2023 INSC 920

**Reportable**

**IN THE SUPREME COURT OF INDIA**
**CIVIL ORIGINAL JURISDICTION**

**Writ Petition (Civil) No. 1011 of 2022**

**Supriyo @ Supriya Chakraborty & Anr. …Petitioners**

**Versus**

**Union of India …Respondent**

**With**
**Writ Petition (Civil) No. 93 of 2023**

**With**
**T. C. (Civil) No. 5 of 2023**

**With**
**T. C. (Civil) No. 8 of 2023**

**With**
**T. C. (Civil) No. 9 of 2023**

**With**
**T. C. (Civil) No. 11 of 2023**

**With**
**T. C. (Civil) No. 12 of 2023**

**With**
**Writ Petition (Civil) No. 1020 of 2022**

**With**
**Writ Petition (Civil) No. 1105 of 2022**

**With**
**Writ Petition (Civil) No. 1141 of 2022**

**With**
**Writ Petition (Civil) No. 1142 of 2022**

**With**
**Writ Petition (Civil) No. 1150 of 2022**

**With**
**Writ Petition (Civil) No. 159 of 2023**

**With**
**Writ Petition (Civil) No. 129 of 2023**

**With**
**Writ Petition (Civil) No. 260 of 2023**

**With**
**T. C. (Civil) No. 6 of 2023**

**With**

**Writ Petition (Civil) No. 319 of 2023**

**With**
**T. C. (Civil) No. 7 of 2023**

**With**
**T. C. (Civil) No. 10 of 2023**

**With**
**T. C. (Civil) No. 13 of 2023**

**And with**
**Writ Petition (Civil) No. 478 of 2023**

# J U D G M E N T

**Dr Dhananjaya Y Chandrachud, CJI**

## Table of Contents

1. The Transfer Petitions in these proceedings are allowed.

2. The terms 'LBGTQ' and 'queer' are used interchangeably and as umbrella expressions to capture the various sexual orientations and gender identities that exist.

3. The term 'union between queer persons' or similar terms have been used to mean relationship between parties where one or both of them have an atypical gender identity or sexual orientation.

## A. Background

### i. The decision of this Court in *Navtej Singh Johar*

4. Section 377 of the Indian Penal Code 1860[1] criminalizes "carnal intercourse against the order of nature." History is replete with instances of the State having used the provision to rip-off the dignity and autonomy of individuals who engaged in sexual activity with persons of the same sex.[2] A colonial provision which reflected Victorian morality continued in the statute after Independence. Section 377 was also weaponized against gender non-conforming persons.[3] Intimate relationships and activities were subject to public ridicule and judicial scrutiny. By criminalizing sexual behavior of homosexual and gender non-conforming persons, the State stripped them of their identity and personhood. Those who defied the mandate of the law and dodged prosecution were socially ostracized.

[1] "IPC"
[2] Meharban Nowshirwan Irani v. Emperor, AIR 1934 Sind. 206
[3] Queen Empress v. Khairati, ILR (1884) 6 All 204

5. In **Naz Foundation** v. **Government of NCTD**[4], a Division Bench of the High Court of Delhi read down Section 377 of the IPC to exclude consensual homosexual sexual activity between adults. On appeal, a two-Judge Bench of this Court in **Suresh Kumar Koushal** v. **Naz Foundation**[5] reversed the judgment of the High Court of Delhi. A writ petition seeking to declare the right to sexuality, the right to sexual autonomy, and the right to choice of a sexual partner as a part of the rights guaranteed under Article 21 of the Constitution and to declare Section 377 of the IPC to be unconstitutional was listed before a three-Judge Bench of this Court. The petitioners argued that the matter must be referred to a five-Judge Bench in view of the decisions of this Court in **National Legal Services Authority** v. **Union of India**[6] and **Justice KS Puttaswamy (9J)** v. **Union of India.**[7] In **NALSA** (supra), this Court held that the state must recognize persons who fall outside the male-female binary as 'third gender persons' and that they are entitled to all constitutionally guaranteed rights. It also directed the Union and State Governments to grant legal recognition to the self-identified gender of transgender persons, including when they identify as male and female. In **Justice KS Puttaswamy (9J)** (supra), this Court held that the Constitution protects the right of a person to exercise their sexual orientation. The three-Judge Bench referred the judgment of this Court in **Suresh Kumar Koushal** (supra) to a larger Bench. The three-Judge Bench also observed that the "order of nature" referred to in Section 377 of the IPC is not a constant but is guided by social morality as opposed to

[4] (2009) 160 DLT 277
[5] (2014) 1 SCC 1
[6] AIR 2014 SC 1863
[7] AIR 2017 SC 4161

constitutional values, and that a section of the population should not remain in a constant state of fear while exercising their choices.

6. This Court answered the reference in **Navtej Singh Johar** v. **Union of India**[8], holding that Section 377 is unconstitutional to the extent that it criminalizes consensual sexual activities by the LGBTQ community. It held that: (i) Section 377 violated Article 14 because it discriminated between heterosexual persons and non-heterosexual persons, although both groups engage in consensual sexual activities [9]; (ii) While Article 14 permits reasonable classification based on intelligible differentia, a classification based on an 'intrinsic and core trait' is not reasonable; Section 377 classified individuals on the basis of the core trait of 'sexual orientation'[10]; (ii) Article 15 prohibits discrimination based on 'sex' which includes within its meaning sexual orientation as well[11] and Section 377 indirectly discriminated between heterosexual persons and the LGBTQ community based on their sexual orientation; and (iii) Section 377 violated Article 19(1)(a) because Section 377 inhibited sexual privacy.[12]

7. One of us (DY Chandrachud, J.) observed that the right to sexual privacy also captures the right of the LGBTQIA+ community to navigate public places free from State interference. The community does not face discrimination merely based on their private 'sexual' activities. It extends to their identity, expression, and existence. The Court declared that the members of the LGBTQIA+ community are entitled to the full range of constitutional rights including the right to choose whom

[8] 2018 1 SCC 791
[9] Chief Justice Dipak Misra in Navtej Singh Johar
[10] Justice Indu Malhotra in **Navtej (**supra)
[11] Justice DY Chandrachud in **Navtej** (supra)
[12] Chief Justice Dipak Misra and Justice DY Chandrachud in **Navtej** (supra)

to partner with, the ability to find fulfilment in sexual intimacies, the benefit of equal citizenship, and the right not to be subject to discriminatory behaviour. This Court in **Navtej** (supra) went beyond decriminalizing the *sexual* offence. It recognized that persons find love and companionship in persons of the same gender; protected the class against discriminatory behavior; and recognized the duty of the State to end the discrimination faced by the queer community.

ii. Societal violence against the queer community

8. Despite the de-criminalization of queer relationships and the broad sweep of the decision in Navtej, members of the queer community still face violence and oppression, contempt, and ridicule in various forms, subtle and not so subtle, every single day. The State (which has the responsibility to identify and end the various forms of discrimination faced by the queer community) has done little to emancipate the community from the shackles of oppression. The ghost of Section 377 lives on in spite of the decriminalization of the sexual offence and the recognition of the rights of queer persons in **Navtej** (supra).

9. The law, in the form of Section 377, imposed social morality on homosexual relationships. The legal regime was the chariot which propels social norms on love and unions. The impact of Section 377 on society must be viewed in terms of its effect on the social conceptions of love and companionship. Section 377 enforced morality through law by shaping beliefs about queer identity. This far-reaching impact of the legal regime is one of the primary reasons for the continuing, widespread revulsion against the LGBTQIA+ community even after homosexual sexual acts have been decriminalized. The lack of sensitization and the ensuing

discrimination has pushed the members of the community into the proverbial closet. For many members of the LGBTQIA+ community, expressing their sexual orientation and gender identity is an act of defiance which requires strength and courage. The ostracism extends across the full range of social values, from parenting to public office.

10. The discrimination faced by the LGBTQIA+ community in various forms is, in so many ways, a product of social morality as much as it is a product of the lack of effort from the State to sensitize the general public about issues concerning queer rights. Social norms and beliefs which were internalised over centuries were not overhauled at the stroke of midnight when the nation became the source of its destiny and when the Constitution was adopted in 1950. Similarly, the stigma against the members of the LGBTQIA+ community did not end with a stroke of the pen when this Court decriminalized consensual homosexual sexual activity.

11. Despite this Court recognizing that sexual orientation is a core and innate trait of an individual, the members of the queer community continue to face economic, social and political oppression in both visible and invisible ways. At a primary level, they face oppression because of their inability to express their gender identity due to the fear of public disapproval. Researchers have recorded incidents where the public has subjected members of the queer community to violence for publicly displaying affection towards one another. A woman who eloped with another woman was beaten, stripped and paraded around the village within a blackened face and a garland of shoes around her neck.[13] Queer

[13] Maya Sharma, *Loving Women: Being Lesbian in Underprivileged India* (2nd edn, Yoda Press 2021)

individuals who are from socio-economically marginalised backgrounds are at an even greater risk of being subject to harassment.

