SYNOPSIS

The present Petition seeks inter alia, a declaration that a spouse of foreign origin of an Indian Citizen or Overseas Citizen of India ('OCI') cardholder is entitled to apply for registration as an Overseas Citizen of India under Section 7A(1)(d) of the Citizenship Act, 1955 regardless of the gender, sex or sexual orientation of the applicant spouse . The Petitioners also seek_legal recognition of all same-sex, queer or non-heterosexual marriages under secular legislations for marriage such as the Foreign Marriage Act 1969 and the Special Marriage Act 1954 in accordance .

Petitioner Nos. 1 and 2 in the present writ petition are a married same-sex couple resident in Paris, France. They met in New York in 2001 and have been in a loving relationship for nearly 20 years. Petitioners No. 1 and 2 got married in New York on August 6, 2012, and are recognized as a legally married couple in the U.S., France, and Canada – the three countries where they have primarily lived and worked in the last twenty years. They have a certificate of registration of marriage issued by the Office of the City Clerk of New York dated 6th August, 2012 and apostille certificate of the same date issued by the Special Deputy Secretary of State, New York.

Joydeep Sengupta and Blaine Stephens, Petitioners 1&2, are preparing for their new role as parents, and they are expecting their first child in July 2021.

The Petitioner No. 1, Joydeep Sengupta, was born in India and was an Indian citizen at birth. He grew up knowing he was gay, and that his right to love and marry was illegal. Education and work took Mr.

Sengupta abroad, he is now a lawyer admitted to the Bars of New York, Paris and Ontario, Canada. He specializes in cross-border investigations, compliance and regulatory matters for some of the world's largest financial institutions and global corporations. Mr. Sengupta is a Canadian Citizen now and since 2011 he has been an Overseas Citizen of India ("OCI"). Mr. Sengupta's parents and extended family all live in India, and he continues to maintain longstanding professional ties to India. He travels to his Indian home regularly.

Blaine Stephens is Mr. Sengupta's husband and Petitioner No. 2. He is a U.S. citizen and currently a long term resident of France. The Petitioner No. 2 has no legal status in India and has only been able to visit India after qualifying for various temporary visitor or business visas. The Petitioner No. 2's first trip to India was to meet the Petitioner No. 1's extended family and friends in India in January 2002. Since then, the Petitioner No. 2 has had multiple visas and has visited India many times to see family and professionally. Petitioner No. 2 is an economist who specializes in microfinance and economic development. He has deep professional relationships with Indian business partners in microfinance, which have included the Reserve Bank of India. Indeed, he has worked as an advisor to the Central Banks of several countries, development institutions and financial institutions, including through the World Bank . He has also taught advanced courses at Columbia University, Georgetown University, Yale University, Sciences Po Paris, among others.

As the Petitioners are expecting their first child in July 2021, with one set of the child's grandparents residing in India (Petitioner No.1's parents), the Petitioner No.2 wishes to apply for OCI status under

Section 7A(1)(d) of the Citizenship Act, as a spouse of an OCI Cardholder. As per the notification dated 22.05.2020 by the Ministry of Home Affairs ('MHA'), due to visa and travel restrictions imposed to contain the spread of Covid 19, only certain categories of OCIs were being allowed entry into India. However, later, MHA, Foreigners Division, vide its notifications dated 21.10.2020 and 04.03.2021 reallowed entry of all OCIs in India and said that OCIs shall be entitled to grant of multiple entry lifelong visa for visiting India for any purpose. This facility is not available to foreign nationals. The Petitioner No. 2 seeks to attain OCI status at the earliest in order to avail of this facility so that he can spend time in India – where the Petitioner no.1's family lives – with his spouse and the baby they are expecting. And indeed, to reach his husband and baby immediately in case of illness or other difficulty as needed during the pandemic .

Petitioner No.3, Mario Dpenha , is an Indian citizen, a queer rights academic and activist, currently pursuing a PhD at Rutgers University, USA on the history of hijras in eighteenth and early nineteenth century western India. He has worked in queer activism for over twenty years and is a founder of Anjuman, the first queer students' collective in Jawaharlal Nehru University, New Delhi in 2003. He was part of Voices Against 377, a party to the legal challenge to Section 377 of the IPC, which led to the eventual decriminalization of homosexuality in *Navtej Singh Johar v. Union of India* ('*Navtej Singh Johar*') ***(2018) 10 SCC 1.*** Petitioner No. 3 identifies as queer:

"Queer" in the present petition is used as an inclusive, umbrella term for people who identify as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, and other related identities (LGBTQIA+).

Such people:

(i) may not conform to the fixed, socially prescribed categories of "male" and "female",

(ii) may have gender identities that do not match their biological sex at birth,
and/or
(iii) may live outside the heterosexual norm.

OCI CARD FOR "SPOUSE" UNDER THE CITIZENSHIP ACT, 1955

Section 7A(1)(d) of the Citizenship Act, 1955 entitles a spouse of foreign origin of an OCI Cardholder, whose marriage has been registered and subsisting for at least two years to apply for OCI status. As per a notification issued by the MHA, Foreigners Division, in the case of a marriage solemnized in a foreign country, the spouse of an OCI or Indian citizen applying for OCI may present the said marriage certificate for such a marriage, which must be apostilled or certified by the concerned Indian mission or post. The Petitioner No. 2, being the spouse of an OCI cardholder, i.e. the Petitioner No. 1, is keen to apply for OCI status through this procedure.

This prompted the Petitioner Nos. 1 and 2 to ascertain the legal position on the eligibility of Petitioner No. 2 to apply for OCI status. Since they aren't citizens of India, they approached the Petitioner No.3, to file RTIs on the issue. Petitioner No.3 filed three RTIs, one with the MHA itself,

one with the MHA Foreigners Division and one with the MEA, Consular, Passport and Visa Division, all seeking the meaning of term "registered" marriage in Section 7A(1)(d) and the list of countries whose marriages are legally recognized by India. However, these RTIs were transferred back and forth by the Ministries, as a result of which the queries were never answered.

Further the Petitioner Nos. 1 and 2 came to know that there are a number of petitions pending before this Hon'ble Court on the issue of legal recognition of same sex marriages in India. One petition, available in the public domain, titled ***Mr. Vaibhav Jain & Anr. Vs. Union of India & Ors. W.P. (C) 7657 of 2020,*** pertains to the refusal by the Consulate General of India, New York (also the Respondent No. 2 in the present case), to register the marriage of a same sex couple under the Foreign Marriage Act, 1969, even though the Petitioners in that case are already legally married in the United States and have a valid marriage certificate, like the Petitioners in the present case. The reason cited by the Consulate General of India, New York for non-registration, as per the petition by Mr. Vaibhav Jain and his husband, was that there are no extant laws and provisions for registration of such a marriage (a same sex marriage) in India.

The Respondent No. 2 is the concerned Indian mission/post which granted the Petitioner No. 2's last visa. It is also the Indian mission which granted Petitioner No. 1 his OCI card, in addition New York is the jurisdiction in which Petitioners 1 and 2 were married. Since the Respondent No. 2 has already denied registration of a same-sex marriage in Mr. Vaibhav Jain's case, the Petitioner No. 2' legitimately fears that his application for OCI status as well as request for

certification/apostillization of the marriage certificate which will be required in the application process, will not be accepted.

The Petitioners have thus approached this Hon'ble Court for relief. Consensual sexual acts between persons of the same sex have already been decriminalized by the Hon'ble Supreme Court of India in ***Navtej Singh Johar.*** It is submitted that even though Indian law is silent on the recognition of same sex marriages, it is a settled principle that where a marriage has been solemnized in a foreign jurisdiction, the law to be applied to such marriage or matrimonial disputes is the law of that jurisdiction. Thus, a marriage like that of Petitioners Nos.1 and 2, being validly registered under US law, must necessarily meet the requirements of the term 'registered' under Section 7A(1)(d) of the Citizenship Act.

It is an equally settled principle of law that the Court cannot supply a *casus omissus* into a statute by judicial interpretation, except in circumstances of clear necessity, when the reasons for the same are found within the four corners of the statute in question itself. It is submitted that in the case of Section 7A(1)(d) of the Citizenship Act, all that is required is that the marriage must be registered and subsisting for 2 years before the spouse can seek to apply for OCI status. There is no requirement that the marriage must be in accordance with Indian law, or that it must be registered under Indian law. In fact, all the Indian statutes pertaining to registration of marriages, require either the marriage to be performed in India (such as the Special marriage Act), or at least one party to be a citizen of India (such as the Foreign Marriage Act). There is no provision regarding registration of marriages between an OCI (non-citizen) card holder and a foreigner. Yet Section 7A(1)(d) of the Citizenship Act specifically allows for such a spouse of an OCI Card

holder to apply for OCI status in India provided the marriage is registered and has subsisted for two years prior to the application. The only other proviso to the same is that the spouse shall be subjected to prior security clearance by a competent Authority in India.

In fact Section 7A(1)(d) was enacted in 2015, i.e. after the enactment of the Foreign Marriage Act, Special Marriage Act, and other marriage laws in India. Thus, it is submitted that the omission of any conditions qua the gender/sex/sexuality of the parties in the marriage between the OCI card holder and spouse of foreign origin is a *casus omissus* that cannot be supplied by judicial interpretative process, and even a same sex spouse of such an OCI Cardholder must be eligible to apply for OCI status.

RECOGNITION OF SAME-SEX AND/ OR QUEER MARRIAGE UNDER THE FOREIGN MARRIAGE ACT, 1969 AND THE SPECIAL MARRIAGE ACT 1954

It is also well settled that where there's a void in domestic law on an issue, the courts may rely on international law and foreign judgments to interpret the law in a manner that upholds and protects fundamental rights. It is submitted that across most jurisdictions that place a premium on the rights to equality, dignity, privacy and liberty, Courts have led the way in ensuring legal recognition of same sex marriages. Further, it may be noted that the starting point of such legal recognition, has been the obligation as interpreted by the Courts, of a State to recognize/ license/ register same sex marriages performed and validly recognized in other jurisdictions.

For instance, the US Supreme Court in *Obergefell v. Hodges, Director, Ohio Department of Health* 576 U.S. 644 (2015) (‘*Obergefell’)*, held that the equal protection clause of the US Constitution, i.e. the 14th Amendment, would require a State to license a marriage between a same-sex couple when the said marriage was lawfully performed and licensed out of the State in question. Significantly, even though same sex marriages were not technically recognized in Israel, the Israeli Supreme Court in *Yossi Ben-Ari v. Director of Population Administration, Ministry of Interior, Interior [2006] (2) IsrLR 283* (‘*Yossi Ben-Ari’*), held that same sex marriages validly performed between Israeli citizens abroad, must be registered by the registration official at the population registry in Israel, who is not competent to examine whether the said marriage conforms to Israeli law. It is submitted that similarly, in the case of Section 7A(1)(d) of the Citizenship Act, there is no power to examine whether the marriage in question is in accordance with substantive Indian law or not – and as long as the marriage is validly registered in the jurisdiction where it was performed and the other conditions of the provision are met, the foreign origin spouse is entitled to apply of OCI status.

The right to equality and equal protection of laws under Article 14 as well as the right to life and personal liberty under Article 21 of the Constitution of India are guaranteed to all persons, including foreigners. The right to marry a person of one’s choice as an essential component of the right to autonomy, privacy within Article 21 has been recognized by a catena of judgments in India as well as by foreign courts. Specifically, the right to legal recognition of same sex or non-heterosexual marriages has also been upheld as a fundamental right in a

number of judgments by foreign courts, such as the Supreme Court of the United States and the Constitutional Court of South Africa. As per a catena of judgments, including those by the Hon'ble Supreme Court of India in the cases of ***Navtej Singh Johar Vs. Union of India (*****2018) 10 SCC 1** and the judgment in ***Justice K.S.Puttaswamy vs. Union of India*** **(2017) 10 SCC 1**, the Constitution is a transformative living document that must adapt with changing times and the court must act as a Constitutional invigilator to ensure social justice. These judgments, as well as those by foreign courts prohibit the State from discriminating against persons on the basis of gender or sexual orientation. It is submitted that the right to legal recognition of marriage is the source for various other rights and privileges. For example,

(i) spousal privilege under Section 122 of the Evidence Act, 1872 protects married couples from being compelled to disclose communications between the spouses during the course of the marriage;

(ii) under the CCS (Pension) Rules, 1972 the spouse is entitled to a family pension after the death of their spouse who was working as a civil servant

(iii) the Pradhan Mantri Shram Yogi Maandhan Yojana, passed under the Unorganized Workers' Social Security Act, 2008 is a voluntary pension scheme for unorganised workers that gives minimum assured pension of Rs. 3000/- after a subscriber attains 60 years of age. The scheme allows the spouse of the beneficiary to receive half the pension as family pension if the beneficiary passes away.

(iv) Section 39(7) of the Insurance Laws (Amendment) Act, 2015, accords nominees who are immediate family members such as spouse,

parents or children the status of beneficial nominee. If any of these persons are made a nominee, the death benefit will be paid to these persons and other legal heirs will have no claim over the money.

The right to OCI status of the Petitioner No. 2 is one such right. Deprivation of the right to legal recognition of marriage hinders members of the queer, LGBTQIA+ community from exercising these other rights. In ***Navtej Singh Johar,*** the Hon'ble Supreme Court acknowledged that history owes an apology to the LGBT community for the tremendous suffering inflicted upon them.

Thus, it is most respectfully submitted that upholding the fundamental right to legal recognition of marriage for the queer, LGBTQIA+ community would ensure that they are not only allowed peaceful existence without interference by the State, but in furtherance of our transformative constitution, it would bring the Petitioners and the queer community closer to the rights of full personhood. It would thus be an inclusive and progressive realisation of their rights, in line with the landmark judgments by the Hon'ble Supreme Court of India in ***NALSA***, ***Navtej Singh Johar*** and ***Puttaswamy***.

In the words of Petitioner No.3, Mr. Mario Leslie Dpenha:

"As a queer person, I have grown up in an India where — for the greater part of my life — my sexuality was criminalized, my personhood was shamed, my choices were circumscribed and my citizenship was rendered second-class, because of Sec. 377. Being queer also made me realize that there were others far worse off than me, who also faced severe humiliation and daily violence because of their identities. Growing up, I learned about and was deeply saddened by the story of

Leela Namdeo and Urmila Srivastava, two female police officers in Madhya Pradesh. In 1987, they exchanged garlands and began living together as spouses, an act that led to their dismissal from service. Their yearning to live unhindered lives of respect led these women into conflict with the laws and social conventions of their time. Their queerness, thus, became the basis for their exclusion from the principle of "equal dignity in the eyes of the law.

This equal dignity before the law — either as the decriminalization of consensual sexual acts between adults, or the recognition of the fundamental right of citizens to choose their own gender to love or marry — has always been a cause close to my heart. There, however, still remain significant impediments to achieving such equality of dignity, especially in spheres related to intimate decisions involving one's choice of partner. I yearn for a day when that is no longer the case, and every person of our country has the right to consensually choose the spouse of their choice, and enjoy the rights guaranteed by our Constitution"

05.07.2021 Hence the present petition.

LIST OF DATES AND EVENTS

Date	Event
2001	The Petitioner Nos. 1 and 2 met in New York, fell in love and entered into a relationship as a same sex couple.
January, 2002	The Petitioner No. 2 made his first trip to India, to meet with the Petitioner No. 1's extended family and friends. Since then, the Petitioner No. 2 has had multiple business visas and has visited India many times.
2005	The Petitioner No. 2's first business visa issued for 1 year in Washington, DC.
11th April, 2005	MHA, vide its notification No. 25022/17/05-F.I. allowed multi entry, lifelong visa for journey to OCIs,
October, 2006	The Petitioner No. 2's multi-year visa issued in Washington DC for a five year period.
2011	The Petitioner No. 1, a Canadian citizen became an OCI Cardholder.
April, 2012	The Petitioner No. 2's second multi-year visa was issued in New York.
6th August, 2012	The Petitioner No. 1 and 2 were married in New York. A certificate of registration of marriage dated 6th August, 2012 was issued to them by the Office of the City Clerk, New York, and an apostille certificate of the same date was issued by the Special Deputy Secretary of State, New York.

