

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No. 159 of 2023

IN THE MATTER OF:

DR. AKKAI PADMASHALI AND ORS.

...PETITIONERS

VERSUS

UNION OF INDIA

...RESPONDENTS

WRITTEN SUBMISSIONS ON BEHALF OF THE PETITIONERS

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DATED:

FILED BY:

ADVOCATES FOR THE PETITIONERS

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SENIOR ADVOCATE

I. The impugned sections 4, 22, 23, 27 and 44 of the Special Marriage Act 1954 (“SMA”) require to be read to include the word ‘spouse’ and ‘person’ to include transgender persons within its ambit:

- (i) It is a well-recognized principle that has been upheld by this Hon’ble Court that the concept of constitutional morality is the embracing of constitutional values is imperative for the ushering a pluralistic and inclusive society. It was held in *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, that embodying constitutional morality means that the values of constitutionalism must trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State. This would include the embodiment of these principles in legislation and legislations must be guided by, and reflect, constitutional morality.
- (ii) The SMA, when enacted, reflected the constitutional morality of the time when it gave legal recognition to inter faith and inter caste marriages. It is submitted that historically under the existing personal laws governing marriage and family life in India, marriages outside of caste and religion were not permitted.

Due to this, the SMA when it was enacted, reflected the evolving and changing conception of marriage as reflected legislatively in India. The Parliamentary debates at the time of the introduction of the Special Marriage Bill in the Indian Parliament noted that one of the main objects of this Act was to “make it more progressive and to encourage marriages. It does not take religion into account and permits marriages between different castes and creeds.” It embodied a certain progressive idea of marriage and the SMA provided a route to realizing an expansive notion of marriage.

(iii) Just as the SMA opened up the doors to inter-faith and inter-caste marriage in the nineteen-fifties, with time, even other pre-conceived notions of marriage have changed and our courts have led such changes. In *Joseph Shine v. Union of India*, (2019) 3 SCC 39, in decriminalizing adultery, this Hon’ble Court shifted the discourse on the “sanctity of marriage” noting that adultery laws were typically rooted in historical inequality of the sexes and held that:

“A woman's ‘purity’ and a man’s marital ‘entitlement’ to her exclusive sexual possession may be reflective of the antiquated social and sexual mores of the nineteenth century, but they cannot be recognized as being so today. It is not the “common morality” of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497.”[para ____]

(iv) In *Independent Thought v. Union of India and others*, (2017) 10 scc 800, the idea of the subordinate role of women within marriage, the tradition of child marriage and child marital rape was held to be against the constitutionally recognized rights of women. This Hon’ble Court held:

“.....It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

83. Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable the few decades ago may not necessarily be acceptable today.

86...There is therefore no doubt that the impact and effect of Exception 2 to Section 375 of the IPC has to be considered not with the blinkered vision of the days gone by but with the social realities of today. Traditions that might have been acceptable at some historical point of time are not cast in stone. If times and situations change, so must views, traditions and conventions.”

- (v) At present, the constitution recognises equal rights and dignity for members of LGBTQ community. The Right to Marry is an important facet of an individual's social existence, and her right to lead a dignified life with their partner and the denial of this right to LGBTQ persons is violation of their right to equal treatment under the law. The SMA must be interpreted in light of the prevailing constitutional morality, to realize the true purport and meaning of fundamental rights under the constitution.
- (vi) Constitutional challenges to marriage laws in other jurisdictions have been upheld to keep up with changing times and recognition of rights. In the United States there were prohibitions on mixed race marriages by anti-miscegenation laws. This was set aside by the US Supreme Court in *Loving v. Virginia*, 388 U. S. 1, 12, which invalidated bans on interracial marriages.
- (vii) In *Kirchberg v. Feenstra*, 450 U. S. 455, the US Supreme Court struck down legislation that required the husband to be the head of the marital community and gave him sole authority to manage and dispose of community property.

The Court held that the law was unconstitutional as it violated the equal protection clause of the fourteenth amendment which prohibits discrimination on the basis of sex and held that it was based on outdated gender stereotypes and perpetuated the notion that women were inferior and subservient to men in marriage.

- (viii) In Reference re Same-Sex Marriage, 2004 SCC 79, the Canadian Supreme Court upheld the constitutionality of a proposed legislation for civil marriage, that defined marriage as a “lawful union of two persons to the exclusion of all others”. The Canadian Supreme Court responding to the argument that there is a fixed concept of marriage as being between a man and a woman, held that:

“Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”

- (ix) Marriage provisions, thus under the SMA which is a civil law for marriage in India, should therefore be read to recognize the inclusion of persons of all gender identities, and not just between a ‘male’ and ‘female’. The eligibility should be to “two persons”, regardless of gender, who should be legally capable of being married and should determine the capacity for marriage.