12. The LGBTQIA+ community also faces discrimination in the public space because of the lack of accommodation in the public sphere for persons who do not conform to the gender binary. All the services provided by the State including public washrooms, security check points, and ticket counters at railway stations and bus depots are segregated based on a strict gender binary. Transwomen have recounted experiences of being asked to shift to the men's queue in security check points.[14] Although they are women and identify with the female gender, they are forced to accept a third party's assessment of their gender as being male. Just as a cisgender woman may feel intensely uncomfortable at using facilities meant for men, transgender women too may feel very uncomfortable. Over time, misgendering a person can have deleterious effects on their mental health and negatively impact their ability to function in the world.

13. Places of education and employment are also not spaces where gender identity and sexual orientation may be expressed devoid of discriminatory attitudes. The members of the queer community may be forced to quit their education or their job if they face oppression in these spaces. This would mean that they do not have equal opportunity. In professional environments, members of the queer community may face various forms of discrimination which may range from being denied opportunities to secure jobs to not being invited to office gatherings and to being passed over for promotions. A human rights organization interviewed 3,619

[14] Also see: e-Committee Supreme Court of India, Sensitisation *Module for the Judiciary on LGBTQIA+ community*

transgender persons out of which only 12% were employed, with half of them earning less than Rs. 5,000 per month.[15] Contrary to popular perception, the significant percentage of unemployment in the transgender community is not because transgender persons do not wish to work or because they prefer to beg, but because employers are unwilling to employ them due to their gender nonconformity. In another study conducted by the National Human Rights Commission (NHRC) it was revealed that seventy-five percent of transgender persons in the National Capital Region and eighty-two percent of transgender persons in Uttar Pradesh never attended school or dropped out before tenth grade. Further, members of the transgender community face difficulty in obtaining proper identification documents which prevents them from accessing even those opportunities which are available to them.

14. The biological family is often the first site of violence and oppression for the queer community. It begins with family members rejecting the gender identities of their transgender children or consenting to "gender normalizing surgeries" for their intersex children (that is, those who have reproductive or sexual anatomy that does not fit into an exclusive male or female sex classification) without giving the child an opportunity to choose for themselves[16]. At a very young age, they face familial rejection. Instead of being nurtured with love and affection, they face contempt because of their identity which in turn makes them vulnerable and inexpressive. The natal families of some homosexual persons force them to marry a person of

[15] Shreya Raman, 'Denied Visibility in Official Data, Millions of Transgender Indians Cant Access Benefits' (India Spend, 11 June 2021)
[16] Also see Arunkumar v. Inspector General of Registration, AIR 2019 Mad 265

the opposite sex once they come to know about their sexual orientation.[17] A woman also recounted that she was wary of communicating the truth about her sexual orientation to her family because she was worried that they would stop her from going to school.[18] Another woman recounted that after she disclosed her sexual orientation to her family, her movements were constantly monitored and even if she went away from home for an hour, her phone would be traced with the assistance of the Station House Officer.[19] Families also consider a queer person's desire of gender expression to be a mental illness which requires cure. A person from the queer community recounted being forced to undergo 'conversion therapy' where they were given electroconvulsive shocks.[20] Another queer person recounts the harrowing experience that they underwent at a rehabilitation centre:

> "It was only later that I realised that I had been shifted to another rehabilitation centre [...]. Here, I was undressed and checked by a female warden. Afterward, I went to sleep for the night.
>
> There was one bathroom in this rehabilitation centre, which everyone used together. There was no door, and there was no question of privacy. I have never been to jail in my life, but I've heard that it's better than this."

15. The transgender community is also discriminated against in other ways. The members of the community are not treated in a dignified manner in the healthcare sector for reasons which range from administrative formalities which are not gender-inclusive to a lack of knowledge about gender-related diseases.[21] Similarly,

[17] Shakthi Shalini, "The Unspoken: A qualitative research on natal family violence" 23
[18] Ibid.
[19] ibid
[20] Ibid,110.
[21] Lakshya Arora, 'PM Bhujang, Muthusamy Sivakami, Understanding discrimination against LGBTQIA+ patients in hospitals using human rights perspective: an exploratory qualitative study' Sex Reprod Health Matters' 2022 29(2) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9423841/.

the community also faces discrimination in the housing sector. Studies have shown that it is very difficult for members of the queer community to rent a house.[22] Some members of the queer community recounted that they have shifted houses twice in four years because of neighbours who assumed that they had parties and caused disturbances.[23]

16. Often, instruments of the State which are tasked with protecting human rights, perpetuate violence. Police and prison officials exhibit violence towards the queer community. Research conducted by the National Institute of Epidemiology involving around 60,000 transgender participants revealed that the law enforcement agencies are the largest perpetrators of violence against the transgender community.[24] A trans-woman lodged in a prison housing two thousand male inmates recounted the violence that she faced during her imprisonment. She reported that the male prisoners sexually assaulted and mentally harassed her.[25] Lesbian and gay couples often approach the police for protection from family violence. However, instead of granting protection to the couple, the police 'hand over' the couple to their families.[26] In one such case, the police colluded with the family despite court orders granting protection to a couple from the queer community. The parents of a cis-woman (who was in a relationship

[22] Sejal Singh and Laura E. Durso, 'Widespread discrimination continues to shape LGBT people's lifes in both subtle and significant ways' (American Progress , 2 May 2017) https://www.americanprogress.org/article/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/

[23] Bindisha Sarang, 'Why its doubly difficult for gay renters to find homes' , (*First Post, November 13, 2013) https://www.firstpost.com/living/why-its-doubly-difficult-for-gay-renters-to-find-homes-1224225.html*

[24] International Commission of Jurists, Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity (ICJ, 2017)

[25] Sukanya Shantha, 'Misgendering, sexual violence, and harassment: What it is like to be a transgender person in an Indian prison' (*The wire,* 11 Feb 2021) https://thewire.in/lgbtqia/transgender-prisoners-india

[26] Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates, A report on the findings from a closed door public hearing on April 1, 2023 organised by PUCL and National Network of LBI Women and Transpersons.

with a trans man) filed a missing persons case, The couple already had already filed an affidavit in court that they were in a live-in relationship. However, the police 'tracked them down'.[27] In some instances, the family's complaint is not recorded by the police. Instead, they try to force persons of the queer community to speak to their family.[28] The violence and the discrimination that the queer community is subjected to leads to them being closeted or feeling compelled to imitate the expressive attitudes of heterosexual persons.[29]

17. This Court in **NALSA** (supra) declared that the transgender community must not be subsumed within the gender binary and must be treated as a "third gender" in the eyes of the law. This Court also directed the Central and the State governments to take steps to address the stigma and oppression faced by the community and create public awareness about the community and their struggles. Parliament enacted the Transgender Persons (Protection of Rights) Act 2019[30] to protect the rights of the transgender community and provide welfare measures for their betterment. The enactment aims to protect the transgender community from discrimination and includes provisions for providing them with opportunities in the educational and social sectors. However, in spite of the decision of this Court in **NALSA** (supra) and the provisions of the Transgender Persons Act, members of the transgender community continue to be denied equal citizenship. They face immense physical and sexual violence. They are often forced to undergo sex-reassignment surgeries before their rights as transgender persons are recognized,

[27] ibid
[28] ibid
[29] Sejal Singh and Laura E. Durso (n 22)
[30] "Transgender Persons Act"

and are frequently subjected to hate speech. Stereotypes about the community are also reinforced in the media.

18. The grievance of the petitioners (who are members of the LGBTQIA+ community) is not that society discriminates against them in an informal (and invisible) manner. That is a secondary but an equally important stage of how discrimination pans out against a marginalised class. The petitioners claim that they are discriminated on a more formal (and visible) level. The petitioners contend that the State through the operation of the current legal regime discriminates against the queer community by impliedly excluding the queer community from a civic institution: marriage. The petitioners have invoked the equality code of the Constitution to seek legal recognition of their relationship with their partner in the form of marriage. The petitioners do not seek exclusive benefits for the queer community, which are unavailable to heterosexuals. They claim that the State ought to treat them on par with the heterosexual community.

## B. Submissions

19. Learned counsel appearing for the petitioners made the submissions detailed below. Since this Court is a court of record, the submissions of each of the counsel are set out.