3rd September, 2018	The Supreme Court of India legalised the right to love and to a partner of choice by decriminalising consensual sexual acts between adult persons of the same sex vide its judgment in ***Navtej Singh Johar Vs. Union of India (2018) 10 SCC 1***
15th November, 2019	The Ministry of Home Affairs, Foreigners Division released a **notification F. No. 26011/Misc./47/2019-OCI** dated 15.11.2019 with Frequently Asked Questions ("FAQs") and answers to the same by the Ministry.
22nd May, 2020	As per the notification dated 22.05.2020 by MHA, due to visa and travel restrictions imposed to contain the spread of Covid 19, only certain categories of OCIs were being allowed entry into India.
8th October, 2020	This Hon'ble Court took up the petition of ***Mr. Vaibhav Jain & Anr. Vs. Union of India & Ors. W.P. (C) 7657 of 2020***. A number of other petitions seeking legal recognition of same sex marriages under different Acts were also taken up by this Hon'ble Court around this time.
21st October, 2020	The MHA had vide notification no. 25022/24/2020-F.V./F.I dated October 21, 2020 allowed, during the pandemic, entry inter alia of OCI and PIO cardholders by water routes or flights under bilateral travel arrangement schemes (e.g. Vande Bharat) or non-scheduled commercial flights as allowed by the Ministry of Civil Aviation. The MHA, then by another notification No. 26011/Misc./83/2020-OCI on the same date, i.e. October 21, 2020 re-allowed multiple entry

	lifelong visa granted for any purpose in terms of the earlier notification dated 11th April, 2005 issued by the MHA.
1st March, 2021	Petitioner No.3 filed RTIs with the MHA, MHA Foreigners Division and the MEA, Consular, Passport and Visa ("CPV") Division to ascertain the legal position on the Petitioner No. 2's (and others like him) eligibility to apply for OCI status.
4th March, 2021	The MHA, Foreigners Division, vide Notification F. No. 26011/CC/05/2018-OCI declared that OCIs shall be entitled to grant of multiple entry lifelong visa for visiting India for any purpose.
10th March, 2021	The MHA, Foreigners Division replied to the RTI by Petitioner No.3, Mr. Dpenha, transferring it to the MEA, CPV Division.
16th March, 2021	The MEA, CPV Division replied to the RTI by Petitioner No.3, Mr. Dpenha, transferring it to the MHA, Foreigners Division.
30th March, 2021	The MHA, Foreigners Division, reissued the same reply that it had on 16th March, 2021, a second time vide replies dated 30th March, 2021 to the RTI Application of Petitioner No.3, Mr. Dpenha, including the one which was transferred to it by the MEA, CPV Division.
31st March, 2021	The MEA, CPV Division transferred the RTI of Petitioner No.3, Mr. Dpenha that was sent back to it by the MHA

	Foreigners Division, to the Legislative Department of the Ministry of Law and Justice.
05.07.2021	HENCE THIS WRIT PETITION

IN THE HIGH COURT OF DELHI AT NEW DELHI
(EXTRAORDINARY CIVIL WRIT JURISDICTION)

WRIT PETITION (CIVIL) NO. _____ OF 2021

IN THE MATTER OF:

Mr. Joydeep Sengupta & Ors. .... PETITIONERS

VERSUS

Union of India & Ors. … RESPONDENTS

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA SEEKING INTER ALIA,

(I) A DECLARATION THAT SECTION 7A(1)(D) OF THE CITIZENSHIP ACT, 1955 APPLIES TO SAME-SEX OR QUEER SPOUSES AND;

(II) A DECLARATION THAT TO THE EXTENT THE FOREIGN MARRIAGE ACT, 1969 EXCLUDES SAME-SEX MARRIAGES OR QUEER MARRIAGES, IT VIOLATES ARTICLES 14, AND 21 OF THE CONSTITUTION OF INDIA AND;

(III) A DECLARATION THAT TO THE EXTENT THE SPECIAL MARRIAGE ACT, 1954 EXCLUDES SAME-SEX MARRIAGES OR QUEER MARRIAGES, IT VIOLATES ARTICLES 14, 15, 19 AND 21 OF THE CONSTITUTION OF INDIA AND;

(IV) A DECLARATION THAT THE RIGHT TO LEGAL RECOGNITION OF A SAME SEX MARRIAGE OR QUEER MARRIAGE IS A FUNDAMENTAL RIGHT UNDER ARTICLES

14, 15, 19 AND 21 IRRESPECTIVE OF A PERSON'S GENDER, SEX OR SEXUAL ORIENTATION

MOST RESPECTFULLY SHOWETH:

1. The present Petition seeks inter alia, a declaration that a same-sex or queer spouse of foreign origin of an Overseas Citizen of India ('OCI') cardholder is entitled to apply for registration as an Overseas Citizen of India under Section 7A(1)(d) of the Citizenship Act, 1955, and the legal recognition of all same-sex or non-heterosexual marriages under the applicable secular statutes in India. The Petition is being filed by (i) a same sex couple (Petitioners No. 1 and 2) married in New York, with Petitioner No.1 being an Overseas Citizen of India, and Petitioner No.2 being his American husband and (ii) Petitioner No.3, an Indian citizen and queer rights activist. Through the present Petition the parties seek marriage equality as an essential part of the fundamental rights to equality, life and freedom to love and commit to one's person of choice.
2. The Respondent No. 1 is the Union of India through the Ministry of Home Affairs. The Foreigners Division of the Respondent No. 1 is the nodal authority re: Overseas Citizenship of India. The Respondent No. 2 is the Consulate General of India, New York, and is the concerned Indian mission/post which granted the Petitioner No. 2's last visa. It is also the Indian mission which granted Petitioner No. 1 his OCI card. It is the authority which can grant OCI status to the Petitioner No. 2. The Respondent No. 3 is the Union of India through the Ministry of External Affairs,

Consular, Passports and Visa Division which is the authority that holds charge over the consulates and embassies of the Government of India across the world including the Consulate General of India, New York, USA.

3. **FACTS:**

(i) The Petitioner Nos. 1 (Indian born Canadian citizen and OCI card holder) and 2 (American citizen) are a married same-sex couple resident in Paris, France. The Petitioner Nos. 1 and 2 met and fell in love in New York in 2001 and have been in a loving relationship for nearly 20 years. The Petitioner Nos. 1 and 2 got married in New York on August 6, 2012. The Petitioner Nos. 1 and 2 are recognized as a legally married couple in the U.S., France, and Canada – the three countries where they have primarily lived and worked in the last twenty years. A certificate of registration of marriage dated 6th August, 2012 was issued to them by the Office of the City Clerk, New York, and an apostille certificate of the same date was issued by the Special Deputy Secretary of State, New York. The Petitioner Nos. 1 and 2 also had a civil ceremony of their marriage at the City Hall in New York City. A scanned true copy of the certificate of registration of marriage along with apostille certificate of the Petitioner Nos. 1 and 2 is annexed herewith as **Annexure P-1 (Colly)**. True copies of photographs of the civil ceremony of the marriage of the

Petitioner Nos. 1 and 2 at the City Hall in New York City are annexed herewith as **Annexure P-2 (Colly).**

(ii) The Petitioner No. 1 is a Canadian citizen and an Overseas Citizen of India ("OCI"). He was an Indian citizen at birth and he grew up knowing he was gay, and that his right to love and marry was illegal. Education and work took Petitioner No. 1 abroad. He became an OCI cardholder in 2011. The Petitioner No. 1 is currently a resident of France. In addition to India, he has lived in multiple countries, including Canada, the United States, Spain, and France. Petitioner No. 1's parents and extended family all live in India. He continues to maintain longstanding family and professional ties to India, and has visited his Indian home regularly as an OCI holder since 2011. A scanned true copy of extract of the passport of the Petitioner No. 1 is annexed herewith as **Annexure P-3**. A scanned true copy of the OCI card of the Petitioner No. 1 is annexed herewith as **Annexure P-4**.

The Petitioner No. 1 is a lawyer admitted to the Bars of New York, Paris and Ontario, Canada. He specializes in cross-border investigations, compliance and regulatory matters for some of the world's largest financial institutions and global corporations. He has worked for two of the world's largest law firms in New York, Washington DC and Paris, as well as the Organisation for Economic Cooperation and Development (OECD) in Paris, and the Court of Appeal for Ontario in Toronto. He also serves as a member of the

Corporate Social Responsibility committee of the American Chamber of Commerce in Paris, a member of the board of advisors of a French Legaltech, and a member of the Board of Directors of United World Colleges France, a non-profit organization promoting educational exchange.

(iii) The Petitioner No. 2 is Petitioner No. 1's husband. He is a U.S. citizen, and a long-term resident of France. The Petitioner No. 2 has no legal status in India and has only been able to visit India after qualifying for various temporary visitor or business visas. The Petitioner No. 2's first trip to India was to meet with the Petitioner No. 1's extended family and friends in India in January 2002. Since then, the Petitioner No. 2 has also fostered professional ties in India, and has had multiple business visas and has visited India many times. His first business visa was issued in 2005, in Washington, DC. His first multi-year visa was issued October 2006, in Washington DC for 5 years. His second multi-year visa was from April 2012, issued in New York. In the last few years, the Petitioner No. 2 has used online e-visas for multiple professional and family visits to India. He has had long term professional relationships with business partners in the microfinance field, which have included financial institutions, the Indian government and non-governmental organizations. Indeed if the Petitioner No. 2's application for OCI status is rejected, he reasonably apprehends being caused serious prejudice to his professional work and family obligations through rejection

of visas. This, at a time he is expecting a baby in July 2021 and will need to spend time in India with family and reach them at short notice if required.

A scanned true copy of the passport of Petitioner No. 2 is annexed herewith as **Annexure P-5**. Scanned true copies of the Visas of the Petitioner No. 2 are annexed herewith as **Annexure P-6 (Colly).**

(iv) The Petitioner No. 2 is an economist who specializes in microfinance and economic development. He has worked as an advisor to the Central Banks of several countries, development institutions and financial institutions both in his personal capacity as well as through his prior professional engagements as the Chief Operating Officer of Microfinance Information Exchange, a project initially developed at the World Bank in Washington DC. The Petitioner No. 2 has worked as an expert consultant in countries around the world. He has also taught advanced courses at Columbia University, Georgetown University, Yale University, Sciences Po Paris, among others.

(v) As such both Petitioners No.1 and 2 have longstanding relationships and connections in India. They are expecting a baby, their first child in July 2021 and would like their child to have regular relationship with his grandparents, one set of which (Petitioner No.1's parents), reside in India, for which they wish to apply for OCI status for Petitioner No.2 under Section 7A(1)(d) of the Indian Citizenship Act.

(vi) As per the notification dated 22.05.2020 issued by MHA, visa and travel restrictions were imposed to contain the spread of Covid 19, and only certain categories of OCIs were being allowed entry into India.

(vii) However, later, the MHA vide notification no. 25022/24/2020-F.V./F.I dated October 21, 2020 re-allowed entry of all OCI and PIO cardholders holding passports of any country as well as foreign nationals intending to visit India for any purpose (except those on tourist visas) by water routes or flights under bilateral travel arrangement schemes (e.g. Vande Bharat) or non-scheduled commercial flights as allowed by the Ministry of Civil Aviation. On the same date, the MHA, vide notification No. 26011/Misc./83/2020-OCI re-allowed multiple entry lifelong visa granted for any purpose in terms of the earlier notification dated 11th April, 2005. Thereafter, the MHA, Foreigners Division, vide Notification F. No. 26011/CC/05/2018-OCI dated 4th March, 2021 reiterated that OCIs shall be entitled to grant of multiple entry lifelong visa for visiting India for any purpose.

True copies of the MHA notifications dated 11th April, 2005, 22.05.2020, 21.10.2020 and 04.03.2021 are annexed herewith as **Annexure P-7 (COLLY)**

(viii) Hence, the Petitioner No. 2, can at this time, get a multiple entry lifelong visa for visiting India for any purpose only

by attaining OCI status. The Petitioner No. 2 requires this facility at the earliest so that he is able to travel freely to India where the Petitioner no.1's family lives – and is able to spend time with them with his spouse and the baby they are expecting

(ix) The Petitioner No. 3, Mr. Mario Dpenha, is an Indian citizen and queer rights activist. In his own words:

> *"I, Mario Leslie Dpenha, am an Indian citizen and proud queer man, passionate about our country, its history, and its Constitution. I am a PhD candidate at Rutgers University, NJ, USA, writing a dissertation on the history of hijras in eighteenth and early nineteenth century western India. I have worked in queer activism for over twenty years. I co-founded Anjuman, the first queer students' collective in Jawaharlal Nehru University, New Delhi in 2003. I was part of Voices Against 377, a coalition of NGOs and progressive groups which was party to the challenge to Sec. 377 in the Delhi High Court and Supreme Court. I am also a Fellow of the All India Professionals Congress, a department of the Indian National Congress. I lead its Committee for LGBTQIA+ Affairs in Maharashtra.*
>
> *As a queer person, I have grown up in an India where — for the greater part of my life — my sexuality was criminalized, my personhood was shamed, my choices were circumscribed and my citizenship was*

rendered second-class, because of Sec. 377. Being queer also made me realize that there were others far worse off than me, who also faced severe humiliation and daily violence because of their identities. Growing up, I read about and was saddened by the story of Leela Namdeo and Urmila Srivastava, two female police officers in Madhya Pradesh. In 1987, they exchanged garlands and began living together as spouses, an act that led to their dismissal from service. Their yearning to live unhindered lives of respect led these women into conflict with the laws and social conventions of their time. Their queerness, thus, became the basis for their exclusion from the principle of "equal dignity in the eyes of the law."

This equal dignity before the law — either as the decriminalization of consensual sexual acts between adults, or the recognition of the fundamental right of citizens to choose their own gender — has always been a cause close to my heart. There, however, still remain significant impediments to achieving such equality of dignity, especially in spheres related to intimate decisions involving one's choice of partner. I yearn for a day when that is no longer the case, and every person has the right to consensually choose the spouse of their choice, and enjoy the rights guaranteed by our Constitution"

(x) Petitioner No. 3 identifies as queer: "Queer" in the present petition, is used as an inclusive, umbrella term for Lesbian, Gay, Bisexual, Transgender, Intersex, Genderqueer, Asexual, and other persons who do not conform to the binary categories of "male" and "female", whose gender identity may not match their sex assigned at birth, and/or those who live outside the heterosexual norm prescribed by society.

(xi) Various articles written by the Petitioner No. 3 on the issues faced by the LGBTQIA+ community and their rights have been published. True copies of some of the published articles written by the Petitioner No. 3 on issues faced by the LGBTQIA+ community and their rights are annexed herewith as **Annexure P-8(Colly).**

(xii) The genesis of the present Petition lies in the Petitioner No. 2's desire to seek OCI status as the spouse of an OCI Card holder, in accordance with Section 7A(1)(d) of the Citizenship Act which reads as follows:

> *"7A. Registration of Overseas Citizen of India Cardholder.—*
>
> *(1) The Central Government may, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf,*

register as an Overseas Citizen of India Cardholder—

...

(d) ***spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section:***

Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India:

Provided further that no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this sub-section"

A true copy of the Citizenship Act, 1955 is annexed herewith and marked as **"Annexure P- 9 ".**

(xiii) The MHA, Foreigners Division has issued a notification with FAQs pertaining to OCI registration. At page 5, in Clause (7) of the answer to Question 7, the Ministry has laid down the evidence to be given by a spouse of foreign origin of an OCI Cardholder, while applying for OCI, namely, that the spouse must provide a registered marriage certificate. It further notes the guidelines that are applicable to the marriage certificate being submitted. If the marriage is solemnized in India, the marriage certificate issued by the Marriage Registrar is required; if the marriage is solemnized in a foreign country, it should be apostilled/ certified by the concerned Indian mission or post. A true copy of relevant extracts of the notification F. No. 26011/Misc./47/2019-OCI dated 15.11.2019 with Frequently Asked Questions ("FAQs") and answers to the same issued by the Ministry of Home Affairs, Foreigners Division is annexed herewith as **Annexure P-10**.

(xiv) Before applying for OCI status, the Petitioner Nos. 1 and 2 came to know of various petitions pending before this Hon'ble Court and other courts on the issue of legal recognition of same sex marriages in India. One of the petitions, which was available in the public domain, ***Mr. Vaibhav Jain & Anr. Vs. Union of India & Ors. W.P. (C) 7657 of 2020,*** first taken up by this Hon'ble Court on 8th October, 2020 pertains to a refusal by the Consulate General of India, New York (also the Respondent No. 2 in the present case) to register the marriage of a same sex couple under the Foreign Marriage Act, 1969, even though

the Petitioners in that case were already legally married in the United States and had a valid marriage certificate. The reason cited by the Respondent No. 2 for non-registration, as per the petition by Mr. Vaibhav Jain and his partner was that there are no extant laws and provisions for registration of such a marriage (a same sex marriage) in India.