- (x) In order to bring legislation within the framework of the constitution, courts, have read down / read up laws so that they do not violate the constitution. In Independent Thought, this Hon’ble Court held:

“59. Therefore, the principle is that normally the Courts should raise a presumption in favour of the impugned law; however, if the law under challenge violates the fundamental rights of the citizens, the law is arbitrary, or is discriminatory, the Courts can either hold the law to be totally unconstitutional and strike down the law or the Court may read down the law in such a manner that the law when read down does not violate the Constitution. While the Courts

must show restraint while dealing with such issues, the Court cannot shut its eyes to the violations of the fundamental rights of the citizens. Therefore, if the legislature enacts a law which is violative of the fundamental rights of the citizens, is arbitrary and discriminatory, then the Court would be failing in its duty if it does not either strike down the law or read down the law in such a manner that it falls within the four corners of the Constitution. "

- (xi) In keeping with a similar approach, the South African Constitutional Court in ***Minister of Home Affairs and Another v. Fourie and Another***, CCT 60 / 04 directed that if Parliament failed to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.
- (xii) Therefore, it is submitted that the SMA, should be read so as to declare that all references to "husband" and "wife" and 'male' and 'female' in Sections 4, 22, 23, 27 and 44 of the Special Marriage Act 1954 be read so as to include the word 'or spouse' after the said words in order to make them apply to all persons, irrespective of their gender identity and sexual orientation.

II. Not giving a broader reading to the SMA to include 'persons' or 'spouse' in the impugned sections, amounts to a violation of the Right to Equality and Equal Protection of the Laws to transgender persons under Article 14 of the constitution:

- (i) By not including the words 'spouse' or 'person' in sections 4, 22, 23, 27 and 44 of the SMA, transgender persons are excluded for the coverage and

equal protection of all laws, being the SMA in the present case, solely due to their gender identity.

(ii) Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet each may be instructive as to the meaning and reach of the other.

(iii) This Hon'ble Court in ***NALSA v. Union of India*** (2014) 5 SCC 438

“Gender identity is one of the most-fundamental aspects of life which refers to a person’s intrinsic sense of being male, female or transgender or transsexual person.Gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual’s self-identification as a man, woman, transgender or other identified category.”

It further held that:

“Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NREGA, 2005, etc. Non- recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.”

(iv) Thus, when gender affirmative treatment is not a requirement for the legal requirement of their gender identity, it cannot be a barrier in getting married, which is permitted under law only to persons of the opposite sex and not to persons whose self-determined gender identity is either not changed in their legal documents, or those whose self-determined gender identity is ‘transgender’. Hence the provisions of the SMA ought to be read down to include the words “or spouse” in all provisions so that all persons are able to get married, irrespective of their gender identity.

- (v) Unless such a purposive reading is given to the impugned sections of SMA, they would violate the core precepts of equality. The SMA is in essence unequal and transgender persons and couples are denied benefits that are afforded to cis-gender persons and opposite-sex couples as they are barred from exercising their fundamental right to marry and equal protection of the SMA. This denial is a grave and continuing harm. It disrespects and subordinates transgender and intersex persons as it does not cover them under the SMA solely based on their gender identity.
- (vi) The right to marry is a fundamental right inherent in the liberty of the person under Article 21 of the constitution and under Article 14, transgender persons may not be deprived of that right and that liberty. Yet by virtue of their exclusion from the SMA, transgender persons are denied the benefits that the State has linked to marriage. Exclusion from being able to have the legal status of marriage gives the message that transgender persons, gays and lesbians are unequal and subordinate and imposes stigma and injury which is wholly based on their gender identity. This amounts to the violation of the guarantee of equal protection under Article 14 of the constitution.
- (vii) If the SMA is not interpreted to include the word 'spouse' or 'person' to include all persons to have the right to marry, it will amount to identifying a subset of relationships as unequal. It would force transgender persons and couples or same-sex couples to live as unmarried for the purpose of law, and undermines both the public and private significance of state-sanctioned marriages; for it tells those couples, and all the world, that their relationships are unworthy of legal recognition. This differentiation

demeans the couple, whose moral and sexual choices the Constitution protects under the *Puttuswamy* judgement and in *Navtej Johar and Others v. Union of India*.