20. Mr. Mukul Rohatgi, learned senior counsel, made the following submissions:

a. This Court's existing jurisprudence on LGBTQIA+ rights declares that LGBTQIA+ persons are entitled to dignity, equality, and privacy, which encompasses the fundamental right of LGBTQIA+ persons to marry a person

of their choice. Accordingly, statutory recognition of such fundamental rights of LGBTQIA+ persons is merely a consequence of this Court's jurisprudence[31];

b. Articles 19 and 21 of the Constitution guarantee all persons the right to marry a person of their choice, including LGBTQIA+ persons;

c. The Special Marriage Act (SMA) violates the right to dignity and decisional autonomy of LGBTQIA+ persons and therefore violates Article 21[32];

d. Excluding LGBTQIA+ persons from the SMA discriminates against them on the basis of their sexual orientation and the sex of their partner. This violates Article 15 of the Constitution;

e. The SMA is violative of Article 14 of the Constitution because:

   i. It denies LGBTQIA+ persons equal protection of the laws. Non-recognition of same-sex and gender-non conforming marriage causes prejudice to LGBTQIA+ persons and denies them rights under social welfare and beneficial legislations;

   ii. It is manifestly arbitrary to exclude LGBTQIA+ persons from the SMA. There is no fair or reasonable justification to exclude LGBTQIA+ couples from the institution of marriage;

[31] Reliance was placed on **K.S. Puttaswamy** v. **Union of India** (2017) 10 SCC 1 [9-Judge Bench], **Navtej Singh Johar** v. **Union of India** (2018) 10 SCC 1, **National Legal Services Authority** v. **Union of India** (2014) 5 SCC 438, and **Deepika Singh** v. **Central Administrative Tribunal** 2022 SCC OnLine SC 1088

[32] Reliance was placed on **Shakti Vahini** v. **Union of India** (2018) 7 SCC 192

iii. There is no constitutionally valid, intelligible differentia between LGBTQIA+ and non-LGBTQIA+ persons. The classification in the present case is based only on the sexual orientation and gender identity of the parties to a marriage, which is constitutionally impermissible. Further, there is no rational nexus with the object sought to be achieved by the SMA. The object of the SMA is to provide a civil form of marriage for couples who cannot or choose not to marry under their personal law. The exclusion of LGBTQ couples from the SMA has no rational nexus with this object;

f. There is no 'legitimate state interest' promoted or safeguarded by denying LGBTQ+ individuals the fundamental right of marriage;

g. Recognizing the right of LGBTQIA+ couples to marry upholds constitutional morality. Constitutional morality urges the organs of the state, including the judiciary, to preserve the heterogeneous nature of our society and encourage it to be pluralistic and inclusive;

h. Every person is entitled to marry someone of their choice. Queer people are equally entitled to the exercise of this right[33].;

i. Denying LGBTQ+ individuals the right to marry inflicts personal harm on them and also inflicts a significant economic cost on the country;

[33] Reliance was placed on **Shafin Jahan** v. **Asokan K.M.** (2018) 16 SCC 368, **Shakti Vahini** (supra), **Laxmibai Chandaragi B.** v. **State of Karnataka** (2021) 3 SCC 360, **Deepika Singh** (supra)

j. Denial of the right to marry amounts to a deprivation of the entitlement to full citizenship as well as a denial of the right to intimacy;

k. The Constitution is a living document and ought to adapt to changing social realities. Notions of marriage equality are not necessarily opposed to social morality.;

l. If a statute appears to violate the Constitution, then this Court may either declare it unconstitutional, or read it expansively to save its constitutionality. Matrimonial as well as other statutes can be read in a gender-neutral manner to include LGBTQIA+ couples within their ambit;

m. There is growing international consensus (including judicial consensus) which recognizes same-sex and gender non-conforming marriages, and this is in line with India's international obligations;

n. Article 32 of the Constitution vests in persons or citizens a fundamental right to approach this Court for the enforcement of the rights guaranteed in Part III of the Constitution. It is therefore incorrect to argue that queer people must wait for Parliament to enact a law granting marriage equality;

o. Consequential reliefs must necessarily follow a declaration that the right to marry is vested equally in all persons including LGBTQIA+ persons;

p. The SMA ought to be read in a gender-neutral manner. Gendered terms such as "husband" and "wife" ought to be read as "spouse." The language used in the SMA facilitates a gender neutral interpretation. Section 4 of the SMA is

with reference to “any two persons,” Section 4(1)(a) refers to a “spouse” and Section 4(1)(b) refers to a “party”;

q. The age that must be attained before a person is eligible to marry under the SMA ought to be twenty-one years for all persons; and

r. Transgender persons may fall into the categories of either “man” or “woman” in the SMA, depending on the gender they identify with.

21. Dr. Abhishek Manu Singhvi, learned senior counsel, made the following submissions:

a. The SMA is unconstitutional because it discriminates on the grounds of sexual orientation by preventing same-sex couples from solemnizing their marriages. Article 15(1) of the Constitution prohibits discrimination on the grounds of sex, which subsumes sexual orientation. The requirement in the SMA that a couple should consist of a man and a woman is one which is based on ascriptive characteristics (attributes that are pre-determined or designated by society or other external norms) and is an exclusion based on a marker of identity;

b. Marriage is not simply a benefit or privilege. Rather, it forms the very basis of a couple’s ability to fully participate in society. Marriage is a source of social validation, dignity, self-respect, fulfilment, security (financial and otherwise), and other legal and civil benefits including in the domain of tax, inheritance, adoption, etc.;

c. The exclusion of same-sex couples from the SMA is violative of Article 14 of the Constitution. While there is an intelligible differentia for the classification

in that the sexual orientation of heterosexual and homosexual persons is different, there is no rational nexus with any legitimate state purpose. A legislative purpose cannot itself be discriminatory or unconstitutional;

d. The exclusion of same-sex couples from the SMA is violative of Article 19 of the Constitution. The act of entering into a marital relationship is protected under Article 19(1)(a) of the Constitution, and is a socially valuable form of expression. The restriction on the right of queer persons to marry is not a reasonable restriction under Article 19(2)[34];

e. The exclusion of same-sex couples from the SMA is violative of their right to dignity and is therefore violative of Article 21 of the Constitution. The exclusion of same-sex couples from the institution of marriage is being used to send a public message about their worth as unequal moral members of society and is *inter alia* akin to caste-based restrictions on temple entry and the refusal to accommodate disability in public examinations;

f. The SMA authorizes the solemnisation of same-sex marriages, when interpreted consistent with the Constitution. It can be read down in the following manner to include the solemnization of marriages between non-heterosexual persons:

    i. The word "man" in Section 2(b) includes "any person", and that correspondingly, the word "woman" includes "any person";

[34] Reliance was placed on **Union of India** v. **Naveen Jindal** (2004) 2 SCC 510

ii. The words "man" and "woman" include trans-men and trans- women, intersex and non-binary individuals as the case may be[35];

iii. Section 4(c) enacts only an age-based exclusion for persons otherwise eligible to marry under the provisions of Section 4, and shall not be construed to impose any disabilities based on gender, sexual orientation, or sexual identity of the parties. For same sex couples in particular, Section 4(c) can be read as a single age-restriction, be it eighteen or twenty-one. In the alternative, Section 4(c) may be read as prescribing the minimum age as eighteen for both parties in the case of a lesbian relationship and twenty-one for both parties in the case of a gay relationship. For non-binary and inter-sex persons, the SMA may be read as imposing no restriction beyond that imposed by other laws which stipulate the age at which persons become capable of binding themselves under law i.e., eighteen years. In the alternative, this Court may lay down guidelines as an interim measure while leaving it open to Parliament to fill the vacuum in due course of time;

iv. The reference to "widow" and "widower" in Schedules II and III must be read as "widow or widower" and "widower or widow," as the case may be, and shall not be construed to impose any disabilities based on gender, sexual orientation, or sexual identity of the parties;

[35] Reliance was placed on **National Legal Services Authority** (supra)

v. References to “bride” and “bridegroom” in Schedules III and IV must be read as “bride or bridegroom”, as the case may be, and shall not be construed to impose any disabilities based on gender, sexual orientation, or sexual identity of the parties.

g. The Foreign Marriage Act 1969 can similarly be read down;

h. The relief sought by the petitioners is workable;

i. In reading down the SMA and the FMA to achieve a constitutionally compliant interpretation, neither the text of the statute nor the intention of Parliament act as a limitation. Only the underlying thrust of the legislation and the institutional capacity of this Court are relevant. The underlying thrust of the SMA is that it was designed to facilitate marriages lying outside the pale of social acceptability. Reliance was placed on **Ghaidan** v. **Godin-Mendoza** [2004] UKHL 30;

j. In the alternative, the principle of updating construction ought to be applied to the SMA. Courts may expand the existing words of a statute to further the march of social norms and contemporary realities;

k. Some laws (such as the Protection of Women Against Domestic Violence Act 2005, the Dowry Prohibition Act 1961, provisions pertaining to cruelty in the Indian Penal Code 1860[36]) were enacted to address structural imbalances of power between men and women in a heteronormative setting. These provisions of law do not impact whether same-sex couples have a right to

[36] “IPC”

marry. These provisions are beyond the scope of the petitions and need not be interpreted in favour of either spouse in a non-heterosexual marriage;

l. There is no timeless and immutable conception of marriage. The SMA itself was enacted contrary to the cultural and social understanding of marriage which prevailed at the time. Further, the SMA is a secular and areligious law which was meant to serve as an alternative for those who could not or did not want to solemnize their marriages under the applicable personal law, which is rooted in religion. The conditions for the solemnization of a marriage under the SMA need not, therefore, conform to the cultural, social, or religious understandings of marriage;

m. The principles of equality and non-discrimination cannot be trumped by societal values. These principles, by definition, require a challenge to majoritarian social norms;

n. This Court is not being asked to act as a substitute for the legislature or to alter the "concept of marriage." Rather, this Court is being asked to find that the exclusion of a group of people from the SMA solely by virtue of their ascriptive characteristics is unconstitutional. A constitutionally compliant reading of the SMA to allow for marriage equality is within the bounds of legitimate statutory interpretation and is not judicial legislation; and

o. Civil unions are not an equal alternative to the legal and social institution of marriage. Relegating non-heterosexual relationships to civil unions would send the queer community a clear message of subordination – that their

relationships are inferior to relationships that comply with the entrenched heteronormative social order.

