

Discussion on the Application of Reservation of Public Order in Foreign-related Same-sex Marriage in China

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Abstract. With the development of globalization, Same-sex marriage has become more and more common and has achieved legal effect in some countries. Reservation of public order is generally applicable in dealing with Foreign-related Same-sex marriage. However, the abstract nature of it allows judges to abuse their discretion, and applying it regardless of the situation has also resulted in the difficulty of maintaining the legitimate rights and interests of the parties, and has brought adverse effects to the judgments of Chinese courts in the international arena. Therefore, China should face up to the objective fact of the universalization of Foreign-related Same-sex marriage, deal with Foreign-related Same-sex marriage cases on a case-by-case basis, and prudently apply the reservation of public order, so as to safeguard the personal and property rights and interests of the parties on the basis of preserving the social interests of China.

Keywords: Foreign-related Same-sex Marriage; Reservation of Public Order.

1. The Challenge of Same-sex Marriage to China's Public Order

In China, due to the influence of traditional feudal ideology, education level, openness, etc., some of the publics are opposed or even disgusted with Same-sex marriage and Same-sex couples. Therefore, our current laws deny the legality of Same-sex marriage. In addition, China still lacks relevant legal system to regulate the legal application of Foreign-related Same-sex marriage, so in practice, it is often excluded on the basis of reservation of public order. With the deepening of globalization, the legal problems arising from Foreign-related Same-sex marriage have an increasingly obvious impact on our country. The unconditional application of reservation of public order not only cannot solve the problem, but also lead to many abuses.

Reservation of public order refers to a reservation system that when the courts of a country should apply the foreign law according to its conflicting norms, they exclude it, because its application would conflict with the vital interests, basic policies, basic concepts of morality or basic principles of the law of the forum country. Chinese courts currently believe that the application of foreign laws to legalize Foreign-related Same-sex marriages will impact current law, marriage system and social order, and therefore refuse to recognize Foreign-related Same-sex marriage by using the principle of reservation of public order.

2. Conflict of Laws on the Validity of Same-sex Marriage

With the increase of civil exchanges in various countries and the emergence of cross-border marriage, we have to consider the legal conflicts that Same-sex marriage may bring. Since the 1980s, some countries and regions have given legal protection to Same-sex unions through marriage or other forms. At present, they can be roughly divided into the following two categories.

2.1 Same-sex Marriage Legislation

Around the world, some countries have adopted the form of marriage to recognize the union between the same sex. By amending the clauses in the marriage law, it directly and clearly provides legal basis for Same-sex marriage and guarantees the legal status of Same-sex couples and the rights of both parties to the greatest extent. Appropriate restrictions have been placed only on the adoption rights. Countries that currently adopt Same-sex marriage legislation include Canada, Spain, the

Netherlands, the United Kingdom, and Belgium. In this way, Same-sex marriage is included in the adjustment scope of the national marriage law. It is relatively simple and conforms to the principle of legislative economy, but it has a greater impact on traditional social concepts and is likely to cause more disputes. Besides, there is no consensus on the custody issues of Same-sex couples in countries that adopt this model.

2.2 Registered Partnership Model

It means that on the premise of not changing the definition of traditional marriage and its legal status, Same-sex couples can be combined in a valid and legal form as legal civil subjects, and enjoy all or part of the same rights and interests as traditional heterosexual couples conferred by law. Different from the marriage legislation model, the registered partner model does not include Same-sex couples in the legal relationship of marriage, but creates a new type of legal relationship, which in disguise gives Same-sex couples similar rights to identity and property between opposite-sex couples. The registered partnership model is an important measure to protect Same-sex couples, which greatly reduces the impact on the traditional marriage and family system, and is an expedient measure for legal protection of Same-sex couples.

3. Existing Problems in Foreign-related Same-sex Marriage

3.1 Abuse of Discretion

It is stipulated in *Law of the PRC on Application of Laws to Foreign-related Civil Relations* that “where the application of foreign laws and international treaties will damage the social and public interests of the People's Republic of China, the laws of the People's Republic of China shall apply.” From this, it is clear that the application of public order in China is based on that the application of foreign laws will lead to the effect of violating the public order of China, instead of adopting the method of direct restriction based on the difference in the content of foreign laws. However, the shortcoming is that, firstly, it does not use the internationally accepted expression “public order”, but replaces it with the more vaguely term “social public interest”, which provides space for the abuse of the system. Secondly, there is no clear definition of “damage”. What is the degree of damage? Is there a distinction between slight, general, or serious? These issues are left to the judge's discretion to deal with, which leads to the expansion of the scope of discretion, and thereby increases the instability and randomness of the case trial, which is not conducive to safeguarding the basic human rights of the parties.