(viii) In *Arunkumar and Anr. v. Inspector General of Registration and Ors.* (2019) 4 Mad LJ 503, the Madras High Court declared that transgender persons who are neither male/female fall within the expression “person” and hence entitled to legal protection of laws in all spheres of State activity as enjoyed by any other citizen of this country. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India. The Madras High Court held that the expression “bride” in Section 5 of the Hindu Marriage Act, 1956 to mean and include a transwoman identifying as a woman, thereby interpreting the law to allow solemnization of marriages involving trans persons.

(ix) In the United States, courts have invoked equal protection principles to invalidate laws relating to marriage. In *Loving v. Virginia*, the US Supreme Court held that inter-racial bans on marriage were a violation of the equal protection clause and held:

“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”

It further held that:

“To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”

- (x) Hence to deny persons the freedom and right to marry solely on the basis of their gender identity, is manifestly arbitrary, and is a classification that has no nexus to the purpose of the legislation which is to recognize marital relationships and therefore denying transgender persons equality under the law and equal protection of the laws and a violation of Article 14 of the constitution.

III. The restrictions under the SMA to marriage only between a 'man' and a 'woman', amount to discrimination on the basis of 'sex' under Article 15 (1) which includes discrimination on the basis of gender identity and sexual orientation:

- (i) The protection extended under Article 15 (1) of the Constitution against discrimination on the basis of sex has seen a dynamic and expansive interpretation by the courts. In *NALSA v. Union of India*, this Hon'ble Court has held that the discrimination on the ground of 'sex' under Articles 15 and 16, includes discrimination on the ground of gender identity.
- (ii) In *Anuj Garg and Ors. v Hotel Association of India and Ors.* (2008) 3 SCC 1, a standard of strict scrutiny for laws rooted in sex stereotypes was established in recognition of the fact that the protection against discrimination extended under Article 15 needs to move in tandem with changing social mores. The Court held that the anti-stereotyping principle is firmly rooted in the prohibition of discrimination under Article 15 of the Constitution. It also held that legislations

encapsulating majoritarian impulses rooted in biological, social and cultural determinants and moralistic traditions, which impinge upon individual autonomy deserve deeper and heightened judicial scrutiny.

(para 46)

(iii) Once the court has established the right to self-determination of gender identity, the means to such realization must also be recognised. It would therefore require that transgender persons or couple or same-sex couples cannot be denied the legal right to marry under the SMA based on their gender identity. Which is afforded to heterosexual opposite sex couples. In NALSA, this Hon'ble Court held:

- The Constitution makers included a guarantee against discrimination on grounds of sex to prevent direct or indirect discrimination on the basis of failure to conform with stereotypical notions of gender. Therefore, Article 15 and 16 prohibit discrimination on the basis of gender identity. (Paras 63 and 66)
- Non-recognition of the gender identity of transgender persons in legislations which are coded in the binary of male/female gender denies them equal protection of law. (Para 81)
- Discrimination on the basis of sexual orientation and gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying equality before law (Para 83)

(iv) In *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, this Hon'ble Court emphatically held that sex includes sex stereotypes, gender identity and sexual orientation and held that:

- Under Article 15, that a ground of discrimination is rooted in sex and in other considerations (sex plus) can no longer be accepted by the intersectional understanding of how discrimination operates, which does not operate in isolation with other identities, especially from the socio-political and economic contexts. (Paras 389, 394)
- A provision challenged as being ultra vires the prohibition of discrimination on the grounds of sex under Article 15(1), is to be assessed not by the objects of the State in enacting it, but by the effect the provision has on affected individuals and their fundamental rights. (para 394)

(v) The discrimination faced by transgender persons who despite having the right to self-determination of gender identity are not only denied legal recognition of their gender identity by the State, but also denied the right to marry and to have a family by virtue of the SMA which provides for only a binary recognition of gender of male and female for the purpose of marriage.

(vi) In *Christine Goodwin v. United Kingdom*, (Application no. 28957/95) the European Court of Human Rights recognized that there was no basis for denying transgender persons the right to marry, and held:

“The Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.¹⁰⁴ The Court concludes that there has been a breach of Article 12 of the Convention in the present case. Article 12 of the Convention, which provides as follows: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

(vii) This Hon’ble Court has held that the Article 15 (1) guarantee on freedom from discrimination on the ground of sex would include

gender-identity based discrimination. The exclusion of transgender and intersex persons from the institution of marriage is discrimination based on their gender identity. Gender identity is a prohibited ground of discrimination under Article 15, and in accordance with the equal constitutional claims of transgender persons, the State cannot exclude them from the institution of marriage. Therefore, the exclusion of transgender persons from the family law institution of marriage is discrimination based on gender identity and is likely to violate Article 15 (1) of the Constitution.