(xv) It is submitted that the Foreign Marriage Act, 1969 applies only to marriages where at least one of the parties is an Indian citizen. Hence, it does not apply to the marriage of the Petitioner Nos. 1 and 2. As per the MHA, Foreigners Division, a registered marriage certificate of a marriage solemnized in a foreign country is on its own sufficient to enable an OCI cardholder's spouse of foreign origin to apply for OCI status, as long as the Indian mission/post certifies/apostles the marriage certificate. Without prejudice to the same, it is pertinent to note that Section 23 of the Foreign Marriage Act, 1969 provides that the Central government may declare, vide notification in the official gazette that the marriages solemnized under the law in force in a foreign country shall be recognized by courts in India as valid if the law in such a foreign country contains provisions similar to those contained in the Foreign Marriage Act, 1969.

(xvi) In order to ascertain the legal position on the issue of eligibility of the Petitioner No. 2 to apply for OCI, the Petitioner Nos. 1 and 2 contemplated filing RTIs. Since

neither of them is an Indian citizen, they approached the Petitioner No. 3, a citizen of India, to file the RTIs on their behalf. Thus Petitioner No.3 filed three RTIs dated 1st March, 2021. One RTI was filed with the Ministry of Home Affairs ("MHA"), one with the Ministry of Home Affairs, Foreigners Division and one with the Ministry of External Affairs ("MEA"), Consular Passport and Visa ("CPV") Division. RTIs were filed with the MHA and MHA Foreigners Division since they are the nodal authorities for OCI. An RTI was also filed with the MEA CPV Division as the "Guide to Consular Services" available on the website of Ministry of External Affairs states that the CPV division of the MEA can assist OCI Cardholders under special circumstances. True copies of the RTIs dated 1st March, 2021 filed by the Petitioner No. 3 on behalf of the Petitioner Nos. 1 and 2 are annexed herewith as **Annexure P-11 (Colly)**.

(xvii) The Information sought was common in all three RTIs, which was as follows

*"**4. Information Sought :***

(1) *A spouse of foreign origin of an OCI card Holder is qualified to apply for an OCI card under Clause (d) of Section 7A of the Citizenship Act, 1955 if the marriage has been registered and has subsisted for a continuous period of at least two years preceding the presentation of the application. I request you to provide information*

on what is meant by 'registered' under Section 7A(d) of the Citizenship Act, i.e:

(i) Whether the marriage between the OCI card holder and spouse of foreign origin must be validly registered under the law in force of the country where the marriage was solemnized? or

(ii) Whether the marriage between the OCI card holder and spouse of foreign origin must be registered under Section 4 or Section 17 of the Foreign Marriage Act, 1969? (Prima facie, marriages under the Foreign Marriage Act appear to require atleast one party to be an Indian citizen, and I seek information on a fact situation where one party is an OCI Card Holder and the other is a foreigner); or

(iii) Whether the marriage between the OCI card holder and spouse of foreign origin must be registered under any other law for the time being in force in India, and if so, which law?

...

(2) *Under Section 23 of the Foreign Marriage Act, the Central Government is empowered to declare that marriages solemnized under the law in force in a particular foreign country as a valid marriage in India if it is satisfied that the law in*

the said foreign country contains provisions similar to those contained in the Foreign Marriage Act. In this regard, I request you to provide information on whether the Central Government has declared the marriage laws of any such foreign country as valid under Indian law under Section 23? If so, which foreign countries' marriages laws and marriages solemnized thereunder, have been recognized as valid under Indian law?"

(xviii) The MEA, CPV Division issued a reply dated 10th March, 2021 to the RTI filed with it, stating that the RTI application was being transferred to the MHA since the subject matter pertained to the MHA. In this regard, the reply stated,

"The RTI application is being transferred to Ministry of Home Affairs under Section 6 (3) (ii) of the RTI Act, 2005 as the subject matter pertains to them. You are requested to contact MHA for further correspondence in the matter."

Thereafter, the MHA, Foreigners Division issued a reply dated 16th March, 2021 stating:

"2. For the information sought in Point No. 1, it is intimated that Information sought by you is in the form of query/ seeking opinion, clarification and hence it does not constitute information as defined in section 2(f) of the RTI Act, 2005. However, you

may refer to the OCI cardholder brochure, which may be accessed through the website link: https.//www. mha.gov.in/sites/default/files//Brochure_OCI_151120 19.pdf.

3. For the information sought in Point No. 2, it is intimated that the information sought closely relates to the Ministry of External Affairs. Therefore, it is being transferred to Ministry of External Affairs under Section 6(3) of the RTI Act, 2005.

True copies of the reply dated 10th March, 2021 issued by the MEA CPV Division and the reply dated 16th March, 2021 issued by the MHA Foreigners–Division to the RTI Applications are annexed herewith as **Annexure P-12(Colly)**.

xix. Thereafter, the Petitioner No. 3 received two responses from the MHA, Foreigners Division, both dated 30th March 2021. It appears that one of the replies from the MHA, Foreigners division was in response to Petitioner No. 3's RTI application addressed to it, while the other was a response to the RTI application transferred to the MHA, Foreigners Division from the MEA. The content of both these responses was identical. The RTI responses dated 30th March 2021 from the MHA, Foreigners Division stated,

"2. For the information sought in Point No. 1, it is intimated that Information sought by you is in the form of query/ seeking opinion, clarification and hence it does not constitute information as defined in

section 2(f) of the RTI Act, 2005. However, you may refer to the OCI cardholder brochure, which may be accessed through the website link: https://www.mha.gov.
in/sites/default/files/Brochure_OCI_15112019.pdf.
3. For the information sought in Point No. 2, it is intimated that the information sought closely relates to the Ministry of External Affairs. Therefore, it is being transferred to Ministry of External Affairs under Section 6(3) of the RTI Act, 2005."

True copies of the replies dated 30th March, 2021 issued by the MHA, Foreigners Division to the RTIs are annexed herewith as **Annexure P-13 (Colly).**

xx. The Petitioner No. 3 received a reply dated 31st March, 2021 from the MEA, CPV Division, in response to the RTI applications that had been re-transferred to the MEA from the MHA, Foreigners Division. The said reply dated 31.03.2021stated that the information sought was not available with it and transferred the RTI to the Legislative Department of the Ministry of Law and Justice.

A true copy of the reply dated 31st March, 2021 issued by the MEA, CPV Division to the RTI Application is annexed herewith as **Annexure P-14**

xxi. Therefore, no effective response has been received to the Petitioners' queries – and the Ministries kept transferring the RTIs back and forth. The answers to the queries in the RTI are

also not available in the brochure on OCI available on the MHA website that the MHA, Foreigners Division has asked Petitioner No.3 to refer to in its replies to his RTI.

xxii. The Respondent No. 2 is the authority which issues visas to the Petitioner No. 2 in the present petition. The Respondent No. 2 has already categorically refused to register a same sex marriage in Mr. Vaibhav Jain's case on the ground that there are no extant laws and provisions pertaining to such a marriage in India. The law in India is silent on the legal recognition of same sex marriages, and a number of petitions on the issue are pending before this Hon'ble Court itself and before other courts in India. Therefore, if the Petitioner No. 2 applies to the Respondent No. 2 for OCI as Petitioner No. 1's spouse, under Section 7A(1)(d) of the Citizenship Act, 1955, he fears rejection of the same. The Respondent No. 2 may also refuse to apostle/certify the registered marriage certificate of the Petitioner Nos. 1 and 2, as was done in the case of Mr. Vaibhav Jain. Rejection of the application for OCI status may further create problems for issuance of visas to him by Respondent No. 2 in the future.

4. Thus, the Petitioners Nos. 1 and 2 have no other choice but to approach this Hon'ble Court for relief. Petitioner No. 3 seeks the said reliefs as a proud queer rights activist deeply embedded in the movement to secure equal rights and personhood for all LGBTQIA+ persons in India. The reliefs sought by the present petition from this Hon'ble Court would not only be in the interest of the Petitioner Nos. 1 and 2 by rendering the Petitioner No. 2

officially eligible to apply for OCI, they would also ensure the protection of the fundamental right of marriage within the ambit of Article 21 of the Constitution of India, to LGBTQIA+ persons and would secure various other rights stemming from a legally recognized marriage for them. Not granting these rights to same sex or non-heterosexual couples, which are otherwise available to heterosexual couples is discriminatory. The terms same-sex marriage or non-heterosexual marriages used throughout this Petition are meant to be analogous to each other and include any marriage between two persons of the same sex, two transgender persons, between a man and a transgender person or between a woman and a transgender person ("transgender" here refers to the term granted legal recognition by the NALSA judgment, which includes non-binary persons, intersex persons etc.) Thus, this Petition is also in public interest.

GROUNDS:

SECTION 7A(1)(d) OF THE CITIZENSHIP ACT , 1955 MAKES ALL FOREIGNER SPOUSES OF OCI CARDHOLDERS ELIGIBLE FOR OCI CARDS

A. Because the Citizenship Act, 1955 does not specify that only heterosexual spouses of different sex and gender will be eligible for OCI cards under Section 7A(1)(d):

7A. Registration of Overseas Citizen of India Cardholder.—

(1) The Central Government may, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf, register as an Overseas Citizen of India Cardholder—

.....

(d) spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section:

Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India:

Provided further that no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this sub-section.

B. Because it is a settled principle of law that the Court cannot supply a *casus omissus* into a statute by judicial interpretation, except in circumstances of clear necessity, when the reasons for the same are found within the four corners of the statute in question itself. It is submitted that in the case of Section 7A(1)(d) of the Citizenship Act, all that is required is that the marriage must be

registered and subsisting for 2 years before the spouse can seek to apply for OCI status. There is no requirement that the marriage must be in accordance with substantive Indian law, or that it must be registered under Indian law. In fact, all the Indian statutes pertaining to registration of marriages, require either the marriage to be performed in India (such as the Special marriage Act), or atleast one party to be a citizen of India (such as the Foreign Marriage Act). There is no provision regarding registration of marriages between an OCI (non-citizen) card holder and a foreigner. Yet Section 7A(1)(d) of the Citizenship Act specifically allows for such a spouse of an OCI Card holder to apply for OCI status in India provided the marriage is registered and has subsisted for two years prior to the application. The only other proviso to the same is that the spouse shall be subjected to prior security clearance by a competent Authority in India. Section 7A(1)(d) was enacted in 2015, i.e. after the enactment of the Foreign Marriage Act, Special Marriage Act, and other marriage laws in India. Thus, it is submitted that the omission of any conditions qua the gender/sex/sexuality of the parties in the marriage between the OCI card holder and spouse of foreign origin is a *casus omissus* that cannot be supplied by judicial interpretative process, and even a same sex spouse of such an OCI Cardholder must be eligible to apply for OCI status.

C. Because the Foreign Marriage Act ('FMA') applies to marriages of Indian citizens outside India, and does not apply to OCI card holders (like the Petitioner No.1 herein) marrying foreigners (like the Petitioner No.2) abroad. The FMA distinguishes between spouses on the basis of their gender. Chapter 2 concerns

solemnization of foreign marriages – Section 4 pertains to the solemnisation of a marriage by an Indian citizen before a Marriage Officer, where registration is sought at the first instance. One of the conditions for such marriages, under Section 4(1)(c) specifically requires the parties to be a 'bride' and a 'bridegroom', i.e., to be female and male.

D. Because Section 17 of the FMA (Foreign Marriage Act) pertains to marriages duly solemnized in a foreign country in accordance with the law of that country between parties of whom at least one was a citizen of India (Section 17(1)(a)). Under Section 17, such parties can seek to have their marriage registered by the Marriage Officer. It is explicit however, as stated in section 17(2), that "No marriage shall be registered under the section unless at the time of registration it satisfies the conditions mentioned in section 4."

E. Because FMA hence unconstitutionally mandates that the parties to a foreign marriage , one of them is an Indian citizen, must be

(i) Male and female, and hence of binary gender and

(ii) Heterosexual

F. . Because the Hon'ble Supreme Court in *NALSA* has held that there is a positive judicial obligation to further the rights of "non-binary" genders and indeed all genders, and the FMA militates against the same.

G. Because the FAQs pertaining to eligibility in applying for OCI available on the website of the Ministry of External Affairs ("MEA") and the answers to them do not bar a spouse of an OCI

cardholder who is applying for OCI on the basis of gender, sex or sexuality. The relevant FAQs and the answers to them given by the MEA are as follows:

"4. Can the spouse of the eligible person apply for OCI?

Ans. Yes, if he/she is eligible in his/her own capacity.

...

6. In what form should a person apply for an OCI and where are the forms available?

Ans. A family consisting of spouses and upto two minor children can apply in the same form i.e. Form XIX, which can filed online or downloaded from our website
http://mha.nic.in/ForeigDiv/ForeigHome.html."

True copy of The FAQs pertaining to eligibility in applying for OCI available on the website of the Ministry of External Affairs ("MEA") and the answers to them are annexed herewith as **Annexure P-15.**

H. This Hon'ble court in order dated 10.04.2020 in *Vaibhav Jain v. Union of India*, held that in its prima facie view, the provisions of the Special Marriage Act, 1954 distinguish in terms of gender identity and sexual orientation. They found that the provisions relating to solemnisation of marriage and degrees of prohibited relationships in the Special Marriage Act, 1954 referenced males and females. This is under Section 2(b), Schedule I and Section 4(c). Sections 12, 15, 22, 23, 25 and 27 also use the terms "husband" and "wife" when providing for the solemnisation, registration and nullity of marriage. Section 27(1)(1A) and 31 provide special conditions for the "wife" while Sections 36 and

37 only provide for alimony to be given to a "wife" by a "husband". Section 44 which provides for punishment for bigamy uses the words "wife" and "husband". Schedules I, II, III, IV and V refer to, "widow", "widower" "bride", "bridegroom", "husband" and "wife". In the context of the Foreign Marriage Act, 1969 the division bench observed that "bride" and "bridegroom" in their prima facie view referred to women and men. This, if applied to the provisions of the Special Marriage Act, 1954 would also restrict the applicability of this act to just males and females. Petitioner No. 3 in the present petition, who identifies as queer will not be able to register their marriage under the Special Marriage Act, 1954 which restricts its applicability only to heterosexual marriages.

I. Because it is also well settled that where there's a void in domestic law on an issue, the courts may rely on international law and foreign judgments to interpret the law in a manner that upholds and protects fundamental rights. It is submitted that across most jurisdictions that place a premium on the rights to equality, dignity, privacy and liberty, Courts have led the way in ensuring legal recognition of same sex marriages.

"WHOSE MARRIAGE HAS BEEN REGISTERED": A MARRIAGE SOLEMNIZED AND REGISTERED IN A FOREIGN JURISDICTION IS ENTITLED TO BE LEGALLY RECOGNIZED IN INDIA :

J. Because it may be noted that the starting point of such legal recognition, has been the obligation as interpreted by the Courts, of a State to recognize/ license/ register same sex marriages performed and validly recognized in other jurisdictions. For instance, the US Supreme Court in ***Obergefell v. Hodges, Director, Ohio Department of Health 576 U.S. 644 (2015)*** (‘*Obergefell’)*, held that the equal protection clause of the US Constitution, i.e. the 14th Amendment, would require a State to license a marriage between a same-sex couple when the said marriage was lawfully performed and licensed out of that State.

