abusive and violent. The mother had come to India to take shelter in her parents' home against the atrocities of the husband, however, the HC ignored the DV instances and allowed repatriation.

Materials for Marlene Eskind Moses

1. Does your jurisdiction recognize cohabitation unions? How did it come to do so/not do so?

2. Does your jurisdiction recognize same sex marriages? How did it come to do so/not do so?

3. What rights do such couples have in terms of children, asset division, maintenance from each other, and other rights and benefits afforded to married couples in terms of housing, immigration, taxes?

4. What's HOT?

_____-

1. There exists a hierarchy, if you will, of relationships, each with its own rights and responsibilities.

A. Domestic Partnership

Domestic partners can be understood as "nonmarital life partners." Some states, counties, and cities offer domestic partnerships as a legal status that an unmarried couple may enter to be afforded some of the rights and benefits given to married couples in that jurisdiction.

Beyond this basic concept, the term domestic partnership is almost impossible to define concisely, as the requirements for entering into a domestic partnership, the rights afforded to domestic partners, and the legal duties of domestic partners vary in nearly every jurisdiction in which domestic partnerships exist.

Nat'l Ctr. for Lesbian Rts., Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States (2020), https://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf [https://perma.cc/YQL8-2JZQ] (providing a state-by-state overview of relationship recognition).

B. Civil Union

Many jurisdictions allow for unmarried couples to enter into a civil union--a legal status very similar to a domestic partnership. Often, civil unions are thought to give unmarried couples more legal rights and duties than domestic partnerships, but as the rights and duties of domestic partners vary so highly between jurisdictions, the comparison is not so straightforward.

The important thing about domestic partnerships is that not all are created equal, and thus the parties will not be granted equivalent rights in different states.

The rights of domestic partners vary from jurisdiction to jurisdiction and fall on a spectrum from not marriage-like to very marriage-like. On one extreme, California's current domestic partnership statute gives domestic partners the same “rights, protections and benefits” as married spouses. Other systems, such as Wisconsin's former domestic partnership registry, explicitly limit the rights of domestic partners as compared to those of legal spouses.

The difference in domestic partnership regimes can have consequences. For example, on May 9th, 2018, a California Appeals court ruled that New Jersey domestic partnerships (“NJ D.P.'s”) are not “substantially equivalent” to California Registered Domestic Partnerships (“CA RDP's”), rejecting a same-sex spouse's claim that the trial court in his divorce erred by declaring the date of the couple's union to be the date they legally wed in Connecticut in 2009 rather than the 2004 date they entered into their NJ D.P. *In re G.C. & R*, 23 Cal. App.5th 1, 232 Cal.Rptr.3d 484 (4th Dist. 2018).

Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 Calif. L. Rev. 87, 91 (Feb. 2014).

Heidi L. Brady, Robin Fretwell Wilson, *The Precarious Status of Domestic Partnerships for the Elderly in a Post-Obergefell World*, 24 Elder L.J. 49 (2016).

Grace J. Anderson, *The Continued Relevance of Domestic Partnerships in the Post-obergefell United States*, 41 Minn. J. L. & Ineq. 133 (Winter 2023).

An interesting new development: In June 2020 and March 2021, respectively, the cities of Sommerville, Massachusetts and Cambridge, Massachusetts passed ordinances allowing more than two people to register as domestic partners. The definition of a domestic partnership in Cambridge still requires these partners to be “in a relationship of mutual support, caring, and commitment and intend to remain in such a relationship” and to “consider themselves to be a family.” The Cambridge ordinance was passed with input from the Polyamory Legal Advocacy Coalition, which stated in a later press release that this decision would help not only polyamorous couples and their families, but also “non-nuclear” families including multi-parent families, families where multiple generations live in the same household and assist with child rearing, and step-family relationships.