IV. The right to personal autonomy and liberty under Article 21 guarantees the right to marry to all persons and cannot be denied on the basis of gender identity and sexual orientation:

- (i) Under Article 21, no person shall be deprived of their life or personal liberty except according to procedure established by law. Personal liberty under the right to life has been held to extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.
- (ii) The right to marry has been held to be a fundamental right under Article 21. Decisions about marriage are among the most intimate that an individual can make. This is true for all persons, whatever their gender identity or sexual orientation.
- (iii) This Hon'ble Court in *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368 held that:

“ 86. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.”

- (iv) The right to intimate association has been protected in ***Griswold v. Connecticut***. Trans couples have the same right as opposite-sex couples to enjoy intimate association, a right extending beyond mere freedom from laws making same-sex intimacy a criminal offense.
- (v) The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their gender or sexual orientation. There is dignity in the bond between two persons who seek to marry and in their autonomy to make such profound choices. Under Article 21 of the Constitution, transgender persons seek in marriage the same legal treatment as heterosexual persons, and it would disparage their choices and diminish their personhood to deny them this right.
- (vi) Further, the provisions of Sections 5, 6, 7, 8, 9, 10 and 46 of the SMA imposing a 30-day public notice obligation amounts an infringement of the constitutional rights of adult persons who seek to get married under the SMA.

V. The Denial of the Right to Marry to Persons based on their Gender Identity, amounts to a Violation of their Right to Dignity:

- (i) The requirement under the SMA that marriage is permitted only between a 'male' and a 'female' is in complete violation of Articles 14, 15 and 21 of the constitution and is a violation of the right to dignity of transgender persons.
- (ii) Denying people with different gender identities the option of marriage under the SMA, when it is a course of action available to all other individuals, impairs the right to dignity inherent in the Article 21 guarantee of the Constitution. Both Article 14 guaranteeing equality and Article 21 guaranteeing the right to life protect personal liberty because it stems from the inherent worth and dignity of each person. The ability independently to define one's identity, is central to any concept of liberty. Protecting dignity rights involves more than just non-interference with one's private, intimate choices.
- (iii) As argued by Danieli Evans, in her article, "Imagining a Same-Sex Marriage Decision Based on Dignity: Considering Human Experience in Constitutional Law", 37 N.Y.U. REV. OF L. & SOC. CHANGE 251 (2013), the freedom to define oneself is incomplete if the State does not respect, validate, and embrace public manifestations of these choices. She thus argues that there are two distinct components of human dignity: intrinsic dignity, or the inherent, inalienable worth that stems from human ability to self-consciously create an individual identity, and extrinsic dignity, the worth that an individual imputes to themselves, based on the extent that their attributes are recognized and

validated by society. Intrinsic worth and extrinsic or imputed worth demands both personal autonomy and societal acceptance of personal attributes that gives rise to an individual's sense of how she is valued in relation to other members of society. To fully execute the Constitution's promise of respect for individual self-definition, worth, and freedom, the state must also respect and validate public manifestations of personal identity.

- (iv) Dignity is tied to how society respects particular choices that determine fundamental aspects of one's being - which includes personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. A person's marital status does not simply denote the legal recognition of a relationship but it also regulates access to a range of other rights and protections including healthcare benefits, social security, property rights, guardianship and adoption, spousal benefits under labour laws. Marital status includes inheritance and property rights; rules of intestate succession; hospital access, medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates, workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under central and state laws is a requirement for several legal benefits.
- (v) It also safeguards children and families. Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser.
- (vi) Denying persons who are transgender the access to the recognition of the status of marriage results in stigma and stereotypes against the trans community. It is difficult for an individual to feel a positive sense of self-worth

if she is not able to fulfill the values society deems most important. It also harms and humiliates the children of trans or same-sex couples as they will be seen as less worthy, coming from families where their parents are not legally married.

(vii) It is submitted that stereotypes about individuals or groups based on their different characteristics, be it their gender, disability or caste or any other characteristics, have the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being. Stereotypes are directly linked to the pre-existing disadvantage, vulnerability, or prejudice experienced by the individual or groups.