K. Because even though same sex marriages were not technically recognized in Israel, the Israeli Supreme Court in ***Yossi Ben-Ari v. Director of Population Administration, Ministry of Interior, [2006] (2) IsrLR 283*** (‘*Yossi Ben-Ari’*), held that same sex marriages validly performed between Israeli citizens abroad, must be registered by the registration official at the population registry in Israel, who is not competent to examine whether the said marriage conforms to Israeli law. The petitioners in this case were five queer couples, all Israeli citizens who got married in Canada in accordance with Canadian law. Upon returning to Israel, they applied to the population registry to be registered as married. Their application was refused. They petitioned the court. The court allowed the petition and held that the purpose of the registry is merely statistical and that the registration official at the population registry is not competent to examine the validity of a marriage. The court held that when the registry official is presented with a marriage certificate, they are obliged to register

the applicants as married, unless such a registration would be manifestly incorrect. The court held that the "manifestly incorrect" exception did not apply in that case. The court did not accept the argument of the state that the registration of a homosexual couple as married is a registration tainted from manifest incorrectness. The court in this case did not rule upon the legal status of non-heterosexual marriages in Israel. However, it held that the purpose of the population registry was to record statistics and the role of the registration official was to collect statistical material for the purpose of managing the registry. The court held that the registration official should register in the population register what is implied by the public certificate that was presented to him by the petitioners, according to which the petitioners were married. The court accordingly directed the respondent to register the petitioners as married in the population register. Without prejudice to the submission that same-sex marriages should be granted legal recognition by Indian law, it is submitted that even in the present case, there is no reason for the state or its agencies to deny legal recognition of marriage to same-sex couples who are legally married in foreign jurisdictions and have valid marriage certificates. The Hon'ble Israeli Court held:

L. . *"23. Before we conclude, let us reemphasize what it is that we are deciding today, and what it is that we are not deciding today. We are deciding that within the context of the status of the population registry as a recorder of statistics, and in view of the role of the registration official as a collector of statistical material for the purpose of managing the registry, the registration official*

*should register in the population register what is implied by the public certificate that is presented to him by the petitioners, according to which the petitioners are married. We are not deciding that marriage between persons of the same sex is recognized in Israel; we are not recognizing a new status of such marriages; we are not adopting any position with regard to recognition in Israel of marriages between persons of the same sex that take place outside Israel (whether between Israeli residents or between persons who are not Israeli residents). The answer to these questions, to which we're giving no answer today, is difficult and complex. It is to be hoped that the Knesset can direct its attention to these, or some of them. The result is that we are making the order nisi absolute. The respondent shall register the petitioners as married in item 2(a)(7) of the population register."*Because it is submitted that similarly, in the case of Section 7A(1)(d) of the Citizenship Act, there is no power to examine whether the marriage in question is in accordance with Indian law or not – and as long as the marriage is validly registered in the jurisdiction where it was performed and the other conditions of the provision are met, the foreign origin spouse is entitled to apply of OCI status. Thus, the Consulate General of India, being the authority to apostle the Petitioner Nos.1 and 2's marriage certificate, should have no discretion or power to refuse such certification.

M. . Because consensual sexual acts between persons of the same sex have already been decriminalized by the Hon'ble Supreme Court of India in ***Navtej Singh Johar Vs. Union of India (2018) 10 SCC***

N. It is submitted that even though Indian law is silent on the recognition of same sex marriages, it is a settled principle that where a marriage has been solemnized in a foreign jurisdiction, the substantive law to be applied to such marriage or matrimonial disputes is the law of that jurisdiction. Hence, inter alia, the requirement in Section 7A(1)(d) that the marriage of the spouse of the OCI cardholder be registered refers to legal registration in the jurisdiction the parties were married in, and the substantive law of that jurisdiction is the only relevant law in this regard. Some of the judgments of the Hon'ble Supreme Court on this issue are as follows:

(i) **Y Narasimha Rao V. Y Venkata Lakshmi 1991 SCC (3) 451:**

"*20. From the aforesaid discussion the following rule can be deduced for recognising foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests*

the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

21. The aforesaid rule with its stated exceptions has the merit of being just and equitable. It does no injustice to any of the parties. The parties do and ought to know their rights and obligations when they marry under a particular law. They cannot be heard to make a grievance about it later or allowed to bypass it by subterfuges as in the present case. The rule also has an advantage of rescuing the institution of marriage from the uncertain maze of the rules of the Private International Law of the different countries with regard to jurisdiction and merits based variously on domicile, nationality, residence-permanent or temporary or ad hoc forum, proper law etc. and ensuring certainty in the most vital field of national life and conformity with public policy. The rule further takes account of the needs of modern life and makes due allowance to accommodate them. Above all, it gives protection to women, the most vulnerable section of our society, whatever the strata to which they may belong. In particular it frees them from the bondage of the tyrannical and servile rule that wife's domicile follows that of her husband and that it is the husband's domicilliary law which determines the jurisdiction and judges the merits of the case."

(ii) **Surinder Kaur Sandhu v. Harbax Singh Sandhu, AIR 1984 SC 1224**

*"10…**The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case.** The jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstances as to when the child, whose custody is in issue, is brought or for the time being lodged. To allow the assumption of jurisdiction by another State in such circumstances will only result encouraging forum-shopping. Ordinarily, jurisdiction must follow upon functional lines. **That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage.**"*

O. . Because therefore, a marriage like that of Petitioners Nos.1 and 2, being validly registered under US law, must necessarily meet the requirements of the term 'registered' under Section 7A(1)(d) of the Citizenship Act.

FUNDAMENTAL RIGHTS UNDER ARTICLES 14 AND 21 ARE AVAILABLE TO ALL PERSONS INCLUDING FOREIGNERS- LEGAL POSITION IN INDIA- RIGHT TO

CHOICE OF PARTNER IN MARRIAGE AND RIGHTS OF LGBTQIA+ PERSONS-

P. Because the fundamental rights guaranteed by Articles 14 and 21 are available to all persons including foreigners. A catena of judgments affirm the fundamental right to choice of partner in marriage as well as the rights of LGBTQIA+ persons, which must be read together and consistently:

(i) Per the judgment of Indu Malhotra, J in ***Navtej Singh Johar,*** the LGBTQIA+ community has already suffered grave injustice for centuries, due to delay in providing redressal for the ignominy they have suffered, stemming from society's ignorance in understanding that homosexuality is after all, a natural condition. This has resulted in a denial of fundamental rights to the community. It is most respectfully submitted that this Hon'ble Court, by granting legal recognition to same sex marriages would thus be taking a significant step towards remedying the injustice that LGBTQIA+ persons have long suffered. As has been held by the Hon'ble Supreme Court:

> *"644. History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to*

recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The misapplication of this provision denied them the Fundamental Right to equality guaranteed by Article 14. It infringed the Fundamental Right to non-discrimination under Article 15, and the Fundamental Right to live a life of dignity and privacy guaranteed by Article 21. "

(ii) The Hon'ble Supreme Court of India, in the case of ***Shafin Jahan vs. Asokan K.M. and Ors (2018) 16 SCC 368***, held that the right to marry a person of one's choice was integral and fell within Article 21 of the Constitution of India.

"84. A marriage can be dissolved at the behest of parties to it, by a competent court of law. Marital status is conferred through legislation or, as the case may be, custom. Deprivation of marital status is a matter of serious import and must be strictly in accordance with law. The High Court in the exercise of its jurisdiction under Article 226 ought not to have embarked on the course of annulling the marriage. The Constitution recognises the liberty and autonomy which inheres in each individual. This includes the ability to take decisions on aspects which define one's personhood and identity. ***The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core***

zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith*. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme. The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. In deciding whether Shafin Jahan is a fit person for Hadiya to marry, the High Court has entered into prohibited terrain. Our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audiences."*

(iii) The Supreme Court also held the right to choose and marry a person of one's choice as a component of the right to dignity within Article 21and that any infringement of this right would be a constitutional violation. In ***Shakti Vahini Vs. Union of India (2018) 7 SCC 192*** it was held:

"45. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. True it is, the same

is bound by the principle of constitutional limitation but in the absence of such limitation, none, we mean, no one shall be permitted to interfere in the fructification of the said choice. If the right to express one's own choice is obstructed, it would be extremely difficult to think of dignity in its sanctified completeness. ***When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can unequivocally be stated that they have the right and any infringement of the said right is a constitutional violation.*** *The majority in the name of class or elevated honour of clan cannot call for their presence or force their appearance as if they are the monarchs of some indescribable era who have the power, authority and final say to impose any sentence and determine the execution of the same in the way they desire possibly harbouring the notion that they are a law unto themselves or they are the ancestors of Caesar or, for that matter, Louis the XIV. The Constitution and the laws of this country do not countenance such an act and, in fact, the whole activity is illegal and punishable as offence under the criminal law."*

(iv) The Supreme Court, in the case of ***Navtej Singh Johar,*** while relying on ***Justice K.S.Puttaswamy,*** held that

individual autonomy is a component of the right to privacy and that sexual orientation is a reflection of autonomy, which is a part of an individual's identity. It is most respectfully submitted that in the present case, by granting legal recognition to same sex marriages, this Hon'ble Court would facilitate expression of sexual orientation for same sex couples. It would thus uphold their fundamental right to dignity, autonomy and human rights. As held in ***Navtej Singh Johar Vs. Union of India (2018) 10 SCC 1*** :

> "*136. While testing the constitutional validity of Section 377 IPC, due regard must be given to the elevated right to privacy as has been recently proclaimed in Puttaswamy (supra). We shall not delve in detail upon the concept of the right to privacy as the same has been delineated at length in Puttaswamy (supra). In the case at hand, our focus is limited to dealing with the right to privacy vis-à-vis Section 377 IPC and other facets such as right to choice as part of the freedom of expression and sexual orientation. That apart, within the compartment of privacy, individual autonomy has a significant space.* ***Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such an orientation or choice that reflects an individual's autonomy is innate to him/her. It is an inalienable part of his/her identity. The said identity under the***

constitutional scheme does not accept any interference as long as its expression is not against decency or morality. ***And the morality that is conceived of under the Constitution is constitutional morality.*** *Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society. Non-acceptance of the same would tantamount to denial of human rights to people and one cannot be oblivious of the saying of Nelson Mandela — —to deny people their human rights is to challenge their very humanity."*

…

"*245. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an insegregable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archival stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.*"

(vi) HMJ. D.Y. Chandrachud's opinion in ***Navtej Singh Johar*** has categorically held that members of the LGBTQIA+ Community are entitled to the full range of constitutional rights and liberties protected by the Constitution, choice of whom to partner with, not be discriminated against on the basis of sexual orientation, benefits of equal citizenship and equal protection of law. It is most respectfully submitted that the right to legal recognition of marriage falls within the ambit of these rights. The relevant para of the judgment is as follows:

"618 We hold and declare that:

618.1 Section 377 of the Penal Code, in so far as it criminalises consensual sexual conduct between adults of the same sex, is unconstitutional;

618.2 Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution;

618.3 The choice of whom to partner, the ability to find fulfilment in sexual intimacies and the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation;

618.4 Members of the LGBT Community are entitled to the benefit of an equal citizenship, without discrimination, and to the equal protection of law; and

618.5 The decision in Koushal stands overruled."

(v) The Madurai Bench of the Hon'ble High Court of Madras, in the case of ***Arun Kumar & Sreeja vs. The Inspector General of Registration, Chennai & Ors. WP(MD)No.4125 of 2019 and WMP(MD)No.3220 of 2019***, vide order dated 22.04.2019, held that a marriage between a man and a transwoman, both professing the Hindu religion was valid under the Hindu Marriage Act, 1955. The court expanded the expression "bride" in Section 5 of the Hindu Marriage Act, 1955 holding that the statute cannot have

static meaning and must be interpreted in light of the existing legal system. The Ld. single judge affirmed the right of marriage of a male and transgender person to marry, under Articles 14, 19(1)(a), 21 and 25 of the Constitution. The relevant para of the order is as follows:

> *"8. Sex and gender are not one and the same. A person's sex is biologically determined at the time of birth. Not so in the case of gender. That is why after making an exhaustive reference to the human rights jurisprudence worldwide in this regard, the Hon'ble Supreme Court held that Article 14 of the Constitution of India which affirms that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India would apply to transgenders also. 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. (Vide Para Nos.61 and 62 of the NLSA case). Article 19(1)(a) and Article 21 were expansively interpreted so as to encompass one's gender identity also.*

(vi) The Hon'ble High Court of Madras**,** vide a recent order dated 7th June, 2021 in the case of ***Ms. S. Sushma & Anr. Vs.***

Commissioner of Police, Greater Chennai Police & Ors. W.P. No. 7284 of 2021, held that after the judgment by the Supreme Court in ***Navtej Singh Johar v. Union of India 2018 (1) SCC 791***, there was no doubt that the fundamental right to life and personal liberty under Article 21 of the Constitution protects and guarantees to all individuals, complete autonomy over the most intimate decisions to their personal life, including their choice of partners. The court further held that the right to life and liberty encompasses the right to sexual autonomy and freedom of expression and that sexual autonomy is an essential aspect of the right of privacy under Article 21. The relevant para of the order by the Madras High Court is as follows:

> *"38.* ***After the decision in Navtej Singh Johar (cited supra), it is no longer open to doubt that Article 21 of the Constitution protects and guarantees to all individuals, complete autonomy over the most intimate decisions to their personal life, including their choice of partners. Such choices are protected by Article 21 of the Constitution as the right to life and liberty encompasses the right to sexual autonomy and freedom of expression. That apart, sexual autonomy is an essential aspect of the right of privacy which is another right recognised and protected under Article 21 of the Constitution. LGBTQIA+ persons, like cis persons, are entitled to their privacy and have a right to lead a dignified existence, which includes their choice of sexual***

orientation, gender identity, gender presentation, gender expression and choice of partner thereof. *This right and the manner of its exercise are constitutionally protected under Article 21 of the Constitution. Furthermore, the enactment of the Transgender Persons (Protection of Rights) Act, 2019 is a clear pointer that Parliament has recognized varying forms of sexual identity. This is clear from the definition of transgender in Section 2(k) which is defined to mean "a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.* ***Under these circumstances, this Court, as the sentinel on the qui vive, must exercise its jurisdiction to protect the rights of the petitioners, which are constitutionally guaranteed under Articles 14, 15 and 21."***

RIGHT TO MARRIAGE OF QUEER PERSONS

Q. Because queer persons' experiences and rights have been historically overlooked and denied legal recognition, but are in

fact central to their exercise of rights under Articles 14,15,19 and 21.

"Queer" in the present petition is used as an inclusive, umbrella term for people who identify as Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual, and other related identities (LGBTQIA+).

Such people may:

(i) may not conform to the fixed, socially prescribed categories of "male" and "female",

(ii) may have gender identities that do not match their biological sex at birth,

and/or

(iii) may live outside the heterosexual norm.

R. . Because after the judgements of the Hon'ble Supreme Court in ***NALSA v. Union of India*** **and** ***Navtej Singh Johar v. Union of India (2018) 10 SCC 1***, the normativity of cisgender identities and heterosexuality has been rejected by law, and there is legal recognition of gender identities and sexualities that exist on a spectrum. The denial of full citizenship rights, particularly the right to marriage goes against such legal recognition of identities outside the binary and heterosexuality. The Hon'ble Supreme Court recognised the inherent rights of such marginalised identities and the denial of such rights will amount to treating them as third-class citizens.

S. . Because the Hon'ble Supreme Court of India in the ***NALSA v. Union of India*** made clear that the rights of queer persons are to be recognised and as zealously protected as the rights of others as follows:

46. We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of "sex identity gender" of persons, and "guarantee to equality and non-discrimination" on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.

....

"***INDIA TO FOLLOW INTERNATIONAL CONVENTIONS***

...

53. Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare legislations. We have exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta principles. Reference was also made to legislations enacted in

other countries dealing with rights of persons of transgender community. Unfortunately we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the International Conventions to which India is a party and to give due respect to other non-binding International Conventions and principles. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized or safeguarded by laws made by the legislature. ***Article 21*** *has been incorporated to safeguard those rights and a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.*

....

55. In the United States, however, it is open to the courts to supersede or modify international law in its application or it may be controlled by the treaties entered into by the United States. But, till an Act of Congress is passed, the Court is bound by the law of nations, which is part of the law of the land. Such a 'supremacy clause' is absent in our Constitution. ***Courts in India would apply the rules of International law according to the principles of comity of Nations, unless they are overridden by clear rules of domestic law. See: Gramophone Company of India Ltd. v. Birendra Bahadur Pandey (1984) 2 SCC 534 and Tractor***

Export v. Tarapore & Co. (1969) 3 SCC 562, Mirza Ali Akbar Kashani v. United Arab Republic (1966) 1 SCR 391. In the case of Jolly George Varghese v. Bank of Cochin (1980) 2 SCC 360, the Court applied the above principle in respect of the International Covenant on Civil and Political Rights, 1966 as well as in connection with the Universal Declaration of Human Rights. India has ratified the above mentioned covenants, hence, those covenants can be used by the municipal courts as an aid to the Interpretation of Statutes by applying the Doctrine of Harmonization. But, certainly, if the Indian law is not in conflict with the International covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in the Indian conditions. The Interpretation of International Conventions is governed by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.