22. Mr. Raju Ramachandran, learned senior counsel, made the following submissions:

a. The petitioners have a fundamental right to marry a person of one's own choice under Articles 14, 15, 19, 21 and 25 of the Constitution, and any exclusion or discrimination, as incorporated in Section 4(c) and other provisions of the SMA, is ultra-vires the Constitution. The denial of their right to marry violates Articles 14, 15, 19, 21 and 25. Article 21 encompasses the right to happiness, which includes a fulfilling union with a person of one's choice;

b. The exclusion of the petitioners from the institution of civil marriage under SMA, 1954, is inconsistent with the very object of the law, i.e., to facilitate any marriage between two Indians, irrespective of caste, creed or religion;

c. The systemic nature of natal family violence against LGBTQIA+ persons, owing to their sexual or gender identity, and the misuse of the criminal law machinery by the families, often in collusion with local police, makes it imperative for this Court to frame guidelines concerning the police action in dealing with cases of adult and consenting queer and transgender persons[37].

d. The special provisions for a wife in a heterosexual marriage under the SMA need not be interpreted by this Court while deciding this batch of petitions

[37] Reliance was placed on **Shakti Vahini** (supra)

because they are protective provisions for women in pursuance of the constitutional mandate in Article 15(3). Similarly, gender-specific laws including penal laws need not be subject to any interpretative exercise. Religious personal laws are also not required to be interfered with;

e. Declarations by the court as to rights of people are followed by legislation. For instance, the rights declared in **National Legal Services Authority** (supra) were given effect to in the Transgender Persons Act;

f. The doctrine of reading-in is well-recognised in Indian jurisprudence; and

g. The Union of India has sought to argue that only Parliament can grant a new 'socio-legal status of marriage' to LGBTQ persons, after undertaking extensive consultations and eliciting views from every part of the nation. The rights of the LGBTQIA+ community cannot be made contingent on the opinion of the majority.

23. Mr. K V Vishwanathan, learned senior counsel, submitted that:

a. Under Article 21 of the Constitution, all persons have a fundamental right to choose a partner;

b. International covenants to which India is a signatory including the Universal Declaration of Human Rights[38] and the International Covenant on Economic, Social and Cultural Rights[39] enjoin a duty upon the state to not interfere with the right of a person to marry and have a family in terms of their own choice

[38] "UDHR"
[39] "ICESCR"

as well as to protect the familial rights of all persons without discrimination on the basis of *inter alia* sexuality, race, and religion;

c. Statutes regulating marriage in India must be read as inclusive of all gender identities and sexualities in view of the pronouncements of this Hon'ble Court in **National Legal Services Authority** (supra) and **Navtej** (supra). Such a reading is necessary to ensure that these statutes pass muster on the touchstone of Part III of the Constitution;

d. Courts across the country as well as state policies and welfare schemes have recognised and accorded equal status to unions between LGBTQ persons. A necessary corollary of the right to self-identify gender is to be able to express personal preference in terms of choice of partner, and, therefore a marriage entered into by a transgender person must be fully recognised by the State[40];

e. This Court has previously issued guidelines to protect citizens against discrimination in cases where there existed a lacuna in the law[41].;

f. The freedom to choose a partner in marriage would be covered under Article 19(1)(a) as an expression, under Article 19(1)(c) as an association or union and Article 19(1)(e), as an exercise of the right to reside and settle in any part of the territory of India[42];

---

[40] Reliance was placed on **Arunkumar** v. **Inspector General of Registration** AIR 2019 Mad 265, **Sushma** v. **Commissioner of Police**, W.P. No. 7248 of 2021, Madras High Court, **Mansur Rahman** v. **Superintendent of Police** 2018 SCC OnLine Mad 3250, **Chinmayee Jena** v. **State of Orissa** 2020 SCC OnLine Ori 602, **Latha** v. **Commissioner of** 2021 SCC OnLine Mad 7495, **Veera Yadav** v. **The Chief Secretary, Government of Bihar**, CW No. 5627 of 2020, Patna High Court, and **Vithal Manik Khatri** v. **Sagar Sanjay Kamble**, Crl. W.P. No. 4037 of 2021, Bombay High Court

[41] Reliance was placed on **Vishaka** v. **State of Rajasthan** (1997) 6 SCC 241, **D.K Basu** v. **Union of India** (1997) 1 SCC 416

[42] Reference was made to **Saroj Rani** v. **Sudarshan Kumar Chadha** (1984) 4 SCC 90

g. Excluding transgender persons from matrimonial statutes fails the reasonable classification test under Article 14;

h. Transgender persons have a right against discrimination under Articles 15 and 16;

i. The right of transgender persons to marry is enjoined by the Transgender Persons Act. The classification sought to be made by the Union of India between "biological" and transgender persons is untenable;

j. Procreation is not the sole purpose of marriage. Marriage is not merely the meeting and mating of two individuals but much more - it is the union of two souls;

k. If the contention of the Union of India that 'male' and 'female' as provided in statutes are to be construed to refer to cisgender males and females, it would lead to absurd and unjust outcomes in implementation of several laws. For instance, the Hindu Succession Act 1956[43] defines an 'heir' as any person 'male or female' entitled to succeed to the property of an intestate under said Act. If the Union of India's argument is taken to be correct, it would lead to a situation where a transgender heir of a person who has died intestate would not be able to inherit the property, even if they happen to be the sole heir;

l. The National Commission for Protection of Child Rights (NCPCR) has made unscientific claims on the effect of puberty blocker / sex-transition therapy on children. They are in complete disregard to the internationally accepted

[43] "Hindu Succession Act"

guidelines issued by World Profession Association for Transgender Health,[44] which are also referenced in the Transgender Persons Act; and

m. The petitioners' constitutional rights cannot be denied based on an argument that it would offend the "will of the people." Constitutional morality cannot and ought not to be replaced by social morality.

24. Ms. Geetha Luthra, learned senior counsel, made the following submissions:

a. The FMA is applicable to a couple if at least one of them is an Indian citizen. The FMA travels with the citizen to a foreign jurisdiction to extend its protection by recognizing the citizen's marriage contracted under foreign law, or by allowing a citizen to solemnize their marriage under Indian law even when they are abroad. In terms of Section 17 of the FMA, a marriage must be valid in terms of foreign law and consistent with international law;

b. All citizens including LGBTQIA+ citizens are entitled to all rights available to Indian citizens, even if they are abroad. Articles 19 and 21 of the Constitution guarantee all persons the right to marry a person of their choice, including LGBTQIA+ citizens. The FMA violates the right to dignity and decisional autonomy of LGBTQIA+ persons and is discriminatory. Reliance was placed on **National Coalition for Gay and Lesbian Equality** v. **Minister of Home Affairs** [2000] 4 LRC 292;

[44] "WPATH"

c. The object of the FMA in adopting the scheme of the SMA is to provide a uniform, civil and secular marriage law for a couple, either of whom is an Indian citizen. However, by recognizing marriages only between opposite sex couples, the effect of the law is to deny same-sex and gender non-conforming couples the right to marry a person of their choice, solely on grounds of their sexual orientation and gender identity. This is violative of Article 15 of the Constitution;

d. The SMA and the FMA are violative of Article 14 of the Constitution because they deny LGBTQIA+ persons the equal protection of laws, are manifestly arbitrary, and fail the rational nexus test. There is no intelligible differentia between LGBTQIA+ and non-LGBTQIA+ couples. The object of the FMA is to extend the protection of the Indian Constitution and its laws to a citizen abroad regardless of who they choose to marry and under whichever law they choose to do so, to provide for maximum international validity of a marriage, and in adopting the framework of the SMA, to provide for a uniform, civil and secular law to govern foreign marriages. The exclusion of same-sex and gender non-conforming couples from the FMA has no rational nexus with these objects;

e. The FMA is *pari materia* to the SMA. They must be interpreted similarly with regard to same-sex and gender non-conforming marriages;

f. Recognition of marriage of same-sex and gender non-conforming couples under the FMA furthers the comity of nations; and

g. The grant of reliefs does not render the provisions of the FMA or other statutes employing gendered terminology unworkable.