See Ellen Barry, A Massachusetts City Decides to Recognize Polyamorous Relationships, N.Y. Times (July 1, 2020), https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html [https://perma.cc/8XT6-CSZN]

B. Same-Sex Marriage

On June 26, 2015, the Supreme Court handed down *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584 (2015), wherein it held that same-sex marriage is a constitutional right protected by the Fourteenth Amendment. In *Pavan v. Smith*, 582 U.S. 563, 566, 137 S.Ct. 2075, 2078 (2017), the Supreme Court held that this means *all* the rights and responsibilities of marriage, in the Court's words, "the constellation of benefits" that marriage affords; same-sex marriage is not a different species of marriage:

> As we explained [in *Obergefell*], a State may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." 576 U.S., at 675-676. Indeed, in listing those terms and conditions—the "rights, benefits, and responsibilities" to which same-sex couples, no less than opposite-sex couples, must have access—we expressly identified "birth and death certificates." *Id.*, at 670. That was no accident: Several of the plaintiffs in *Obergefell* challenged a State's refusal to recognize their same-sex spouses on their children's birth certificates. *See DeBoer v. Snyder*, 772 F.3d 388, 398–399 (C.A.6 2014). In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. *See* 576 U.S., at 675-676. That holding applies with equal force to § 20–18–401.

Interestingly, the case that achieved marriage equality for the LGBTQ+ community became the impetus for the restriction and reversal of rights for domestic partners in several states.

Kaiponanea T. Matsumura, A Right Not to Marry, 84 Fordham L. Rev. 1509 (2016) (summarizing state decisions to terminate domestic partnership statutes or convert domestic partnerships into marriages).

States' and municipalities' differing responses to domestic partnership law post-Obergefell is the result of a difficult question: if domestic partnership statutes primarily exist to protect the rights of same-sex couples, and now same-sex couples in all states can choose to marry, should domestic partnerships still be an option for unmarried couples? States approached this issue in vastly different ways. For example, while Wisconsin ended its domestic partnership registry and Washington converted civil unions into legal marriages, California continued to see the use for domestic partnership statutes and ordinances even after same-sex partners' rights could be protected by marriage, and it expanded these statutes to encompass a variety of unmarried partners regardless of sexual orientation.

2. The Rights of Domestic Partners

As noted above, the rights of domestic partners vary from state to state, from municipality to municipality.

Under California's expansive domestic partnership regime, the laws passed require all employers to extend the same benefits to an employee's domestic partner as they would to an employee's spouse. These employer rights include (depending on the employer's policy for spouses) access to an employer's healthcare provider for domestic partners, a leave of absence upon the death of a partner, and/or sick leave to care for an injured or sick partner. The potential to access these rights and abilities could improve the financial situation of unmarried partners, and provide an unmarried partner with care and comfort upon grief, illness, and injury.

Further protections upon the unexpected injury or death of a partner commonly included among domestic partnership statutes are medical visitation and decision-making rights, the right to inherit property from a deceased partner, and the right to sue on behalf of a deceased partner in an action for wrongful death. These rights give an unmarried partner, who may be closer to their partner than members of their family who would receive these rights without a domestic partnership in place, the ability to make decisions that are best for their partner and ensure financial stability in case of a tragedy.

In terms of child custody and childcare, many domestic partnership statutes assume that after a domestic partnership has been terminated by death or dissolution, the former partner has no special legal right to custody or care of the child. Cambridge's domestic partnership ordinance provides a domestic partner with access to the school records of their partner's children, access to personnel records regarding concerns about the child, and grants them the ability to remove the child from school in the event of an emergency or illness. However, the ordinance specifies that after a partnership is terminated, so too are these rights. Wisconsin's previous domestic partnership statute gave no mention to the rights of a domestic partner in regards to their partner's legal child, including any rights after the partnership has terminated.However, California--characteristically broad in its scope of rights afforded to domestic partners--states that the rights of former or surviving partners are the same in regard to their partner's child as those of former or surviving spouses.

3. What's Hot

A. UCERA

The Uniform Cohabitants' Economic Remedies Act (UCERA) was passed by the Uniform Law Commission in 2021. So far, it has been introduced only in Illinois.

The underlying philosophy of the Act is that cohabitants should be treated the same as others in asserting contractual and equitable claims. This is stated directly in Section 4. "That Section makes clear that cohabitants' claims shall not be barred because of a cohabiting or sexual relationship or because one cohabitant is married to someone else."