58. Article 51, as already indicated, has to be read along with Article 253 of the Constitution. ***If parliament has made any legislation which is in conflict with the international law, then Indian Courts are bound to give effect to the Indian Law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law.*** *In His Holiness Kesavananda Bharati Sripadavalvaru v. State of Kerala (1973) 4 SCC 225, it was stated that in view of Article 51 of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the*

light of United Nations Charter and the solemn declaration subscribed to it by India. ***In Apparel Export Promotion Council v. A. K. Chopra (1999) 1 SCC 759, it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law.*** *Reference may also be made to the Judgments of this Court in Githa Hariharan (Ms) and another v. Reserve Bank of India and another (1999) 2 SCC 228, R.D. Upadhyay v. State of Andhra Pradesh and others (2007) 15 SCC 337 and People's Union for Civil Liberties v. Union of India and another (2005) 2 SCC 436.*

59. ***In Vishaka and others v. State of Rajasthan and Others (1997) 6 SCC 241, this Court under Article 141 laid down various guidelines to prevent sexual harassment of women in working places, and to enable gender equality relying on Articles 11, 24 and general recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions, e.g., Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee.***

60. The Principles discussed hereinbefore on TGs and the International Conventions, including Yogyakarta principles, which we have found not inconsistent with the various

fundamental rights guaranteed under the Indian Constitution, must be recognized and followed, which has sufficient legal and historical justification in our country."

"***Article 14 and Transgenders***

61. Article 14 of the Constitution of India states that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/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, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country."

T. Because the Hon'ble Supreme Court in NALASA (supra) referred to its judgment in ***Anuj Garg v. Hotel Association of***

India (2008) 3 SCC 1 (paragraphs 34-35), wherein the court had held that personal autonomy includes both the negative right to not be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in, as follows:

"***Article 21 and Transgenders***

73. Article 21 of the Constitution of India reads as follows:

"21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law." Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".

...

75. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In Anuj Garg v. Hotel Association of India (2008) 3 SCC 1 (paragraphs 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India."

U. Because the Hon'ble Supreme Court, in the NALSA judgment, held that

"*83. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.*"

V. Because A.K. Sikri J of the Hon'ble Supreme Court, in his concurring opinion in the NALSA judgment, held that non-recognition deprived transgenders of various valuable rights and privileges otherwise available to citizens of India. It is submitted that the same rationale should apply to the present issue, since non-recognition of same-sex marriages deprives same-sex

couples of various rights and privileges. The relevant para of the NALSA judgment is as follows:

"*87. Indubitably, the issue of choice of gender identify has all the trappings of a human rights. That apart, as it becomes clear from the reading of the judgment of my esteemed Brother Radhakrishnan,J., the issue is not limited to the exercise of choice of gender/sex. Many rights which flow from this choice also come into play, inasmuch not giving them the status of a third gender results in depriving the community of TGs of many of their valuable rights and privileges which other persons enjoy as citizens of this Country. There is also deprivation of social and cultural participation which results into eclipsing their access to education and health services. Radhakrishnan,J. has exhaustively described the term 'Transgender' as an umbrella term which embraces within itself a wide range of identities and experiences including but not limited to pre- operative/post-operative trans sexual people who strongly identify with the gender opposite to their biological sex i.e. male/ female. Therein, the history of transgenders in India is also traced and while doing so, there is mention of upon the draconian legislation enacted during the British Rule, known as Criminal Tribes Act, 1871 which treated, per se, the entire community of Hizra persons as innately 'criminals', 'addicted to the systematic commission of non-bailable offences'.*"

W. Because the Hon'ble Supreme Court, in the NALSA judgment, held that human rights, being universally recognized exist irrespective of whether they are granted or recognized by the legal

and social system within which we live. These are thus "pre-legal rights", which are neither granted by people nor taken away by them. The court further delved into international human rights law and the two complementary principles that equality is founded upon within it, being non-discrimination and reasonable differentiation, as folows:

94. There is thus a universal recognition that human rights are rights that "belong" to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right- grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognized by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-legal rights. They are not granted by people nor can they be taken away by them.

95. In international human rights law, equality is found upon two complementary principles: non-discrimination and reasonable differentiation. The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of the TGs, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti- discrimination laws), but goes beyond in

remedying discrimination against groups suffering systematic discrimination in society. In concrete terms, it means embracing the notion of positive rights, affirmative action and reasonable accommodation."

MARRIAGE AS A RIGHT TO LIFE: UNDER ARTICLE 21 OF THE CONSTITUTION OF INDIA

X. Because the right to life guaranteed under Article 21 includes the right to autonomy and individual choice. The choice of a marital partner are part of an individual's autonomy. The constitution guarantees the right to lead a dignified life. J. Chandrachud in *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1*** spoke of the need of the State to recognise the capacity of an individuals to make exercise their autonomy removed from the expectations of society or stereotypes of immorality. This also affirms the right to exercise choices that may not be accepted by society. The relevant para of the judgment is as follows:

> *"474.* ***The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be***

construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them*.(...)"*

Y. Because the right to life guaranteed under Article 21 includes the right to privacy and dignity. This privacy allows an individual sovereignty over their own body. As acknowledged in *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1, family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. The intimate choice of an individual to enter into marriage with a queer or non-heterosexual partner is within their right to privacy and right to live with dignity. Justice Nariman in *Navtej Singh Johar v Union of India* ***(2018) 10 SCC 1*** citing the Hon'ble Supreme Court's judgement in *Justice K.S. Puttaswamy v. Union of India* recognised the right to make intimidate choices within the right to privacy and right to live with dignity. The relevant para of the judgment is as follows:

"350. Given our judgment in Puttaswamy (supra), in particular, ***the right of every citizen of India to live with dignity and the right to privacy including the right to make intimate choices regarding the manner in which such individual wishes to live being protected by Articles 14, 19 and 21.*** *it is clear that Section 377, insofar as it applies to same-sex consenting adults, demeans them by having them*

prosecuted instead of understanding their sexual orientation and attempting to correct centuries of the stigma associated with such persons."

Z. In *Justice K.S. Puttaswamy v. Union of India,* J. Chandrachud speaking for the majority held:

"271. We need also emphasise the lack of substance in the submission that privacy is a privilege for the few. Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individual."

AA. Because the right to privacy under Article 21 encompasses privacy with respect to family life. The right to marry of queer or

non-heterosexual persons as recognised as part of the law in the United States was cited in the judgement of the Hon'ble Supreme Court in *Justice K.S. Puttaswamy v. Union of India*, wherein the decision to marry someone forms part of the foundation of family and consequently is within the right to privacy in matters of family life. The relevant para of the judgment is as follows:

> *"194. In Obergefell v. Hodges 576 US - (2015), the Court held in a 5:4 decision that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy authored the majority opinion (joined by Justices Ginsburg, Breyer, Sotamayor and Kagan):* ***Indeed, the Court has noted it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society****."*

BB. ⁻. Because the recognition of the right to marry for queer persons under Article 21 does not violate the foundation of family unit in the country, but in fact re-enforces it. Currently, the framework of marriage denies the right to marry to persons of non-heterosexual orientations. The right to companionship and sexual intimacy of non-heterosexual persons under Article 21 was recognised in *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***. Marriage is only the social and legal recognition of this companionship and

sexual intimacy. Legal recognition of this relationship invites rights and liabilities for both parties. Indian courts have found similar rights and liabilities to exist even in live-in relationships that in the nature of marriages, recognising that it is the social circumstances that make a marriage. To deny non-heterosexuals the right to marriage, but recognise their right to intimacy, prevents them from having families and allows such relationships to exist like marriages without rights and liabilities.

CC. Because several high courts including this Hon'ble court have recognised the legitimacy of non-heterosexual relationships and marital partners after *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***, and accorded them protection under habeus corpus jurisdiction. The following is an illustrative list of such cases-

(i) Hon'ble Delhi High Court order dated 1.10.2018 in *Sadhana Sinsinwar & Anr. v. State & Ors* W.P. (Crl) 3005/2018.

(ii) Hon'ble High Court of Punjab and Haryana order dated 22.07.2020 in *Paramjit Kaur & Anr. v. State of Punjab* C.R.W.P. No. 5024 of 2020.

(iii) Hon'ble High Court of Gujarat, Ahmedabad order dated 23.07.2020 in *Vanitaben Damjibhai Solanki v. State of Gujarat* in Special Criminal Application No. 3011 of 2020.

(iv) Hon'ble Delhi High Court order dated 12.04.2019 in *Bhawna & Ors v State* W.P.(Crl) 1075/2019.

(v) Hon'ble Orissa High Court order dated 24.8.2020 in *Chinmayee Jena @ Sonu Krishna Jena v State of Odisha & other*. W.P.(Crl) 57/2020.

DD. Because when live-in relationships in the nature of marriage are recognised and live in relationships between queer partners have been recognised, the jurisprudence of the courts is leading towards the recognition of the inherent right to marriage of non-heterosexual persons. In order dated 12.6.2020 in *Madhubala v. State of Uttarakhand & Ors Paramjit Kaur* Habeas Corpus petition No. 8 of 2020, the Hon'ble High Court of Uttarakhand recognised that an individual has the right to choose with whom they share companionship and a home. The single judge held that consensual co-habitation between two individuals of the same gender identity is a right under Article 21 of the Constitution and it is the court's duty to protect the right to self-determination and freedom to choose their sexual orientation and partner.

> *"3. Incidentally the question, which arises in this writ petition filed for seeking a writ of habeas corpus is to the effect that whether two adult persons of same gender can be permitted to be in a relationship and further whether they can be permitted to live together, which is a wider a question already raised before various High Courts of the country involving a consideration of a question as to whether the liberty of a person, who had attained majority can be curtailed and one of the leading judgments on this*

aspect is that of as reported in AIR 2018 SC 346 'Soni Gerry vs. Gerry Douglas', wherein, the Hon'ble Apex Court has observed that "it needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. He or she is entitled to make his or her choice. The court can, so long as the choice remains, assume the role of parnis patriae. The daughter is entitled to enjoy her freedom as the law permits and the courts shall not assume the role of a super guardian being moved by any kind of sentiments of the mother or egotism of the father. We say so without any reservations."

*4. In view of the aforesaid dictum of the Hon'ble Apex Court it provides that even if the parties, who are living together though they are belonging to the same gender**; they are not competent to enter into a wedlock, but still they have got a right to live together even outside the wedlock. It would further be not out of pretext to mention that a live-in relationship has now being recognized by the legislature itself, which has found its place under the provisions of protection of women from Domestic Violence Act.***

5. The question is that, as to whether a person, who is alleged to be a detenue and produced before the court, if it is found by his or her independent choice

and it is seen that the person seeking the release from the illegal confinement, which is being imposed by the private persons therein, if in the proceedings of a writ, ***it is essential to remember that the song of liberty is to be sung with sincerity and at the exclusive choice of an individual is appropriately respected and conferred its esteemed status as the constitution guarantees, it was found that the social values and morals they do have their space, but they are not above the constitutional guarantee of freedom assigned to a citizen of a country****. This freedom is both a constitutional as well as a human right. Hence, the said freedom and the exercise of jurisdiction in a writ courts should not transgress into an area of determining the suitability of a partner to a marital life, that decision exclusively rests with the individual themselves that the State, society or even the court cannot intrude into the domain and that is the strength provided by our constitution, which lies in its acceptance of plurality and diversity of the culture.* ***Intimacy of marriage, including the choice of partner, which individual make, on whether or not to marry and whom to marry are the aspects which exclusively lies outside the control of the State or the Society. The court as an upholder of the constitutional freedom has to safeguard that such a relationship where there is a choice exclusively vested with a major person has***

to be honoured by the courts depending upon the statements recorded by the individual before the court*.*

6. ***In view of the above concept, this Court is in agreement that the consensual cohabitation between two adults of the same sex cannot in our understanding be illegal far or less a crime because its a fundamental right which is being guaranteed to the person under article 21 of the Constitution of India, which inheres within its ambit and it is wide enough in its amplitude to protect an inherent right of self determination with regards to one's identity and freedom of choice with regards to the sexual orientation of choice of the partner****. In such type of circumstances it is exclusively the statement recorded of the detenue, who is said to be wrongfully/illegaly confined and who is said to be having a consensual or a lesbian relationship with the petitioner, which becomes of a prime importance, to be considered while parting with the judgment. Since initially the parties were not present, hence, the detenue was directed to appear in person in the custody of the respondent police official and, hence, she was directed to be produced on the date fixed."*

In *Chinmayee Jena @ Sonu Krishna Jena v State of Odisha & other*., a transman and a woman sought protection from

the court from interference with their live-in relationship. They argued that even if they are not allowed to enter in wedlock, they have the right to live together outside the wedlock. The Hon'ble Orissa High Court after quoting relevant parts from *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1*** and *NALSA v. Union of India* held that;

13. Thus, taking into consideration the aforesaid authoritative pronouncements of the Hon'ble Supreme Court, there is hardly any scope to take a view other than holding that ***the petitioner has the right of self-determination of sex/gender and also he has the right to have a live-in relationship with a person of his choice even though such person may belong to the same gender as the petitioner.***

*14. Therefore, we allow the writ application (criminal) and direct that the petitioner and the daughter of the Opposite Party No.****5 have the right to decide their sexual preferences including the right to stay as live-in partners. The State shall provide all kind of protection to them, which are enshrined in Part-III of the Constitution of India, which includes the right to life, right to equality before law and equal protection of law.*** *Hence, we direct the Opposite Party No.2 to clear the way by taking appropriate administrative/police action to facilitate Rashmi to join the society of the petitioner.*

> *However, we are also alive to the apprehensions of the Opposite Party No.5, mother of the girl. Hence, we further direct that the petitioner shall take all good care of the lady as long as she is residing with him and that the Opposite Party Nos. 5 and 6 and the sister of the lady would be allowed to have a communication with her both over phone or otherwise. They have the right to visit the lady in the residence of the petitioner. The lady shall have all the rights of a woman as enshrined under the Protection of Women from Domestic Violence Act, 2005. The Opposite Party No.3, Inspector In-Charge of the Khandagiri Police Station, Khandagiri, Bhubaneswar shall obtain a written undertaking (to that effect) from the petitioner and shall keep a copy thereof in his office and send the original to this Court to form a part of this record. It should be sent in the address of the Registrar General of this Court.*

EE. Because an individual's rights under Article 21 cannot be fully realized unless an integral right like the right to marry is not restricted by the state. In *NALSA v. Union of India* (2014) 5 SCC 438, J. a two judge bench of the Hon'ble Supreme Court recognised the importance of civil rights being available to all persons. A denial of the basic civil right to marriage to non-heterosexual persons denies them the right to life and liberty under Article 21.

"119. Therefore, gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many ***rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on****.*

120. Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgenders. Now it's time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition that TG as third gender."

FF. Because marriage as a social institution has developed over time and heteronormative, cisgender and patriarchal norms that uphold only heterosexual marriages as valid marriages are outside the

purview of the Constitution. In *Joseph Sine v. Union of India* (2019) 3 SCC 39, a constitution bench of the Hon'ble Supreme Court recognised the change in the social institution of marriage and opined that law regulating this institution must reflect the right to privacy and dignity of citizens under the Constitution.

> *"200.* ***Marriage as a social institution has undergone changes****. Propelled by access to education and by economic and social progress, women have found greater freedom to assert their choices and preferences.* ***The law must also reflect their status as equals in a marriage, entitled to the constitutional guarantees of privacy and dignity****. The opinion delivered on behalf of four judges in Puttaswamy held thus:*
>
> > *"130…****As society evolves, so must constitutional doctrine. The institutions which the Constitution has created must adapt flexibly to meet the challenges in a rapidly growing knowledge economy. Above all, constitutional interpretation is but a process in achieving justice, liberty and dignity to every citizen****."*

MARRIAGE AS A RIGHT TO FREE EXPRESSION UNDER ARTICLE 19 (1)(a)

GG. Because disallowing non-heterosexual individuals from marriage is discrimination against individuals on the basis of their sexual

orientation and is violative of Article 19(1)(a). In *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1*** the Hon'ble Supreme Court has recognised that the expression of an individual's sexuality or sexual orientation or right to choose a partner is protected under Article 19(1)(a) and any discrimination on the basis of sexual orientation would violative Article 19(1)(a).

> *"268.7. Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who he/she gets attracted to.* ***Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right of freedom of expression****."*

HH. Because even non-heterosexuals have the right to express their intimacies, companionship and personality to the world and the law through marriage and restriction of such right would fall foul of Article 19(1)(a). The choice of a marital partner is an expression of choice and exercise of freedom under Article 19(1)(a). In *Shakti Vahini v. Union of India* (2018) 7 SCC 192, *Vikas Yadav v. State of UP* (2016) 9 SCC 541 and *Asha Ranjan v. State of Bihar* (2017) 4 SCC 397, the Hon'ble Supreme Court has recognised that the right to marry of two consenting adults is protected under Article 19 and cannot be restricted due to group

thinking or class honour. in In *NALSA v. Union of India*, the Hon'ble Supreme Court recognised that an individual's gender identity is a reflection of their personality and is part of Article 19(1)(a). The state is bound to protect and recognise these rights.