3.2 Causing Damage to the Interests of Parties

When there is a dispute over personal or property rights such as child custody, inheritance, etc. between the parties, it is necessary to confirm the validity of the marriage to protect the corresponding legitimate rights and interests. When Chinese courts deal with this situation in accordance with the law, they always use the reservation of public order to exclude the application of foreign laws to deny the legal marriage relationship of Same-sex couples. Therefore, the parties cannot guide their behaviors in accordance with clear laws and foresee the legal consequences, and they must accept the damage to their property and personal rights caused by the lack of legal recognition of their marriage. In other words, civil legal rights and interests arising from the precondition of Same-sex marriage in China may not be protected by law due to Same-sex marriage. This is detrimental to the legal authority of China.

3.3 The Application of Reservation of Public Order Lacks Reasonability

Same-sex marriage belongs to the adjustment category of marriage and family law, and has strong personal exclusiveness. Its marriage relationship as the object of marriage law adjustment is a personal relationship and a property relationship formed based on personal relationship. Therefore,

its private law and personal attributes determine that it has small negative impact on the national political level, and it will not shake China's fundamental systems or principles in the fields of politics, law, and society. Besides, China adopts this system to exclude the application of international practice, which makes it difficult for other countries to accept it. In conclusion, when dealing with Foreign-related Same-sex marriage, China applies the reservation of public order regardless of the situation, which lacks certain rationality. In some cases, the recognition of the legal status of Same-sex couples will not cause problems that harm the public interests of the country and society. On the contrary, it can protect the legitimate rights and interests of the parties, and at the same time conform to the world trend, and enhance the acceptance of Chinese court judgments around the world.

4. Suggestions for China to Adopt Reservation of Public Order to Deal with Foreign-related Same-sex Marriage

4.1 Reservation of Jurisdiction

When dealing with Foreign-related Same-sex marriage issues, Chinese courts should not directly give up their jurisdiction due to refusing to recognize Same-sex marriage, and take a negative attitude towards the legitimate rights and interests of the parties, but should conduct effective trials in accordance with Foreign-related jurisdictional rules and procedures. Due to the relatively separate nature of litigious rights and substantive rights, the litigious rights of the parties cannot be deprived because the substantive rights are not guaranteed. Reviewing and handling such cases in accordance with the law can safeguard the legitimate interests of the parties and prevent judges from improperly using or abusing their powers.

4.2 Prudent Application of the Reservation of Public Order

The situation of Foreign-related Same-sex marriage is complex and cannot be generalized. The universal recognition of the validity of Same-sex marriage in the world should not be denied by violently applying the reservation of public order across the board. Among the lawsuits caused by Foreign-related Same-sex marriage, there are few cases of separate requests for the validity of Same-sex marriage, most situations are problems regarding identity and property rights in the marital relationship based on the legality of Same-sex marriage. Therefore, the disputed content of the validity of Same-sex marriage should be specifically and objectively reviewed as a preliminary issue, and the reservation of public order should be prudently applied, so as to better protect the personal and property rights and interests of the parties, and also safeguard the dignity of our China's laws.

4.3 Judging the Legality of Foreign-related Same-sex Marriage Case by Case

The validity of Foreign-related Same-sex marriages should be treated differently, and different methods should be adopted according to different types, so as to protect the basic rights and interests of the parties on the basis of maintaining public order and interests in China, and to achieve substantial fairness. Same-sex marriages can be roughly divided into the following categories: First, circumventive Foreign-related marriage. This means both parties are Chinese citizens who subjectively seek recognition of their Same-sex marriage in foreign countries in order to evade Chinese laws. Second, immigrant-type Foreign-related Same-sex marriage. At least one of the parties is a foreign citizen or a Chinese citizen who has lived in a foreign country for a long time. Third, temporary Same-sex marriage. This refers to foreigners who have established Same-sex marriages or partnerships in accordance with the law and come to visit China temporarily. Due to some special circumstances, it is necessary to obtain the approval of the validity of the marriage from the courts of China. In the second and third cases, the recognition of Same-sex marriage will not harm the public interest of the country, nor will it shake the social order and good morals, so it is legitimate to recognize the validity of its union.

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