Section 6 of the Act provides the basis for contractual claims. Agreements may be oral, express, or implied-in-fact. Contributions to the relationship, whether monetary or non-monetary, are sufficient consideration. Contractual claims may be asserted during and after cohabitation. Just as in the case of premarital, post-marital, or property settlement agreements, an agreement that adversely affects a child's right to support or limits a cohabitant's ability to pursue legal remedies as a victim of violence are void.

Section 7 of the Act provides that a cohabitant may bring an equitable action against the other cohabitant based on that important concept of "contributions to the relationship." The Act does not create a new kind of claim in equity, but rather operates within the framework of unjust enrichment, constructive trust, and injunctive relief. Section 7 also provides that equitable claims accrue on termination of the cohabitation, whether by death, separation, or marriage between the cohabitants. Section 7 lists factors for courts to consider in adjudicating such a claim, including the nature and value of the contributions, the duration of the cohabitation, reasonable reliance on representations or conduct of the other cohabitant, and intent. UCERA requires a close examination of the circumstances of the parties' cohabitation in determining whether any division of property is appropriate.

Because UCERA does not govern domestic partnerships, it does not include any rights to make medical decisions on behalf of a partner, visitation at a hospital or prison, or standing to sue for wrongful death of a partner. Contract-based claims and claims for equitable relief are more accessible under UCERA, so economic benefits could be easier to attain after a partnership ends. However, this economic relief would only occur upon a dispute between the cohabitants or upon the termination of the relationship, so partners are placed in a win-or-lose scenario to obtain relief. Providing economic benefits to partners during the course of a partnership through access to employer healthcare is not included in UCERA. Though UCERA is not contrary to the goals of unmarried partners in the United States, an additional act should be passed which establishes an opt-in status to enable unmarried partners to gain affirmative rights during the course of a partnership.

Uniform Cohabitants' Economic Remedies Act, Unif. L. Comm'n https://www.uniformlaws.org/committees/community-home?CommunityKey=c5b72926-53d2-49f4-907c-a1cba9cc56f5

Laura W. Morgan, *The Uniform Cohabitants' Economic Remedies Act (2021)*, 36 J. Amer. Acad. Matrim. Law. 129 (2023) [https://aaml.org/wp-content/uploads/5-MAT109.pdf]

Barbara Atwood & Naomi Cahn, *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Unmarried Partners*, ___ FAM . L.Q. ___ (forthcoming), https://papers.ssrn.com/sol3/pa-pers.cfm?abstract_id=4409696 (posted Apr. 7, 2023).

B. Is Same-Sex Marriage in Trouble Under the Current Supreme Court?

In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S.Ct. 2228 (2022), the Supreme Court held that the federal constitution does not provide a right to abortion, and authority to regulate abortion must be returned to the people and their elected representatives, overruling *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

In his concurrence, Justice Thomas threw out this bomb:

> [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence*, and *Obergefell*.
>
> Because any substantive due process decision is "demonstrably erroneous," *Ramos v. Louisiana*, 590 U.S. ——, ——, 140 S.Ct. 1390, 1424, 206 L.Ed.2d 583 (2020) (THOMAS, J., concurring in judgment), we have a duty to "correct the error" established in those precedents, Gamble v. United States, 587 U.S. ——, ——, 139 S.Ct. 1960, 1984-1985, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.

Justice Thomas is almost desperate to overturn Obergefell. Same-sex marriage would then be up to the states, and we know how that went.

See Jasmine Aguilera, What Will Happen to Same-Sex Marriage Around the Country if Obergefell Falls, Time (Dec. 14, 2022, 10:26 AM), https://time.com/6240497/same-sex-marriage-rights-us-obergefell/.

Sydney Jackson, *Dobbs's Impact on LGBTQ+ Rights: Where Do We Go from Here?*, 101 U. Det. Mercy L. Rev. 43 (Fall 2023).

"Traditional" marriage is safe. But what does this all mean for cross-border recognition of non-marital relationships? For the time being, unless and until the Supreme Court overrules Obergefell, cross-border recognition of domestic partnerships should be the order of the day, to the extent as recognized in the country of origin, unless the relationship somehow is against public policy. With *Masterpiece Cakeshop*, though, who knows what that might be.