> *"72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or 42 interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons.* ***We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognise those rights****."*

II. Because the violation of Article 19(1)(a) due to non-recognition of non-heterosexual marriages is an unreasonable restriction and not protected by Article 19(2). The Hon'ble Supreme Court has held that reasonable restrictions cannot be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The restrictions on non-heterosexual marriages, denying a

whole community of people the right to marriage only on the basis of their gender identity or sexual orientation are excessive and arbitrary. In *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***, the Hon'ble Supreme Court found that Section 377 of the Indian Penal Code 1860 was violative of Article 19(1)(a) as it was an unreasonable restriction and did not harm public decency or morality.

> *"261. That apart, any display of affection amongst the members of the LGBT community towards their partners in the public so long as it does not amount to indecency or has the potentiality to disturb public order cannot be bogged down by majority perception.* ***Section 377 IPC amounts to unreasonable restriction as it makes carnal intercourse between consenting adults within their castle a criminal offence which is manifestly not only overboard and vague but also has a chilling effect on an individual's freedom of choice****.*
>
> *262.* ***In view of the test laid down in the aforesaid authorities, Section 377 IPC does not meet the criteria of proportionality and is violative of the fundamental right of freedom of expression including the right to choose a sexual partner****. Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass*

> ***the LGBT community.*** *It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their very natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved."*

JJ. Because the violation of Article 19(1)(a) due to non-recognition of queer marriages is not protected by allowances of restrictions on the basis of decency or morality in Article 19(2). Although non-heterosexual marriages may be seen as unnatural or indecent to certain communities or individuals, this cannot be extended to restrict the right to marry of non-heterosexual persons. In *S. Khushboo v. Kanniammal and another* (*2010) 5 SCC 600,* the Hon'ble Supreme Court held that while decency and morality may be grounds on which reasonable restrictions can be imposed, this should not be beyond a rational or logical limit and must be tolerant of unpopular social views.

> *"45.* ***Even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as `decency and morality' among others, we must lay stress on the need to tolerate unpopular views in the socio-cultural space****. The framers of our Constitution recognised the importance of*

safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, we must also promote a culture of open dialogue when it comes to societal attitudes.

46. Admittedly, the appellant's remarks did provoke a controversy since the acceptance of premarital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive.

> *47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform.* ***The law should not be used in a manner that has chilling effects on the freedom of speech and expression****."*

KK. Because one's right to marry an individual of their choice is a freedom accorded to every person under Article 19, and read with Article 21, their right to privacy allows them the inviolable right to determine how this freedom is exercised. An individual has the right to enter into a non-heterosexual marriage if they so choose in exercise of their freedom and rights under Article 19 and 21 of the Constitution. In *Justice K.S. Puttaswamy v. Union of India*, J. Chandrachud, speaking for the majority held,

> *"298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet,*

dignity and freedom are inseparably inter-twined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realization of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the

freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. ***The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised****. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood.* ***The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences****.* ***Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind****. The constitutional right to the freedom of religion*

under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

THE RIGHT TO MARRIAGE UNDER ARTICLES 14 AND 15 (1)

LL. Because Article 14 requires equal treatment of equally situated individuals and the state cannot deny queer persons the legal right to marriage, while similarly allowing heterosexual individuals the legal right to marriage. In *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***, the then CJI Dipak Mishra recognised the need to treat individuals belonging to the LGBT community equally

with the same human, fundamental and constitutional rights that other citizens have.

> *"255.* ***The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights in here in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law a****nd, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary."*

MM. Because in *NALSA v. Union of India*, the Hon'ble Supreme Court concluded that discrimination on the basis of gender identity or sexual orientation includes restrictions that deny equal protection of the law to such persons and directed compliance with constitutional rights of members of the transgender community. Persons with non-heterosexual sexual orientations deserve equal protection of the law and the state must ensure that the law provides for a framework for them to exercise their right to marriage.

> "*83.* ***We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction***

or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community*."*

NN. Because there is no reasonable classification due to which non-heterosexual persons can be treated differently in relation to marriage. What distinguishes most queer marriages from heterosexual marriages is the ability for a heterosexual couple to reproduce. Marriage is a social relationship and also a legal relationship, for which reproduction is not *sine qua non*. All heterosexual marriages are valid regardless of the ability to have biological children, nor does having the ability to have biological children act as a qualification for registration of a marriage. In *NALSA v. Union of India*, the Hon'ble Supreme Court accord legal recognition to transgender persons who are neither men or women and do not have reproductive capacities. The Hon'ble Supreme Court also recognised that such persons have issues with marriage and adoption and found that it was essential for the state to accord full civil rights including the right to marriage to them.

OO. Because there is no constitutionally permissible intelligible differentia which can justify treating non-heterosexuals and heterosexuals differently for the right to marriage. Heterosexuality is an accepted form of union in both religious and formal law on which other rights such as divorce, maintenance,

inheritance and other similar frameworks are dependent. No such framework exists for non-heterosexual couples. The non-existence of frameworks for regulation cannot act as a bar to legal recognition and accordance of constitutionally mandated rights. In *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***, it was argued that there will be a cascading effect on other laws such as marriage laws, divorce laws, sexual crimes and open a floodgate of social issues. Despite this, the right of LGBTQIA+ persons to have sexual relationships was recognised and Section 377 of the Indian Penal Code 1860 was decriminalised. In *NALSA v. Union of India* for example, persons who did not come within the current framework of law where given space under the law and all consequent civil rights. As society develops, so should the law. Laws that do not fulfil rights under the Constitution should be changed to bring them in compliance with the Constitution and where there is a lacunae, such law should be created.

PP. . Because denial of the right to marry to non-heterosexuals is discrimination under Article 15(1). "Sex" under Article 15 includes gender and sexual orientation, as decided in *NALSA v. Union of India* and *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***. Discrimination against non-heterosexuals is discrimination on the basis of both gender or sex and sexual orientation. The right to marry of sex or gender identities outside the binary are is not recognised under the present legislation. An individual's sexual orientation being non-heterosexual directly prevents them from registering a marriage in the country. In *Navtej Singh Johar v. Union of India* ***(2018) 10 SCC 1***,

Chandrachud J re-iterated that equality demands equal protection of the sexual orientation of every individual citing *Justice K.S.Puttaswamy v. Union of India.* The relevant para of the Supreme Court's judgment by J. Chandrachud in ***Navtej Singh Johar Vs. Union of India (2018) 10 SCC 1*** is as follows:

> *"464. Puttaswamy rejected the "test of popular acceptance" employed by this Court in Koushal and affirmed that sexual orientation is a constitutionally guaranteed freedom: (Puttaswamy case, SCC pp. 421-22, para 144)*
>
> > *144. The guarantee of constitutional rights does not depend upon their exercise being favourably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life do not accord with the "mainstream".* ***Yet in a democratic Constitution founded on the Rule of Law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. Discrimination***

against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. 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*."*

Rejecting the notion that the rights of the LGBT community can be construed as illusory, the Court held that the right to privacy claimed by sexual minorities is a constitutionally entrenched right (Puttoswamy case?, SCC p. 422, para 145)

"145. The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights". The expression "so-called" seems to suggest the exercise of a liberty in the garb of a right which is illusory. This is an inappropriate construction of the privacy-based claims of the LGBT population. Their rights are not "so-called" but are real rights founded on sound constitutional doctrine. They inhere in the right to life. They dwell in privacy and dignity. They constitute the essence of liberty and

freedom. Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination."

Kaul, J. concurring with the recognition of sexual orientation as an aspect of privacy, noted that: (Puttaswamy cases, SCC p. 635, para 647)

"647... The sexual orientation even within the four walls of the house thus became an aspect of debate. I am in agreement with the view of Dr. D.Y. Chandrachud, J. who in paras 144 to 146 of his judgment, states that the right of privacy cannot be denied, even if there is a miniscule fraction of the population which is affected. The majoritarian concept does not apply to constitutional rights and the courts are often called up on to take what may be categorised as a non-majoritarian view, in the check and balance of power envisaged under the Constitution of India. One's sexual orientation is undoubtedly an attribute of privacy."

With these observations by five of the nine Judges in Puttaswamy, the basis on which Koushal upheld the validity of Section 377 stands eroded and even disapproved. dignity and self-worth of the individual. Equality demands that the sexual

orientation of each individual in society must be protected on an even platform. 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"

RIGHT OF QUEER PERSONS NOT TO SUFFER DISABILITIES UNDER ARTICLE 15(2) DUE TO THE DENIAL OF THE RIGHT TO MARRIAGE

QQ. A. Because without legal recognition of their marriage, queer persons are also denied access to commercial establishments and public spaces and there is a violation of their rights under Article 15(2). They do not have the entitlements of a marital partner in privately accessed necessities and activities like insurance, hospitalisation and booking of hotels. The legal recognition of non-heterosexual marriages is imperative for them to access these entitlements and ensure non-discrimination in all areas of life.

RR. The legal recognition of non-heterosexual marriages is imperative for them to access the entitlements of other spouses and ensure non-discrimination in all areas of life. The following list has examples of benefits which are available to married partners, as simply a result of being married, which will never be available to non-heterosexual individuals. For example Section 39(7) of the Insurance Laws (Amendment) Act, 2015, accords nominees who are immediate family members such as spouse, parents or children the status of beneficial nominee. If any of these persons are made

a nominee, the death benefit will be paid to these persons and other legal heirs will have no claim over the money. Similarly, Section 10A(4) of the Employees' Compensation Act, 1923 allows the Commissioner under the Act to inform the dependents of a deceased workman about the possibility of claiming compensation. Section 2(1)(d) of the Employees' Compensation Act, 1923 defines "dependent" to include the surviving spouse.

SS. Further, discrimination of queer couples by private establishments providing services should be held violative of rights under Article 15(2) of the Constitution. In *Indian Medical Association v Union of India* (2011) 7 SCC 179, the Supreme Court on an examination of Constituent Assembly debates held that "shops" under Article 15(2) should be interpreted broadly to not just refer to physical shops, but also any provision of goods or services in the market. The Supreme Court further held that the private sector cannot conduct services in a manner that is discriminatory. Article 15(2) can be interpreted to mean that such establishments do not have to just refrain from discrimination, but also make sure that their rules of access do not perpetuate social disadvantages.

"186. The purport of Article 15 (2) can be gathered from the Constituent Assembly debates. Babasaheb Ambedkar elucidated on the same saying that: (CAD, Vol. 7, p.661)

"...To define the word `shop' in the most generic term one can think of is to state that `shop' is a place where the owner is

prepared to offer his service to anybody who is prepared to go there seeking his service. .... Certainly it will include anybody who offers his services. ***I am using it in a generic sense. I should like to point out therefore that the word `shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.****"*

187. In as much as education, pursuant to TMA Pai, is an occupation under sub-clause (g) of clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of clause (2) of Article 15. ***In this regard, the purport of the above exposition of clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which Equality of status and opportunity, and Justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages****.*

188. There are two potential interpretations of the use of the word "only" in clause (2) of Article 1540. One could be an interpretation that suggests that the particular private establishment not discriminate on the basis of enumerated

grounds and not be worried about the consequences. ***Another interpretation could be that the private establishment not just refrain from the particular form of overt discrimination but also ensure that the consequences of rules of access to such private establishments do not contribute to the perpetration of the unwarranted social disadvantages associated with the functioning of the social, cultural and economic order.*** *Whether sub-clause (a) of clause (2) of Article 15 is self-executory or not is irrelevant in the context of reservations. If the State does enact "special provisions" for the advancement of socially and educationally backward classes, it does so in order to prevent the perpetuation of social and educational backwardness in certain classes of people generation after generation.*

189. ***If a publicly offered service follows a particular rule that achieves the same or similar consequences as the proscribed discrimination, and tends to perpetuate the effects of such discrimination, then it would violate the principle of substantive equality.*** *In the case of admissions to colleges, it is an acknowledged fact, in both TMA Pai, and in fact even by Bhandari J., in his opinion in Ashoka Kumar Thakur, that the test of merit, based on some qualifying examinations or a common entrance test, actually is particularly prone to rewarding an individual who has had access to better schools, family lives, social exposure and means to coaching classes. This would mean that many of the youngsters, who hail from disadvantaged backgrounds are severely handicapped in demonstrating their actual talents. This would be even more so in the case of Scheduled Castes and*

Scheduled Tribes. Given that social and educational, background of the parents, and of general community members, has an important bearing on how well the youngsters learn and advance, it would only mean that complete dependence on such tests which do not discriminate and grade, in terms of real merit relative to peers in similar circumstances, but on the basis of so called absolute abilities, we would end up selecting more students from better social and educational backgrounds, thereby foreclosing or substantially truncating the possibility of individuals in such disadvantaged groups from being able to gain access to a vital element of modern life that grants dignity to the individuals, and thereby to the group as a whole, both in this generation, and in future generations."

TT. In *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, private and public employers were held to the constitutional obligation of providing a framework for protection against sexual harassment. The state was recognised to have the constitutional duty to protect individuals from sexual harassment in the workplace and due to the void of legislation, the Supreme Court issued guidelines for both private and public workplaces.

UU. To fulfil the guarantee of substantive equality under Article 15(2) of the Constitution of India, queer individuals cannot be discriminated in the provision of goods and services. The state has the obligation to ensure that they are not excluded or socially disadvantaged due to their gender or sexual orientation. In the

absence of any laws to enforce this protection, the court may consider issuing guidelines to prevent such discrimination.

FOREIGN JUDGMENTS ON SAME SEX AND QUEER MARRIAGES

VV. Because same-sex marriages have been granted legal recognition by courts in various jurisdictions around the world. The Hon'ble Supreme Court of India, in the case of ***NALSA Vs. Union of India & Ors (2014) 5 SCC 438*** (hereinafter referred to as the "***NALSA judgment***") relied upon various foreign judgments to highlight that the principle of guarantee to equality and non-discrimination on the basis of gender is gaining prominence in international law and thus may be applied in India. The Hon'ble Supreme Court, in the ***NALSA*** **judgment**, categorically stated that *"...46. We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of "sex identity gender" of persons, and "guarantee to equality and non-discrimination" on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India as well.*"

(i) The Supreme Court of the United States, in the case of ***Obergefell vs. Hodges 576 U.S. 644 (2015)*** granted legal recognition to same sex marriages. As per the judgment, all states in the US are now required to issue marriage licenses to same sex couples and recognize same sex marriages

validly performed in other jurisdictions. While doing so, it upheld several relevant principles which can be applied in the context of India. Some of the principles, along with the relevant excerpts from the judgment are as follows:

(a) The US Supreme Court held that the right to personal choice regarding marriage is inherent in the concept of individual autonomy and the right to privacy with respect to this matter must be recognized as it is for other family matters. The right to privacy has been held to be a fundamental right by the Supreme Court of India in ***Justice K.S.Puttaswamy vs. Union of India (2017) 10 SCC 1,*** wherein this US judgment was also referred to and the application of the right to privacy with respect to marriage was emphasized upon. The relevant excerpt of the judgment by the US Supreme Court is as follows:

> *"A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why Loving invalidated interracial marriage bans under the Due Process Clause. See 388 U. S., at 12; see also Zablocki, supra, at 384 (observing Loving held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the*

Constitution, decisions concerning marriage are among the most intimate that an individual can make. See Lawrence, supra. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." Zablocki, supra, at 386."

(b) The US Supreme Court held that although it had already invalidated laws which criminalized same sex intimacy in one of its previous judgments, freedom did not end there and that on its own did not achieve the full promise of liberty. It is most respectfully submitted that on the same premise, even though the Supreme Court of India has decriminalized sexual intercourse between queer persons and/ or those of the same sex, the fundamental right to life and personal liberty guaranteed by Article 21 will be enforced in its completeness when all the rights available to heterosexual couples are available to queer couples, including the right to legal recognition of marriage. The relevant para of the US Supreme Court judgment is as follows:

"As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. Lawrence invalidated laws that made samesex intimacy a criminal act. And it acknowledged that "when sexuality finds overt

expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U. S., at 567. But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."

(c) The US Supreme Court held that a legally recognized marriage was the source for various other rights and privileges and that non-recognition of same-sex marriages was resulted in denial of these rights to that community. It is submitted that this applies to India as well, since same-sex couples such as the Petitioner Nos. 1 and 2 are being denied of various rights due to non-recognition of their marriages. The relevant para of the judgment by the US Supreme Court held that:

"*For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of*

marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as Amicus Curiae 6–9; Brief for American Bar Association as Amicus Curiae 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See Windsor, 570 U. S., at ___ – ___ (slip op., at 15–16). The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."