25. Mr. Anand Grover, learned senior counsel, made the following submissions:

a. Marriage remains fundamental to the functioning of the society, and to avail important schemes under the modern nation - state, such as joint tax benefits and rights of surrogacy;

b. The FMA must be interpreted liberally to advance the cause of society at large. It must not be interpreted to cause hardship;

c. The failure of the SMA to recognize same-sex marriages violates Articles 14 and 15 of the Constitution because it fails the reasonable classification test, is manifestly arbitrary, and discriminates based on gender identity and sexual orientation;

d. The failure of the SMA to recognize same-sex marriages violates Article 19(1)(a) of the Constitution because sexuality, gender expression, and marriage are forms of expression;

e. The right to intimate associations is protected by Article 19(1)(c) of the Constitution. Reliance was placed on **Griswold** v. **Connecticut** 381 US 479 (1965);

f. Same-sex marriages or gender non-conforming marriages form a part of Indian tradition and culture. Reliance was placed on **National Legal Services Authority** (supra);

g. Queerness or homosexuality is not an urban, elite conception or expression. Numerous queer or homosexual couples from villages and towns in India have expressed their sexuality, chosen their partner, and entered into the institution of marriage; and

h. There is no traditional bar on marriage between non-heterosexual persons. Excerpts from various scriptures support this proposition.

26. Ms. Jayna Kothari, learned senior counsel, made the following submissions:

a. The SMA ought to be read to include the words “spouse” and “person” so as to include transgender persons within its ambit. Failure to do so amounts to a violation of the right of transgender persons to equality and to equal protection of the laws under Article 14 of the Constitution;

b. The SMA discriminates on the basis of sex, gender identity, and sexual orientation, thereby violating Article 15 of the Constitution;

c. The denial of the right to marry to persons based on their gender identity is a denial of the right to dignity, personal autonomy, and liberty under Article 21 of the Constitution;

d. Inter-sex persons have the same rights as all other persons in India, including the right to marry; and

e. The right to a family is available under Article 21, and this right includes the right to marry. The SMA is violative of the right of transgender persons to have

a family. Reliance was placed on **Oliari** v. **Italy** Applications nos. 18766/11 and 36030/11.

27. Dr Menaka Guruswamy, learned senior counsel, made the following submissions:

a. The Indian Parliament is a creature of the Constitution and does not enjoy unfettered sovereignty. The supremacy of the Constitution is protected by this Court by interpreting laws in consonance with constitutional values;

b. This Court's power of judicial review over legislative action is part of the basic structure of the Constitution;

c. Constitutional courts are empowered to review statutory law to ensure its conformity with constitutional values. The courts do not need to wait for the legislature to enact/amend law to recognize same-sex marriage;

d. The provisions of SMA, insofar as they do not recognize same-sex marriages, are unconstitutional as being violative of Articles 14, 15, 19, 21 and 25 of the Constitution. Hence, to save it from the vice of unconstitutionality, the SMA must be read up to recognise same-sex marriages;

e. Recognition of same-sex marriages under the SMA is consistent with the evolving conception of the institution of marriage;

f. Same-sex marriage is a time honoured tradition in the Indian society;

g. The gendered references in the SMA are capable of being read to recognize same-sex marriages;

h. The State has no legitimate interest in restricting the institution of marriage to heterosexual couples alone; and

i. The codification of Hindu personal laws commenced in 1941 with the colonial Government appointing the Hindu Law Committee, which prepared the first draft of the Hindu Code Bill. There was vociferous opposition to the Hindu Code Bill, which was later enacted into four distinct legislations - the Hindu Marriage Act 1955,[45] the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act 1956, and the Hindu Adoptions and Maintenance Act 1956. Inter-caste marriages, sagotra marriages, the prescription of monogamy, and the introduction of divorce were met with great opposition. Despite vehement opposition, these reforms have stood the test of time and society has prospered overall as a result. Today, the objections raised on behalf of the Union of India opposing the recognition of same-sex marriage are akin to the opposition to the Hindu Code Bill.

28. Mr. Saurabh Kirpal, learned senior counsel, submitted that:

a. Depriving LGBTQ+ individuals of the right to marry violates Articles 14, 15, 19(1)(a) and 21 of the Constitution;

b. The right to marry a person of one's choice is itself a Fundamental Right under the Constitution;

[45] "HMA"

c. The SMA is unconstitutional if it is interpreted to exclude access to LGBTQ individuals from its ambit;

d. The intent of Parliament when it enacted the SMA is not relevant. The doctrine of reading in does not aim to discover the intention of Parliament. The jurisprudential basis of the doctrine is that courts read something in to save a statute from the vice of unconstitutionality;

e. Having found a right to marry, this Court cannot hold that there is no remedy or a real possibility for the exercise of that right; and

f. By virtue of Article 13, the Constitution trumps a statute which violates the Constitution. Analysis under Article 13 does not extend to whether or not a statute or a system of law is workable after it is read up or after certain words or phrases are read in to save it from being unconstitutional. It cannot be that a complex statute can defeat a fundamental right by virtue of its complexity.

29. Ms. Vrinda Grover, learned senior counsel, made the following submissions:

a. Interference, opposition and violence from natal families, irrespective of marital status, violates the fundamental right to life and personal Liberty under Article 21 of the Constitution;

b. Non-recognition of ‘atypical families’ or ‘chosen families’ beyond constraints of marriage, blood or adoption violates Articles 14, 15, 19 and 21;

c. Non-recognition of marriage between two consenting adults on the basis of gender identity or sexual orientation under the SMA violates Articles 14, 15, 19 and 21;

d. Constitutional courts sometimes accord undue deference to the natal family. This ignores the coercion and violence that queer and transgender persons face within their homes. Reference was made to **Devu G** v. **State of Kerala**, SLP (Criminal) No. 5027/2023, Order dated 6 February 2023;

e. This Court ought to issue directions to all state governments to instruct police officers to compulsorily follow the mandate of Sections 41 and 41-A of the Code of Criminal Procedure 1973[46] when responding to complaints involving queer and transgender adults who voluntarily leave natal homes;

f. Issues of 'workability' in statutory provisions do not preclude this Court from protecting rights under Part III of the Constitution.

30. Ms. Karuna Nundy, learned counsel, submitted that:

a. A spouse of foreign origin of an Indian Citizen or Overseas Citizen of India[47] cardholder is entitled to apply for registration as an OCI under Section 7A(1)(d) of the Citizenship Act 1955.[48] Section 7A(1)(d) is gender, sex and sexuality neutral, as distinct from the FMA and SMA. The absence of any conditions qua gender/ sex/sexuality of the parties is a *casus omissus* in the

[46] "CrPC"
[47] "OCI"
[48] "Citizenship Act"

statute. This Court cannot supply a *casus omissus* into a statute by judicial interpretation, except in circumstances of clear necessity;

b. The recognition of a foreign marriage between two non-citizens is a mere ministerial Act. Only the substantive law of the foreign jurisdiction is relevant;

c. It would be manifestly arbitrary and contrary to Article 14, for the law to accord a larger ambit for registration of marriages to an OCI than to a citizen of the country married in a foreign jurisdiction, and to the extent of the inconsistency a harmonious construction of the FMA with the Citizenship Act is required;

d. A denial of the right to marry for queer persons is violative of Articles 14, 15, 19, and 21 of the Constitution; and

e. Rule 5 of the Transgender Persons (Protection of Rights) Rules 2020 recognises marriage of transgender persons because Form 2 contains the word “spouse”.

31. Ms. Anitha Shenoy, learned senior counsel, submitted that:

a. The petitioners have a fundamental right to marry a person of one’s own choice under Articles 14, 15, 19, 21 and 25 of the Constitution, and any exclusion or discrimination from solemnization or registration, as incorporated in Section 4(c) and 17(2) and other provisions of the FMA is *ultra-vires* the Constitution;

b. The denial of recognition of the petitioners' marriage is inconsistent with the very object of the FMA not to invalidate marriages duly solemnized under foreign law by Indian citizens;

c. The requirement of proof of a 'marital relationship' by a 'married couple' for the purpose of joint adoption under Regulations 5(2)(a) and 5(3) is beyond the remit of Section 57 of the JJ Act that extends joint adoption to relationships that are 'marriage like' including marriages between same-sex couples solemnized overseas;

d. Regulations 5(2)(a) and 5(3) of the Adoption Regulations 2022[49] are *ultra vires* the Juvenile Justice (Care and Protection of Children) Act 2015.[50] They also violate:

   i. The principle of equality and non-discrimination on the basis of sexual orientation under Articles 14 and 15;

   ii. The right to adoption and motherhood protected under Article 21; and

   iii. The right of a child to be adopted recognised under the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption 1980 and the Convention on the Rights of Children 1989.