(viii) Courts have recognized that subordination which is done by stereotyping, has the result of denying equal dignity and worth of all persons. In the case of same sex marriage, the Constitutional Court of South Africa declared that the failure of the common law and Marriage Act to provide for same-sex marriage violated the express constitutional guarantee of dignity in ***Minister of Home Affairs v. Marie Adriaana Fourie***. Noting the close relationship between dignity and equality, the South African Constitutional Court held that the exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society and held that:

“The crucial determinant will always be whether human dignity is enhanced or diminished and the achievement of equality is promoted or undermined by the measure concerned. Differential treatment in itself does not necessarily violate the dignity of those affected. It is when separation implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status that it becomes constitutionally invidious.”¹

¹ *Fourie* (n 2).

(ix) In ***Egan v. Canada***, which was a case about a homosexual couple where one of the partners was refused spousal allowance, L'Heureux-Dube, J of the Canadian Supreme Court held that:

“Equality . . . means nothing if it does not represent regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.”²

(x) In ***Obergefell v. Hodges***, the US Supreme Court held that discriminatory sex-based classifications in marriage treating women as unequal to men in marriage denied the equal dignity of men and women. It went on to hold that when same sex couples seek the right to marry, they seek equal dignity and upheld their right to marry. Justice Kennedy poignantly states at the end of his opinion, “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”³

(xi) In ***Goodridge v. Dept. of Public Health***, 798 N.E.2d 941 (Mass. 2003), the Court interpreted the state constitution as affirming “the dignity and equality of all individuals,” and it further held that “it forbids the creation of second-class citizens.” It held that that “the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution” precludes the intrusion of the government “into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner.”

(xii) In ***United States v. Windsor***, the US Supreme Court held that:

“For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality. “

(xiii) In ***Navtej Johar and others v Union of India***, this Hon’ble Court held, the discrimination faced by the LGBTQI community “is deeply offensive to the

² *Egan v Canada* [1995] 2 SCR 513, 543.

³ *Ibid* 681 (Kennedy J).

dignity and self-worth of the individual” and that equality demands that the sexual orientation of each individual in the society must be protected on an even platform, for the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.⁴

- (xiv) Hence, the non-inclusion of transgender persons under the SMA, based solely on their gender identity, amounts to stereotyping and subordination and to a violation of their right to dignity and deserves to be given an interpretation that allows for marriage, irrespective of one’s gender identity or sexual orientation.

VI. Article 21 of the constitution includes the Right to Family Life and the SMA amounts to a violation of the rights of transgender persons to have a family:

- (i) While it has been held that Article 21 includes the right to marry, it is submitted that it would also include the right to have a family and the right to family life.
- (ii) Under many international treaties, there are provisions which guarantee the right to family life.
- The Universal Declaration of Human Rights in Article 16 states that “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

⁴ Navtej (n 19).

They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

- Under Article 9 of the Charter of Fundamental Rights of the European Union, all persons have the right to marry and the right to found a family.
- Article 8 of the European Convention on Human Rights guarantees the right to privacy and states that “Everyone has the right to respect for his private and family life, his home and his correspondence”
- The Yogyakarta Principles which have been followed by this Hon’ble Court, in Principle 24 clearly recognizes that everyone has the right to found a family, regardless of sexual orientation or gender identity. Principle 24 states follows:

Principle 24: Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

(iii) In ***Oliari and others v. Italy***, (Applications nos. 18766/11 and 36030/11) the European Court of Human Rights held that the absence of a legal framework allowing for recognition and protection of same-sex relationships violates the rights under Article 8 of the Convention and that measures needed to be taken by the State to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private and family life.

(iv) In India, for the first time, the Hon’ble Delhi High Court in ***Lakshmi Bhavya Tanneeru v. Union of India***, 2021 SCC OnLine Del 4994, held that the right

to a meaningful family life, which helps in retaining physical, psychological and emotional integrity, would find a place in the four corners of Article 21 of the Constitution.

(v) It is therefore submitted that the right to life under Article 21, while it includes the right to marry, also includes the right to all persons to be able to have a family and the right to family life. The right to family life would include the right to be able to have one's relationships legally recognized by the State under the applicable marriage laws, in this case the SMA. This right to family life would also include the right to have all other benefits related to the recognition of marriage, including having children, spousal recognition under the law and all that which comes within the framework of a family, as recognized under the law.

(vi) The right to life, personal autonomy and privacy is infringed by the SMA as it interferes with the private life of adult transgender persons by depriving them of their right to marriage and the right to family life, thereby violating Article 21 of the Constitution of India.

Place:

Date

Counsel for the Petitioners