(d) The US Supreme Court in ***Obergefell v. Hodges 576 US - (2015)*** stated that in its previous judgment in ***Lawrence v. Texas*** **539 U.S. 558 (2003)**, it had drawn upon principles of liberty and equality to decriminalise private sexual conduct between gays and lesbians. The court held that the same rationale as applied in the ***Lawrence*** judgment would apply to same-sex marriages and that the challenged laws abridged the central precepts of equality and that the right to marry was a

fundamental right inherent in the liberty of the person. The court then relied upon the Due Process and Equal protection clauses of the fourteenth amendment to the US Constitution and held that the state laws under challenge were invalid to the extent that they excluded same-sex couples from civil marriage on the same terms and conditions as opposite sex couples. The Hon'ble Supreme Court of India had also drawn upon the fundamental rights to life and personal liberty and that of equality to decriminalise sexual acts between persons of the same sex, in ***Navtej Singh Johar Vs. Union of India (2018) 10 SCC 1***, just like the US Supreme Court did in the ***Lawrence*** judgment. Hence, it is most respectfully submitted that just as the US Supreme Court in the case of ***Obergefell v. Hodges***, drew a parallel to its application of the rights to liberty and equality in the ***Lawrence*** judgment to uphold legality of same sex marriages on the basis of these rights, this Hon'ble Court may draw a parallel to the application of the fundamental rights of life and personal liberty and right to equality by the Supreme Court in the ***Navtej Singh Johar*** judgment and grant legal recognition to same sex marriages in India to uphold these fundamental rights, which are available to all persons under Articles 14 and 21 of the Constitution of India. It is pertinent to note that the right to marry a person of one's choice has been held to fall within the ambit of Article 21 by the Hon'ble Supreme Court of India in a

catena of decisions (***Shafin Jahan vs. Asokan K.M. and Ors (2018) 16 SCC 368; Shakti Vahini Vs. Union of India***). The relevant paras of the judgment by the US Supreme Court in ***Obergefell v. Hodges*** are as follows:

> "*In Lawrence the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U. S., at 575. Although Lawrence elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See ibid. Lawrence therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." Id., at 578. This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long*

history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, e.g., Zablocki, supra, at 383–388; Skinner, 316 U. S., at 541. These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as oppositesex couples."

(e) The US Supreme Court, in ***Obergefell v. Hodges 576 US - (2015)***, held that the dynamic of the American constitutional system was such that individuals need not

await legislative action before asserting a fundamental right and that an individual could invoke a right to constitutional protection when he or she was harmed, even if the broader public disagreed and even if the legislature refused to act. It is submitted that the same principle applies to India, as there are a catena of judgments where fundamental rights of individuals have been upheld despite lack of legislation or majority consensus on an issue and that the protection of fundamental rights lies at the very core of the Constitution. The relevant para of the judgment by the US Supreme Court is as follows:

> *"The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 638 (1943). This is why "fundamental*

rights may not be submitted to a vote; they depend on the outcome of no elections."

(ii) The Constitutional Court of South Africa, in the case of ***Minister of Home Affairs & Anr. vs. Fourie & Anr. with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae) CCT 60/04***, declared that the common law definition of marriage was inconsistent with the Constitution and invalid to the extent that it did not permit queer couples to enjoy the status and the benefits coupled with responsibilities available to heterosexual couples. The court further declared that the omission of the words "or spouse" after the words "or husband" in Section 30(1) of the Marriage Act, in South Africa was inconsistent with the Constitution. The Marriage Act was declared invalid to the extent of this inconsistency. The court directed the Parliament of South Africa to frame necessary legislation to grant legal recognition to non heterosexual marriages. It suspended the declaration of invalidity for a period of 12 months and held that if the Parliament would not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula. The relevant para of the judgment wherein the order has been made is as follows:

"*THE ORDER*

...

2. In the matter between the Lesbian and Gay Equality Project and Eighteen Others and the Minister of Home Affairs, the Director General of Home Affairs and the Minister of Justice and Constitutional Development, CCT 10/05, the following order is made:

a) The application by the Lesbian and Gay Equality Project and Eighteen Others for direct access is granted.

b) The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.

c) The omission from section 30(1) of the Marriage Act 25 of 1961 after the words "or husband" of the words "or spouse" is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.

d) The declarations of invalidity in paragraphs (b) and (c) are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.

e) Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of

1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.

f) The Minister and Director-General of Home Affairs and the Minister of Justice and Constitutional Development are ordered to pay the applicants' costs, including the costs of two counsel in the Constitutional Court."

There were a number of relevant principles upheld by the judgment, some of which, along with the excerpts from the judgment, are as follows:

(a) The Constitutional Court of South Africa held that a legally recognised marriage is the only source of various socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights. Hence, by denying same sex-couples the right to legal recognition of marriage, several other rights are being denied to them. It is submitted that the same rationale may be applied in the context of India. The relevant para of the judgment is as follows:

"*[70] Marriage law thus goes well beyond its earlier purpose in the common law of legitimising sexual*

relations and securing succession of legitimate heirs to family property. And it is much more than a mere piece of paper. As the SALRC Paper comments, the rights and obligations associated with marriage are vast. Besides other important purposes served by marriage, as an institution it was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.

(b) The constitutional court of South Africa held that exclusion of same-sex couples from legal recognition of marriages represented a harsh and oblique statement that same-sex couples were outsiders and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. The court further held that such exclusion reinforced the flawed notion that same sex couples were biological oddities and misfits. The relevant para of the judgment is as follows:

"*[71] The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential*

inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

(c) The constitutional court of South Africa held that given the centrality of marriage in culture, denial of the right to be legally married negates their right to "self-definition" in the most profound way. The relevant para of the judgment is as follows:

"*[72] ... It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in*

this respect is to negate their right to self-definition in a most profound way."

(d) While discussing the lack of legal recourses available to same-sex couples in the event of marital problems due to non-recognition of their marriages, the Constitutional Court of South Africa made some interesting observations. The Court observed that slavery, colonialism, prohibition of interracial marriages and overt male domination were all once sanctioned by religion and imposed by law. The court noted that slavery and colonialism are today regarded with total disdain and prohibition of interracial marriages with shame and embarrassment. It is submitted that like South Africa, India was once a country under colonial rule, with several archaic, discriminatory, archaic laws and practices, exercised both against Indians by the colonial rulers and within Indian society on the basis of caste and creed. Like South Africa, upon attaining freedom from colonial rule, India, as a nation managed to break the shackles that impeded her progress and embrace a Constitution that guaranteed equality and non-discrimination to all persons. The observation of the Constitutional Court of South Africa, regarding evolution of law and change in a progressive

direction, applies to India as well. It is most respectfully submitted that this Hon'ble Court may thus apply the same principles and grant legal recognition to same sex marriages, in order to evolve law for the facilitation of social justice. The relevant para of the judgment by the Constitutional Court of South Africa is as follows:

"[74] The law should not turn its back on any persons requiring legal support in times of family breakdown. It should certainly not do so on a discriminatory basis; the antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, and the third with varying degrees of denial, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the

legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights.

(e) The Constitutional Court of South Africa held that excluding same sex couples from legal recognition of same sex marriages was a denial of equal protection of law that was guaranteed by their Constitution. It is most respectfully submitted that this Hon'ble Court may thus apply the same rationale in the present case and declare that not granting legal recognition of marriage to same sex couples under Indian law constitutes a denial of the right to equality and equal protection of law guaranteed to all persons by Article 14 of the Constitution of India. The relevant para of the judgment by the Constitutional Court of South Africa is as follows:

"*Equal protection and unfair discrimination*

[75] It is convenient at this stage to restate the relevant provisions of the Constitution. Section 9(1) provides:
"Everyone is equal before the law and has the right to equal protection and benefit of the law."

It is clear that the exclusion of same-sex couples from the status, entitlements and responsibilities

accorded to heterosexual couples through marriage, constitutes a denial to them of their right to equal protection and benefit of the law."

(f) The South African Court in its judgment held that unfair discrimination against same sex couples did not flow from any express exclusion in the Marriage Act. The problem was that the Marriage Act simply made no provision for them to have their unions recognized and protected in the same manner as heterosexual couples. It was as if they did not exist as far as the law was concerned. It is most respectfully submitted that this Hon'ble Court may thus apply the same principle to the present case, where there is no express exclusion of same-sex marriages in the impugned provisions and there is no recognition of the same either. The law is silent on the marital status of same sex couples and treats them as non-existent, thus presenting the need to accord their marriages legal status. The relevant para of the judgment by the Constitutional Court of South Africa is as follows:

"*[77] Some minorities are visible, and suffer discrimination on the basis of presumed characteristics of the group with which they are identified. Other minorities are rendered invisible inasmuch as the law refuses them the*

right to express themselves as a group with characteristics different from the norm. ***In the present matter, the unfair discrimination against same-sex couples does not flow from any express exclusion in the Marriage Act. The problem is that the Marriage Act simply makes no provision for them to have their unions recognised and protected in the same way as it does for those of heterosexual couples.*** *It is as if they did not exist as far as the law is concerned. They are implicitly defined out of contemplation as subjects of the law.*"

(g) The Constitutional Court of South Africa, in its judgment, upheld a very relevant principle. It held that merely protecting same-sex couples from punishment or stigmatisation was not sufficient. The court held that same-sex couples were no longer seeking the right to be left alone or non-interference from the State. They were seeking the right to be acknowledged as equals and be embraced with dignity by law. The court held that the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accorded to heterosexual couples. The court further held that although considerable progress had been made in specific cases through constitutional interpretation, and,

by means of legislative intervention, the default position of gays and lesbians was still one of exclusion and marginalisation. The court held that the law and relevant statutes in South Africa continued to deny to same-sex couples equal protection and benefit of the law, resulting in them being subjected to unfair discrimination by the state in conflict with the Constitution. It is most respectfully submitted that the same rationale may be applied by this Hon'ble Court in the present case. The Hon'ble Supreme Court of India, vide its landmark judgment in the case of ***Navtej Singh Johar Vs. Union of India (2018) 10 SCC 1***, has already decriminalized homosexuality. The Petitioners are now seeking that this Hon'ble Court go a step further and acknowledge LGBTQIA+ persons as equals and members of society, by granting legal recognition to their marriages, so that they can avail the same status, benefits and carry out the same responsibilities that heterosexual couples in India can. The relevant para of the judgment by the Constitutional Court of South Africa is as follows:

"*[78] Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go*

beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law. Their love that was once forced to be clandestine, may now dare openly to speak its name. The world in which they live and in which the Constitution functions, has evolved from repudiating expressions of their desire to accepting the reality of their presence, and the integrity, in its own terms, of their intimate life. Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day. By both drawing on and reinforcing discriminatory social practices, the law in the past failed to secure for same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples. Although considerable progress has been made in specific

cases through constitutional interpretation, and, as will be seen, by means of legislative intervention, the default position of gays and lesbians is still one of exclusion and marginalisation. The common law and section 30(1) of the Marriage Act continue to deny to same-sex couples equal protection and benefit of the law, in conflict with section 9(1) of the Constitution, and taken together result in same-sex couples being subjected to unfair discrimination by the state in conflict with section 9(3) of the Constitution."

(iii) The Supreme Court, in the case of ***Navtej Singh Johar vs. Union of India***, relied upon a decision of the Supreme Court of Nepal in the case of ***Sunil Babu Pant vs. Nepal Government***, wherein it was held, in the context of same-sex marriages that one adult had the right to enter into marital relations with another adult wilfully. The Supreme Court of Nepal directed the Nepalese government to enact new legislation or amend existing legislation to ensure that persons of all sexual orientations and gender identities could enjoy equal rights.

(iv) The Supreme Court of India, in the case of ***Navtej Singh Johar vs. Union of India (2018) 10 SCC 1,*** also cited a decision of the European Court of Human Rights in the case of Oliari Vs. Italy 276 [2015] ECHR 716 277, wherein it

was affirmed that same-sex couples "are in need of legal recognition and protection of their relationship." The ECtHR concluded that gay couples are equally capable of entering into stable and committed relationships in the same way as heterosexual couples. The ECtHR examined the domestic context in Italy, and noted a clear gap between the "social reality of the applicants", who openly live their relationship, and the law, which fails to formally recognize same-sex partnerships. The ECtHR held that in the absence of any evidence of a prevailing community interest in preventing legal recognition of same-sex partnerships, Italian authorities "*have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.*"

(v) The global trend towards the right to marry was taken cognizance of, while rendering her judgment, by Indu Malhotra J in her judgment in ***Johar (supra)*** as follows:

"631. The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights. In 2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report that 124 countries no

longer penalise homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments. Relationships between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children. For instance, the United Kingdom now outlaws discrimination in employment, education, social protection and housing on the ground of sexual orientation. Marriage between same-sex couples have been recognised in England and Wales."

INTERNATIONAL LAW AND QUEER RIGHTS

WW. Because international law prevents discrimination on the basis of sexual orientation and recommends that states legally recognize same sex marriages, inter alia:

(i) The United Nations General Assembly (UNGA) released a *"Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/HRC/35/36"* dated 19th April, 2017. The report states:

"*20…The genesis of human rights protection after the Second World War was the Universal Declaration of Human Rights, of 1948. There are now nine core international human rights treaties, complemented by various protocols. All of them interrelate with the issue of sexual orientation and gender identity, to a lesser or greater extent. For instance, the right to be free from discrimination is propounded in article 2 of the Universal Declaration of Human Rights and in all human rights treaties. Article 2 of the International Covenant on Civil and Political Rights stipulates:*

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
>
> *21. Other provisions (e.g. article 7 of the Universal Declaration of Human Rights and article 26 of the International Covenant on Civil and Political Rights) reaffirm the right to equality before the law and equal protection of the law without discrimination. The stricture against discrimination was deliberated upon by the Human Rights Committee in regard to a seminal case, Toonen v.*

Australia, that concerned the presence of a local law that prohibited same-sex relations. The Committee found that the local law in question violated article 17 of the Covenant in regard to the right to privacy, and that the reference to "sex" in article 2 (1) (as well as in art. 26) covered sexual orientation.

22. Under the International Covenant on Economic, Social and Cultural Rights, the monitoring committee has affirmed that the right to non-discrimination guaranteed by the Covenant includes sexual orientation, gender identity and sex characteristics. Under the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, the monitoring committees have issued general comments and have made recommendations to States covering respect for sexual orientation and gender identity.

…

32. A sample of recent constructive practices can be cited. A number of countries on every continent have seen reforms of antiquated and obstructive laws and policies, even though the progress is not always universal. Many South Asian countries and countries in other regions uphold the rights of transgender people, even where they have difficulty in accepting the rights of gays, lesbians and bisexuals. ***Same-sex***

> ***couples are now allowed to marry officially in a number of countries, such as Canada, the United States of America, and a range of countries in Europe and Latin America. In 2016, a top court in Belize declared an old law, which had prohibited same-sex relations, to be unconstitutional. Seychelles reformed its law similarly on this front. In 2017, New Zealand agreed to expunge the criminal record of persons criminalized by the colonial law which had forbidden same-sex relations (the law itself having been abrogated a while ago). Germany also moved to annul Nazi-era homosexuality convictions (about 42,000 such convictions had been made under the Third Reich, under an old provision of the Penal Code (art. 175)) and to offer compensation.***

A perusal of the excerpts of the report cited above indicate that the United Nations and other international organizations are taking measures to combat discrimination on the grounds of sexual orientation and are encouraging States to legally recognize same sex marriages.

(ii) The Inter American Court of Human Rights ("IACtHR"), upon being requested by the Republic of Costa Rica gave Advisory Opinion Oc-24/17 Of November 24, 2017, titled "***Gender Identity, And Equality And Non-Discrimination Of Same-Sex Couples State Obligations Concerning***

Change Of Name, Gender Identity, And Rights Derived From A Relationship Between Same-Sex Couples (Interpretation And Scope Of Articles 1(1), 3, 7, 11(2), 13, 17, 18 And 24, In Relation To Article 1, Of The American Convention On Human Rights)". In this Opinion, it stated that in several resolutions adopted since 2008, the OAS General Assembly has stated that LGBTQIA+ persons are subject to various forms of violence and discrimination based on the perception of their sexual orientation and gender identity or expression, and has resolved to condemn acts of violence, human rights violations and **all forms of discrimination on the basis of sexual orientation** and gender identity or expression. As per the Opinion, these resolutions are, "*Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIII-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender*

Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008."

The relevant observations and findings of the advisory opinion by the ICAtHR are as follows:

(a) The ICAtHR, in its advisory opinion, referred to its judgment in Cf. Case of Duque v. Colombia, of 2016, wherein it had made observations on the consequences of the failure of official recognition of relationships between persons of the same sex.