[49] "Adoption Regulations"
[50] "JJ Act"

## PART B

32. Ms. Arundhati Katju, learned counsel, made the following submissions:

a. Article 21 protects the right to found a family and the right to a meaningful family life for all persons including LGBTQ persons. The law defines “family” and “household” broadly and is not limited to a “biological” man and woman and their children. Surrogacy and adoption are available only to married couples, thus, denying LGBTQ couples the right to found a family;

b. A child’s right to a meaningful family life under Article 21, and its best interest, is protected by recognizing its parents’ relationship through marriage;

c. Denying LGBTQ couples the right to marry violates Article 14 *qua* them and their children;

d. The SMA should be read expansively to save it from the vice of unconstitutionality and in the alternative, it should be struck down;

e. Any interpretative difficulties which arise because of the exercise of reading-in must be decided on a case-by-case basis by the courts before which such issues arise; and

f. A declaration of the rights of queer people by this Court will not preclude any debates or discussions about queerness either in Parliament or in society.

**PART B**

33. Ms. Amritananda Chakravorty, learned counsel, made the following submissions:

a. The Office Memorandum issued by CARA on 16 June 2022[51] is unconstitutional because they prevent same-sex couples and gender non-conforming couples from availing of joint adoption; and

b. The requirements prescribed in the CARA Circular travel beyond the remit of the JJ Act. Section 2(49) of the JJ Act defines the term "prospective adoptive parents" to mean "a person or persons eligible to adopt a child as per the provisions of section 57." Section 2(49) does not require the prospective adoptive parents to be heterosexual. Further, Section 57 does not specify marital status as a relevant factor to be considered while determining the eligibility of prospective adoptive parents.

34. Mr. Raghav Awasthi, learned counsel, sought to make submissions regarding the Hindu Marriage Act. This Court declined to hear arguments on this issue in the present proceedings.

35. Mr. Shivam Singh, learned counsel, made the following submissions:

a. It is unconstitutional for the state to discriminate against persons because of their innate characteristics;

b. Upholding the heterosexual notion of marriage as the only constitutionally and legally sanctioned notion of marriage will serve to

[51] CARAICA013/1/2022Administration; "CARA Circular"

perpetuate gender-based stereotypes proscribed by the Constitution and is therefore violative of Article 15; and

c. Resorting to the provisions of the General Clauses Act 1897, Section 4(c) of the SMA (which otherwise appears to be unconstitutional) can be read down such that the singular “male” and “female” includes the plural as well.

36. Manu Srinath, learned counsel, made the following submissions:

a. Persons whose fundamental rights are violated are entitled to seek judicial review of the violating act;

b. It is permissible for judicial review to result in an increase in the size of the intended pool of beneficiaries of a legislation. Such an exercise will not amount to legislation by courts; and

c. Judicial review is a tool to achieve social justice. It is also a tool by which constitutional aspirations and ideals are achieved.

37. Jaideep Gupta, learned counsel, made the following submissions:

a. If recognition is accorded to marriage by queer persons, they will be protected from so-called “conversion therapies” which attempt to “convert” the sexual orientation of queer people into a heterosexual orientation as well as forced marriages;

b. Queer marriages do not fall within the degrees of prohibited relationships; and

c. The classification on the basis of age in the SMA ought to be declared unconstitutional insofar as it mandates a different minimum age requirement for men and women. This Court ought to declare twenty-one years as the ideal age for all marriages. The Prohibition of Child Marriage (Amendment) Bill 2021, which seeks to raise the legally permissible age of girls to marry from eighteen years to twenty-one years is currently pending in Parliament.

38. Thulasi Raj, learned counsel, submitted that:

a. The exclusion of the LGBT community from the institution of marriage is "demeaning" as defined by Deborah Hellman; and

b. Prejudicial notions about sexuality inform the SMA although its provisions may not expressly contain words which indicate such prejudices.

39. Tanushree Bhalla, learned counsel, submitted that:

a. The word "man" in the SMA ought to be read as meaning a cisgender man, a transgender man, and any person who assumes a role in the marriage that the statute or society or the institution of marriage confers on men. The word "woman" must be interpreted in a similar fashion;

b. Section 4(c) of the SMA excludes intersex persons; and

c. A minimum age at which persons of the "third gender" may marry may be read in, in Section 4(c) of the SMA.

40. In addition to the above submissions, some senior counsel and counsel sought to address this Court on the 'notice and objections regime' in the SMA (i.e., Sections 5 to 9 of the SMA which stipulate a set of procedural preconditions to the solemnization of marriages under the SMA). This Court has not heard arguments on this issue in the present proceedings.

41. Mr. R. Venkataramani, learned Attorney General of India appearing for the Union of India, made the following submissions:

a. This Court has already issued constitutional declarations on the right to form a family, and the right to marry of non-heterosexual persons in **Navtej** (supra). The issue in this batch of petitions relates to fitting the constitutional declaration into relevant laws;

b. The SMA is a species of the general marriage laws. Marriage is conceived to be a union between heterosexuals across all laws on marriage and procreation is an essential aspect of marriage;

c. At the time when the SMA was enacted, an alternative conception of a union of persons (other than heterosexuals) did not exist. The SMA is intended to regulate marriage between heterosexuals irrespective of caste and religion. Thus, the omission of non-heterosexual unions from the purview of the enactment would not render the enactment unconstitutional because of under-inclusiveness. The SMA will be underinclusive only when a class of heterosexuals is excluded by the statute;

d. There would be no internal cohesion in the SMA if Section 4 is read in a gender-neutral manner. Such an interpretation would render the implementation of Sections 19 to 21A which link the SMA with other personal and non-personal laws difficult;

e. Courts can use the interpretative tool of reading-in only when the stated purpose of the law is not achieved. Since the purpose of SMA is to regulate heterosexual marriages, this Court cannot read words into the enactment to expand its purview beyond what was originally conceptualized;

f. It is up to Parliament to enact a special code regulating non-heterosexual unions and the specific issues that such unions would face during and after the partnership, after comprehensively engaging with all stakeholders;

g. The course adopted by this Court in **Vishaka** (supra) cannot be replicated for two reasons: *one,* there is no legislative vacuum in the instant case, and *second,* the non-inclusion of all possible kinds of unions cannot be construed as a constitutional omission;

h. Courts cannot issue directions granting legal recognition to non-heterosexual marriages because it would require the redesigning of several enactments and rules. Marriage rights must be given only through the parliamentary process after wide consultation; and

i. A declaration by this Court granting legal recognition to non-heterosexual marriages accompanied with a scheme of rights would be anathema to

separation of powers. This Court must not venture into the realm of policy making and law making.

42. Mr. Tushar Mehta, learned Solicitor General appearing for the Union of India, made the following submissions:

a. The institution of marriage occupies a central role in the sustenance and progression of humankind. The prominent components of a marriage are companionship, sexual intimacy, and most importantly, procreation. Marriage (from an individual perspective) serves the purpose of sustaining an individual's gene pool. From a societal perspective, marriage contributes towards the proliferation of future generations for the sustenance of humankind;

b. The Constitution does not recognize a right to marry. An expression of a person's sexuality is protected under Article 19(1)(a) of the Constitution. However, marriage cannot be traced to the right to freedom of expression or the right to form unions under Article 19(1)(c);

c. This Court has not previously recognized the right to marry under the Constitution. The observations of this Court in **Shafin Jahan** (supra) and **Shakti Vahini** (supra) that the petitioners' right to marry has been violated must be read in the specific context of these judgments. In these cases, the right to marry which is conferred by the legislature to inter-caste and inter-religious couples was violated by State and non-State actors;

d. Marriage is a creation of statutes. The State by virtue of Entry 5 of List III of the Seventh Schedule has the power to regulate the institution of marriage. In exercise of this power, the legislature has prescribed various conditions which must be fulfilled before legal recognition can be given to a union. These conditions *inter alia* include the minimum age to be able to consent to a marriage, the prohibition of bigamy, and the bar against marrying within the degrees of prohibited relationship;

e. The State is not under an obligation to grant legal recognition to every type of relationship. The State only recognizes relationships when there exists a legitimate state interest. The State has a legitimate State interest in legally recognizing heterosexual relationships for the sustenance of society;

f. After the decriminalization of homosexuality in **Navtej** (supra)**,** members of the LGBTQIA+ community have the freedom and autonomy to choose their partners without restraints on gender and sexuality. However, the decriminalization of the sexual offence does not cast an obligation on the State to grant legal recognition to such relationships or unions. Marriage is a legal privilege. It is conditional upon statutory or societal conditions. The right to choose a partner does not necessarily imply that there is a right to marry a partner of choice;

g. The Courts do not have the power to decide if legal recognition can be granted to a union of non-heterosexual individuals. This is an issue which must necessarily be decided by the legislature, being the elected representatives of the citizens;