(b) The ICAtHR in its Advisory Opinion also referred to Para 68 of the Report of the Office of the United Nations High Commissioner for Human Rights ("UNHCR"), titled "***Discrimination And Violence Against Individuals Based On Their Sexual Orientation And Gender Identity, A/HRC/29/23***", dated 4 May 2015, wherein the UNHCHR has indicated that lack of official recognition results in *"same-sex partners being treated unfairly by private actors, including health-care providers and insurance companies."*

(c) The ICAtHR in its advisory opinion said that States must refrain from taking actions that are directly or indirectly aimed at creating situations of de jure or de facto

discrimination and cited para 110 of its decision in the ***Case of Flor Freire v. Ecuador.***

(d) The ICAtHR in its advisory opinion stated that as per its jurisprudence, the fundamental principle of equality and non-discrimination has entered the domain of ius cogens in international law.

(e) The ICAtHR concluded by deciding that:-

"7. The State must recognize and ensure all the rights derived from a family relationship between same-sex couples in accordance with the provisions of Articles 11(2) and 17(1) of the American Convention, as established in paragraphs 200 to 218."

"8. Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples, as established in paragraphs 200 to 228."

THE TRANSFORMATIVE CONSTITUTION OF INDIA

XX. Because the Constitution is a transformative, living document. It must be interpreted to uphold and protect fundamental rights of

persons as per changing times. It can thus be interpreted by this Hon'ble Court in a manner so as to prevent discrimination against same sex couples, by granting legal recognition to their marriages. The Supreme Court of India, in the case of ***Navtej Singh Johar vs. Union of India (2018) 10 SCC 1***, discussed the concept of "transformative constitutionalism" and relied upon a number of its own previous judgments to hold that the Constitution is an "*organic charter of progressive rights*". The relevant paras of the judgment in the Navtej Singh Johar case are as follows:

> *"**G. The Constitution – an organic charter of progressive rights***
>
> *93. A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society. It was highlighted by this Court in the case of Chief Justice of Andhra Pradesh and others v. L.V.A. Dixitulu and others that the Constitution is a living, integrated organism having a soul and consciousness of its own and its pulse beats, emanating from the spinal cord of its basic framework, can be felt all over its body, even in the extremities of its limbs.*
>
> *94. In Saurabh Chaudri and others v. Union of India and others35, it was observed:-*
>
> > *"Our Constitution is organic in nature, being a living organ, it is ongoing and with the passage of time, law*

must change. Horizons of constitutional law are expanding."

95. Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters. The following observations made in the case of Ashok Kumar Gupta and another v. State of U.P. and others further throws light on this role of the courts:-

"Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."

96. The rights that are guaranteed as Fundamental Rights under our Constitution are the dynamic and timeless rights

of 'liberty' and 'equality' and it would be against the principles of our Constitution to give them a static interpretation without recognizing their transformative and evolving nature. The argument does not lie in the fact that the concepts underlying these rights change with the changing times but the changing times illustrate and illuminate the concepts underlying the said rights. In this regard, the observations in Video Electronics Pvt. Ltd. and another v. State of Punjab and another are quite instructive:-

> *"Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour in evolving dynamic situations."*

97. Our Constitution fosters and strengthens the spirit of equality and envisions a society where every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual. This guarantee of recognition of individuality runs through the entire length and breadth of this dynamic instrument. The Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'. It is the duty of the courts to realize the constitutional vision of

equal rights in consonance with the current demands and situations and not to read and interpret the same as per the standards of equality that existed decades ago. The judiciary cannot remain oblivious to the fact that the society is constantly evolving and many a variation may emerge with the changing times. There is a constant need to transform the constitutional idealism into reality by fostering respect for human rights, promoting inclusion of pluralism, bringing harmony, that is, unity amongst diversity, abandoning the idea of alienation or some unacceptable social notions built on medieval egos and establishing the cult of egalitarian liberalism founded on reasonable principles that can withstand scrutiny.

…

Transformative Constitutionalism and the Rights of LGBTQIA+ Community

107. For understanding the need of having a constitutional democracy and for solving the million dollar question as to why we adopted the Constitution, we perhaps need to understand the concept of transformative constitutionalism with some degree of definiteness. In this quest of ours, the ideals enshrined in the Preamble to our Constitution would be a guiding laser beam. The ultimate goal of our magnificent Constitution is to make right the upheaval which existed in the Indian society before the adopting of the Constitution. The Court in State of Kerala and another

v. N.M. Thomas and others 41 observed that the Indian Constitution is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy and its provisions can be comprehended only by a spacious, social- science approach, not by pedantic, traditional legalism. The whole idea of having a Constitution is to guide the nation towards a resplendent future. Therefore, the purpose of having a Constitution is to transform the society for the better and this objective is the fundamental pillar of transformative constitutionalism. 41 AIR 1976 SC 490

108. The concept of transformative constitutionalism has at its kernel a pledge, promise and thirst to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution. The expression _transformative constitutionalism' can be best understood by embracing a pragmatic lens which will help in recognizing the realities of the current day. Transformation as a singular term is diametrically opposed to something which is static and stagnant, rather it signifies change, alteration and the ability to metamorphose. Thus, the concept of transformative constitutionalism, which is an actuality with regard to all Constitutions and particularly so with regard to the Indian Constitution, is, as a matter of

fact, the ability of the Constitution to adapt and transform with the changing needs of the times.

109. It is this ability of a Constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. Its exposition and energetic appreciation by constitutional courts constitute the lifeblood of progressive societies. The Constitution would become a stale and dead testament without dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of the society. That is the raison d'etre for the Constitution.

110. The Supreme Court as well as other constitutional courts have time and again realized that in a society undergoing fast social and economic change, static judicial interpretation of the Constitution would stultify the spirit of the Constitution. Accordingly, the constitutional courts, while viewing the Constitution as a transformative document, have ardently fulfilled their obligation to act as the sentinel on qui vive for guarding the rights of all individuals irrespective of their sex, choice and sexual orientation.

...

122. The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights. It ought to be remembered that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However, it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the fundamental rights of an individual that we can preserve and strengthen the values of our compassionate Constitution.

...

Q. Conclusions

268. In view of the aforesaid analysis, we record our conclusions in seriatim:-

…

268.4 The primary objective of having a constitutional democracy is to transform the society progressively and inclusively. Our Constitution has been perceived to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction which is reflective of their intent and purpose in consonance with the changing times. Transformative constitutionalism not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society. When guided by transformative constitutionalism, the society is dissuaded from indulging in any form of discrimination so that the nation is guided towards a resplendent future."

YY. . Because in the process of rights-based transformation, a variety of voluntary relationships of love, care and family may be recognised. In ***NALSA vs. Union of India (2018) 10 SCC***, the Hon'ble Supreme Court recognised the social and cultural identities of the Hijra, Arvani and Jogappa communities. These communities have their own established institutions of family, household and kinship that are not based on marriage, but rather on their own institutionalised practices. Several other queer

communities are based on relationships of love, belonging and shared experiences that reject the traditional cisgender heterosexual patriarchal family. Conceptions of family and kinship under law, hence should recognise communities of people who may vary in their personal identities but live together in a shared experience of queerness and love to not participate in the compulsory heteronormative family. The practices and relationships of queer people deserve to be recognised, as much as heterosexual relationships are, in society and in law. By the same token, voluntary relationships of marriage between same sex and queer persons must be recognised under Articles 14, 15, 19 and 21.

ZZ. (. Because our courts have time and again cast a positive obligation upon states to take active measures to protect and ensure the fulfilment of the right to life and personal liberty under Article 21. In the case of ***Vishaka vs. State of Rajasthan AIR 1997 6 SCC 241***, the Supreme Court went a step further and held that since domestic law on sexual harassment of women at the workplace was absent, effective measures with respect to the same were to be put in place and implemented to protect fundamental rights under Articles 14, 15 19(1)(g) and 21 of the Constitution for which the contents of international conventions and norms were significant, by placing reliance on Article 51(c) of the Constitution. The court further held that the Parliament had the power to enact laws for implementing international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. The court

also referred to Article 73 of the Constitution which provides that the executive power of the Union shall extend to the matters with respect to which the Parliament has power to make laws and held that till the Parliament legislated on the issue of sexual harassment at the workplace, the executive power of the Union could be exercised to curb the evil. The relevant portion of the judgment is as follows:

> "*7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power*

of the Union is, therefore, available till the parliament enacts to expressly provide measures needed to curb the evil."

Similarly, in the case of ***Ms. S. Sushma & Anr. Vs. Commissioner of Police, Greater Chennai Police & Ors. W.P. No. 7284 of 2021***, the Hon'ble High Court of Madras, vide a recent order dated 7th June, 2021 issued a slew of guidelines/directions to the police, Union Government, State Governments as well as certain ministries/departments to protect same-sex couples from discrimination, harassment and to provide them support.

AAA. Because the Supreme Court, in the case of ***Navtej Singh Johar vs. Union of India (2018) 10 SCC 1***, held that that the constitutional courts have to embody in their approach a telescopic vision wherein they inculcate the ability to be futuristic and do not procrastinate till the day when the number of citizens whose fundamental rights are affected and violated grow in figures. The Court also held that it was not relevant that the LGBTQIA+ community, being discriminated against, was small, rather it was necessary to strike down any discriminatory law. The relevant paras of the judgment are as follows:

"181. The observation made in Suresh Koushal (supra) that gays, lesbians, bisexuals and transgenders constitute a very minuscule part of the population is perverse due to the very reason that such an approach would be violative of the

equality principle enshrined under Article 14 of the Constitution. The mere fact that the percentage of population whose fundamental right to privacy is being abridged by the existence of Section 377 in its present form is low does not impose a limitation upon this Court from protecting the fundamental rights of those who are so affected by the present Section 377 IPC.

181. The constitution framers could have never intended that the protection of fundamental rights was only for the majority population. If such had been the intention, then all provisions in Part III of the Constitution would have contained qualifying words such as 'majority persons' or 'majority citizens'. Instead, the provisions have employed the words 'any person' and any citizen' making it manifest that the constitutional courts are under an obligation to protect the fundamental rights of every single citizen without waiting for the catastrophic situation when the fundamental rights of the majority of citizens get violated.

183. Such a view is well supported on two counts, namely, one that the constitutional courts have to embody in their approach a telescopic vision wherein they inculcate the ability to be futuristic and do not procrastinate till the day when the number of citizens whose fundamental rights are affected and violated grow in figures. In the case at hand, whatever be the percentage of gays, lesbians, bisexuals and transgenders, this Court is not concerned with the number

of persons belonging to the LGBT community. What matters is whether this community is entitled to certain fundamental rights which they claim and whether such fundamental rights are being violated due to the presence of a law in the statute book. If the answer to both these questions is in the affirmative, then the constitutional courts must not display an iota of doubt and must not hesitate in striking down such provision of law on the account of it being violative of the fundamental rights of certain citizens, however minuscule their percentage may be.

184. A second count on which the view in Suresh Koushal (supra) becomes highly unsustainable is that the language of both Articles 32 and 226 of the Constitution is not reflective of such an intention. A cursory reading of both the Articles divulges that the right to move the Supreme Court and the High Courts under Articles 32 and 226 respectively is not limited to a situation when there is violation of the fundamental rights of a large chunk of populace.

185. Such a view is also fortified by several landmark judgments of the Supreme Court such as D.K. Basu v. State of W.B.71 wherein the Court was concerned with the fundamental rights of only those persons who were put under arrest and which again formed a minuscule fraction of the total populace. Another recent case wherein the Supreme Court while discharging its constitutional duty

did not hesitate to protect the fundamental right to die with dignity is Common Cause (A Regd. Society) (supra) wherein the Supreme (1997) 1 SCC 416 Court stepped in to protect the said fundamental right of those who may have slipped into permanent vegetative state, who again form a very minuscule part of the society.

186. Such an approach reflects the idea as also mooted by Martin Luther King Jr. who said, ―Injustice anywhere is a threat to justice everywhere. While propounding this view, we are absolutely conscious of the concept of reasonable classification and the fact that even single person legislation could be valid as held in ***Chiranjit Lal Chowdhury v. Union of India,*** *which regarded the classification to be reasonable from both procedural and substantive points of view."*

BBB. Because constitutional courts must protect constitutional morality and disregard social morality. It is the duty of the courts to ensure that queer persons , however small in number or disregarded by society are given the full protection of rights under the Constitution. In *Navtej Singh Johar v. Union of India*, the then CJI Dipak Mishra held that in the garb of social morality, members of the queer community cannot be denied their fundamental rights. The relevant para of the judgment is as follows:

> *"122.* ***In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher****.*

CCC. Because the nature of our constitution is transformative and rights thereunder aim to develop with society and change as society changes, the right to marry for queer persons , which was not recognised before, should be recognised now. This transformative constitutionalism allows the Constitution to be a living document that breathes lives into communities who have been previously social and legally discarded. The constitution must be interpreted in a manner to protect rights of all individuals regardless of their gender identity or sexual orientation.

DDD. Because the constitution must be interpreted in a dynamic and progressive manner, to ensure that purpose of the rights under the Constitution are fulfilled. Such interpretation requires prioritisation of the constitutional obligation to give all the rights under the Constitution to all persons including queer persons . In *Naz Foundation v. Government of NCT of Delhi and others (2009) 111 DRJ 1*, this Hon'ble court held that,

"114. A constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that ***the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems.*** *[Francis Coralie Mullin v. Union Territory of Delhi (supra), para 6 of SCC). In M. Nagraj v. Union of India, (2006) 8 SCC 212, the Constitution Bench noted that:*

"Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. ***It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted.*** *A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges" [para 19 of SCC)"*

EEE. It is for the aforementioned reasons that the non-recognition of same sex or non-heterosexual or queer persons marriages in India is manifestly unjust and a violation of the fundamental rights of the Petitioners under Articles 14 and 21 which are available to all persons including foreigners and the public at large under Articles 14, 15, 19 and 21.

FFF. That the Petitioners seek leave of this Hon'ble Court to raise additional grounds during the course of the proceedings.

GGG. The Petitioners have not filed any other petition praying for a similar relief before this court or any other court apart from the present petition/lis.

HHH. The Petitioners submit that they have no alternative, efficacious remedy under the law except to approach this Hon'ble Court by way of the present Writ Petition under Article 226 of the Constitution of India.

III. The balance of convenience and/or inconvenience entirely lies in favour of passing of orders as prayed for herein.

JJJ. This Petition is made bona fide and in the interest of justice and unless orders as prayed for herein are passed, the Petitioner will suffer irreparable loss, prejudice and injury.

PRAYERS

In the aforesaid facts and circumstances it is respectfully prayed that this Hon'ble Court may be pleased to:

(a) Issue a writ, order or direction in the nature of a declaration that since section 7A(1)(d) of the Citizenship Act, 1955, does not distinguish between heterosexual, same-sex or queer spouses, a person married to an Overseas Citizen of India, whose marriage is registered and subsisting for two years, be eligible to apply as a spouse for an OCI card.

(b) Issue a writ, order or direction in the nature of prohibition to Respondent no. 2, restraining it from declaring a spouse of an OCI applying for an OCI card to be ineligible for the same merely, on the ground that they are in a same-sex marriage or queer (non-heterosexual) marriage; and also restraining it from refusing to certify/apostille the registered marriage certificate of the Petitioner Nos. 1 and 2 on this ground.

(c) Issue a writ, order or direction in the nature of declaration that to the extent the Foreign Marriage Act, 1969 excludes same-sex marriages or queer marriages, it violates articles 14, and 21 of the Constitution of India; and further read the Foreign Marriage Act, 1969 to recognize marriages between consenting adults irrespective of the gender, sex and sexual orientation of the parties;

(d) Issue a writ, order or direction in the nature of declaration that to the extent the Special Marriage Act, 1954 excludes same-sex marriages or queer marriages, it violates articles 14, 15, 19 and 21 of the Constitution of India; and further read the Special Marriage Act 1954 to recognize marriages between

consenting adults irrespective of the gender, sex and sexual orientation of the parties;

(e) Issue a writ order or direction in the nature of declaration to the effect that the right to legal recognition of a same sex marriage or queer marriage is a fundamental right under Articles 14, 15, 19 and 21 irrespective of a person's gender, sex or sexual orientation; and that all such marriages be legally recognized in India by the under the applicable statutes, rules and policies that are in force.

(f) Pass such other orders as may be deemed fit in the interest of justice in the facts and circumstances of the case.

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Place: New Delhi