h. It would become impossible to deny legal recognition to practices such as incest or polygamy if non-heterosexual couples are granted the right to marry;

i. Marriage is a public institution. It falls in the outer-most zone of privacy and is thus, susceptible to the highest degree of State regulation. This Court in **Navtej** (supra) only granted protection to the intimate and intermediate zone of privacy of non-heterosexual couples;

j. Both the father and the mother have a significant and unique role in the upbringing of children. In non-heterosexual unions, the child born out of surrogacy or artificial reproductive technology or adopted by the couple would feel the absence of either a father or a mother. The State does not grant legal recognition to homosexual unions in the form of marriage to protect the interest of the children. This is a legitimate State interest. The petitioners have not submitted sufficient data to back their claim that the interest of a child brought up by a non-heterosexual couple is protected;

k. Granting legal recognition to non-heterosexual unions would dilute heterosexual marriages. For example, in Netherlands, more heterosexual couples have opted for domestic partnerships and cohabitation after legal recognition was granted to non-heterosexual unions. Non-heterosexual unions are not granted legal recognition to protect the institution of marriage;

l. The impugned provisions of the SMA are constitutional because:

i. The legislative debates during the introduction of the SMA indicate that Parliament made a conscious decision to exclude non-heterosexual unions from the ambit of the SMA;

ii. The object of the SMA is to grant (and regulate) legal recognition to inter-faith and inter-caste unions of heterosexual couples. The provisions of the SMA have a reasonable nexus to this object;

iii. There is an intelligible differentia in classifying unions into heterosexual and non-heterosexual partnerships because heterosexual couples sustain a society through precreation. In fact, the Transgender Persons Act also classifies persons into homosexuals and heterosexuals and grants substantive rights to the members of the LGBTQIA+ community in furtherance of the mandate of substantive equality. The Transgender Persons Act recognizes the autonomy of the members of the LGBTQI+ community to choose a partner of their choice;

iv. The constitutionality of a statute cannot be challenged on the ground of under-inclusion;

v. An emerging body of evidence indicates that homosexuality may be an acquired characteristic and not an innate characteristic. Children who have been exposed to homosexual experiences are more likely to identify as a homosexual on attaining adulthood. Thus, this Court must not approach this issue from a "linear reductionist perspective." Further, the argument of the petitioners that the SMA is unconstitutional

because it is excludes a class based on innate characteristics is erroneous;

vi. The SMA would become unworkable if it is read in a gender-neutral manner. It would also amount to this Court re-drafting a large number of provisions:

A. Section 2(b) read with the First Schedule prescribes distinctive degrees of prohibited relationships for the bride and the groom;

B. According to Section 4(c), the male must have completed twenty-one years of age **and** the female must have completed eighteen years of age at the time of marriage. Reading the phrase 'spouse' in place of 'male' and 'female' would render the distinctive minimum age requirement for marriage based on gender otiose;

C. The form of the statutory oath which the parties are required to take for the solemnization of their marriage expressly uses the phrases 'wife' and 'husband';

D. According to Section 21, the rules of succession provided in the Indian Succession Act 1925[52] govern the succession of property of any person who is married under the SMA. The ISA prescribes different rules and procedures for succession based on gender.

[52] "ISA"

Reading the provisions of the SMA in a gender-neutral manner would impact the interpretation of the provisions of the ISA as well;

E. By virtue of Section 21A, the rules of succession under the HMA shall apply for marriages solemnized between a male and female professing the Hindu, Buddist, Sikh or Jain religion. The HSA prescribes different rules for succession based on gender. Reading the provisions of the SMA in a gender-neutral manner would render the HSA unworkable; and

F. Other provisions of the SMA such as Sections 27, 31, 36, and 37 cater to the needs and requirements of a woman in a heterosexual marriage. A reading of the SMA in a gender-neutral manner would impact the interpretation of these provisions.

m. By declaring that non-heterosexual couples have a right to marry, this Court would be granting legal recognition to a new social relationship. Such a declaration by this Court could also pre-empt debates on this issue in the legislature; and

n. The term ‘spouse’ in Section 7A of the Citizenship Act 1955 cannot be read in a gender neutral manner. Section 7A of the Citizenship Act applies to the same class of persons to whom the FMA applies. The FMA expressly uses the phrases ‘bride’ and ‘bridegroom.’ Section 4 of the FMA prescribes the same conditions for the registration of a marriage as Section 4 of SMA.

## PART B

43. Mr. Kapil Sibal, learned senior counsel appearing for intervenor made the following submissions:

a. Marriage was defined by the social acceptability of a relationship even before it was codified. The heterosexual nature of a marriage was not introduced by law. Law merely regulated unions which were socio-historically recognised. The law has always differentiated between heterosexual and non-heterosexual unions;

b. A legal recognition of a union is premised on the recognition of a relationship on an individual level, family level, and societal level;

c. The right of a person to choose a partner of their choice is protected under Article 21. However, the legislative recognition of such a choice is not a fundamental right;

d. The right to marry cannot be traced to the right to privacy. The right to privacy postulates the right to be left alone. There is a negative obligation on the State and the society to not interfere with choices of individuals. However, if the exercise of the right to privacy has a public dimension, the State must regulate the exercise of the right in the larger interest of the community. The State has, in the past, regulated the parameters of choice within the realm of marriage with respect to the number of partners and the age of marriage. Thus, the right to the recognition of non-heterosexual unions is not traceable in Article 21;

e. The South African Supreme Court in **Minister of Home Affairs** v. **Fourie**[53] and the United States Supreme Court in **Obergefell** v. **Hodges, Director, Department of Health**[54] while recognising the right to marry acknowledged the importance and relevance of social debate and public discourse on the issue. The courts observed that the public has become more accepting of non-heterosexual unions. While it may not be necessary to reach public consensus on social issues, it is still important to have some form of discourse on the issue be it through law commissions, referendums, bills in the legislature, or even High Court decisions;

f. Public engagement also goes hand-in-hand with an incrementalistic approach by the courts or the legislature. For example, Mexico City recognised cohabitation partnership of homosexual unions in 2006. Three years later, their right to marry was recognised. In South Africa, before the judgment in **Fourie** (supra), the constitutional court had dealt with the criminalisation of sodomy,[55] the rights of same-sex immigrant partners[56], the right to adoption of same-sex partners[57], and the non-inclusion of same-sex partners in a statute providing pension rights[58];

g. This Court instead of limiting its judgment to the reliefs sought by the petitioners, must also address the following issues:

[53] (2006) 1 SA 524
[54] 576 US 644 (2015)
[55] Sodomy Case, 1999(1) SA 6 (CC)
[56] Home Affairs case, 2000(2) SA 1 (CC)
[57] Du Troit, 2003 (2) SA 198 (CC)
[58] Satchwell, 2002 (6) SA 1 (CC)

(i) Whether the LGBTQIA+ community, being a sexual minority, is entitled to be protected even in the absence of a law;

(ii) The recognition of the hindrances faced by LGBTQIA+ unions and the procedure to resolve the difficulties; and

(iii) The necessity of administrative procedures and guidelines recognizing that sexual orientation is a physiological phenomenon and that same sex unions must not be discriminated against.

h. The assumption of the petitioners that both law and society must consider non-heterosexual unions as belonging to the same class as heterosexual unions without distinction based on sexual orientation is wrong. The exclusion of non-heterosexual unions from the SMA is not violative of Articles 14 and 15 of the Constitution;

i. Marriage between “any two persons” as provided in Section 4 of SMA and FMA cannot include non-heterosexual unions for the following reasons:

(i) Section 4(a) states that marriage cannot be solemnised if either party has a spouse living at the time of marriage. The SMA, when it was enacted, referred to marriages which had taken place before it came into force. In that case, the word ‘spouse’ could have only been used in the context of heterosexual marriages; and

(ii) The mere usage of a gender-neutral term does not indicate the legislative will to include non-heterosexual unions within the ambit of the enactment.

j. The statute is not underinclusive for impliedly excluding non-heterosexual unions from its purview because Parliament did not contemplate the inclusion of non-heterosexual marriages at the time of enactment. A statute will be under-inclusive only where a statute which must necessarily cover a category excludes them from the benefits it confers. The principle will not apply to persons who are not *ex-facie* covered by the statute;

k. The interpretative tool of "reading-in" means reading into the text of the statute and not *altering* it. Reading the word "spouse" into SMA where the words "husband" and "wife" are used would render provisions which are enacted based on conventional ideas about a heterosexual relationship redundant;

l. The legislative regime related to marriage and other allied issues has been enacted in response to the unique challenges that heterosexual marriages face. Even if this Court finds that the Constitution grants a right to legal recognition of non-heterosexual unions, a new legislative regime regulating non-heterosexual marriages must be introduced to respond to the unique challenges they face; and

m. This Court can use its power under Article 142 to fill legislative vacuums to the limited extent of laying down procedural guidelines. The court cannot create substantive rights and obligations to fill a legislative vacuum because it would amount to judicial legislation. This Court can neither direct the legislature to enact a law nor direct the legislature *when* to enact a law. These are established parameters of separation of powers and must be respected.

44. Mr. Arvind P Datar, learned senior counsel appearing for one of intervenors made the following submissions:

a. This Court has recognised the right to marry in **KS Puttaswamy (9J)** (supra), **Shafin Jahan** (supra), **Shakti Vahini** (supra) and **Navtej** (supra). However, only Justice Nariman's opinion in **Navtej** (supra) held that non-heterosexual couples also have a right to marry;

b. A statute can be struck down after a passage of time only if the rationale of the law ceases to exist as in the case of Section 377 of the IPC where medical research indicated that same sex relationships are not unnatural or against the order of nature;

c. This Court while interpreting provisions of a statute can "iron out the creases but not alter the fabric." The exercise of reading up can only be undertaken by the Courts when it would be consistent with legislative intention, when it would not alter the nature of the enactment, and when the new state of affairs would be of the same kind as the earlier state of affairs to which the enactment applies;

d. The judgment of the High Court of Madras in **Arunkumar** (supra) interpreting the word "bride" in the Hindu Marriage Act to include transgender and intersex persons is contrary to the judgment of this Court in **Madhu Kishwar** v. **State of Bihar**[59] where it was held that male pronouns must not be expansively interpreted to include female pronouns within their ambit;

[59] (1996) 5 SCC 125

e. The legal recognition of non-heterosexual unions is a polycentric issue which cannot be resolved solely by the judiciary;

f. Unenumerated rights or derivate rights, which are recognised by courts through judicial interpretation are inchoate rights because they are an exception to the rule of *ubi jus ibi remedium.*[60] Thus, even if this Court recognises the petitioners' right to marry, it is not enforceable.

45. Ms. Aishwarya Bhati, learned Additional Solicitor General, appearing for one of the intervenors made the following submissions:

a. Article 21 guarantees that every child will have the best upbringing. The petitioners have not submitted any data to prove that the interests of the child would be protected if they are raised by non-heterosexual parents. A child born to a heterosexual couple is innately adaptable to a similar family environment and naturally seeks out a family environment which is comparable to their birth family;

b. Chapter II of the JJ Act which lays down the General Principles of Care and Protection of Children stresses upon the best interest of the child. Principle xiii states that every child in the juvenile justice system has a right to be restored to the same socio-economic and cultural status as they were earlier in;

c. Men and women are differentiated for the purpose of adoption, assisted reproduction, and surrogate reproduction. For example, the law does not

[60] HM Seervai, The Privy Purse Case: A Criticisum, (1972) 74 Bom LR (journal) 37

permit a man to adopt a girl child. The scheme of the laws relating to adoption and surrogacy must be revamped for the inclusion of any of the excluded categories of intending parents; and

d. The law protects a child by assuming that they are incapable of entering in contracts, of committing an offence, and of consenting to a sexual relationship. Thus, children cannot be imposed upon with emerging and evolving notions of gender fluidity. Children cannot be made guinea pigs of an evolving social experiment. The state is justified in prescribing reasonable restrictions for adoption, assisted reproductive technology, and surrogacy based on the welfare of children.

46. Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the State of Madhya Pradesh made the following submissions:

a. Only thirty-four of the one hundred and ninety-four countries have recognised marriage between non-heterosexual individuals. Out of the thirty-four countries, the legislature has recognized it in twenty-four of them. At least twenty of the twenty-four countries enacted a framework for registered partnerships or civil unions for granting legal recognition to non-heterosexual unions. In ten countries, the courts have directed the State to recognise non-heterosexual marriages. The approach taken by the courts in these ten countries is not uniform. The approach is specific to social complexities and legal arrangements in each of the countries;

b. The laws relating to marriage, and the benefits (and rights) which accrue because of marriage are not uniform. The laws take into account religious and

regional differences. The principle of non-discrimination in Article 14 and 15(1) does not mandate that marriage must be organised and recognised in a uniform manner. The principle of equality does not postulate uniformity;

c. The principle of non-discrimination in Article 14 is not violated if the law is not "all-embracing." The legislature can choose to remedy certain degrees of harm;

d. It is for the legislature to decide if non-heterosexual unions must be legally recognised, and what benefits and entitlements must be conferred to the union;

e. Legislations governing unions and the benefits which accrue because of unions do not become unconstitutional after the decriminalisation of homosexuality in **Navtej** (supra). Decriminalisation of a sexual offence does not automatically confer legal recognition to a union;

f. The opinion of the majority in **Navtej** (supra) held that homosexuals have a right to form a union under Article 21. This Court specifically observed that a union does not mean marriage. Thus, **Navtej** (supra) has ruled out the possibility of non-heterosexual marriages; and

g. The observation in **Puttaswamy (9J)** (supra) that the State has a positive obligation to provide legal protection to enable the exercise of choice was limited to the specific context of data protection. Such an obligation can be imposed on the State only when a right is infringed because of actions of the State.

47. Mr. Maninder Singh, learned senior counsel, submitted that Section 112 of the Indian Evidence Act 1872 which provides that birth during the sustenance of marriage or two hundred and eighty days after the dissolution of marriage is a conclusive proof of legitimacy establishes that procreation is a chief component of marriage. He further submitted that an alteration of the chief component of marriage would render other laws which are premised on the heteronormative nature of marriage unworkable.

48. Mr. Atamaram Nadkarni, senior counsel appearing for an intervenor (Akhil Bharatiya Sant Samiti) submitted that the SMA is interwoven with personal law. He argued that the recognition of non-heterosexual marriages under the SMA would impact personal laws on succession, and adoption.

49. Ms. Manisha Lavkumar, learned senior counsel appearing for the State of Gujarat made the following submissions:

a. Though the rules of marriage continue to evolve, they are still grounded in heterosexual relationships;

b. There is an overarching State interest in excluding non-heterosexual unions from the ambit of marriage because it: (a) regulates matrimonial conduct; (b) preserves social order; and (c) ensures the progression of society in a legitimate manner;

c. The State can impose reasonable restrictions on individual autonomy and consent by introducing conditions such as the number of marriages, the

minimum age for marriage and the degrees of prohibited relationship. The heterosexual nature of a relationship is one such reasonable restriction; and

d. The FMA is modelled on the SMA. The FMA also envisages a heterosexual union. Section 23 of the FMA states that the Central Government may recognise marriages solemnised in a foreign country as valid in India only if the law in the foreign country on marriage is similar to the FMA. Since the FMA only includes heterosexual unions, a non-heterosexual marriage solemnised in a foreign country cannot be recognised in India.

50. Mr. J Sai Deepak, learned counsel appearing on behalf of an intervenor made the following submissions:

a. A judicial sanctioned legal recognition of non-heterosexual union would be a colonial top-down imposition of morality. Such an approach would diminish democratic voices in the process;

b. The issue of lack of legal recognition of non-heterosexual unions is placed differently as opposed to the legislative vacuum on sexual harassment at workplaces. The history and purpose of the SMA does not permit the Court to issue guidelines under Article 141 as it did in **Vishaka** (supra). The power under Article 141 to issue guidelines must be used sparingly. The power must not be used to take over the functions of the other organs of the State;

c. The judgments of this Court in **NALSA** (supra) and the Madras High Court in **Arun Kumar** (supra) suffer from internal and external inconsistencies; and

d. The LGBTQIA+ community is not a homogenous class. The court cannot cater to the interests of a heterogenous class which they constitute. The legislature would be better placed to cater to their needs.

51. Mr. MR Shamshad, learned counsel appearing for an intervenor submitted that a declaration that non-heterosexual couples have a right to marry would conflict with the tenets of religion where marriage is considered a heterosexual union.

52. Ms. Priya Aristotle, learned counsel appearing for an intervenor submitted that granting non-heterosexual couples parental rights would affect the children of heterosexual couples.

53. Mr. Sasmit Patra, learned counsel appearing for the intervenor submitted that:

a. Granting legal recognition to non-heterosexual unions would require wide ranging amendments to various laws. It is only the legislature which has the capacity and functionality to deal with matters of such wide implication;

b. A declaration by this Court that non-heterosexual unions have a right to marry cannot be implemented without the aid of the legislature and executive; and

c. A social change of this magnitude will not be fructified if the role of the polity in the process is negligent.

54. Ms. Archana Pathak Dave, learned counsel appearing for an intervenor (Ex-Servicemen Advocates Welfare Association) submitted that non-heterosexual marriages must not be permitted particularly for personnel working in the armed forces because Article 33 permits restrictions on their fundamental rights. It was submitted that granting legal recognition to non-heterosexual marriages may dilute the disciplinary code in the army, the navy, and the air force, would create conflicts in the workplace over personal and religious beliefs, and would raise concerns about shared facilities such as communal showers and shared rooms.

55. Ms. Manisha Narain Agarwal, learned counsel appearing for an intervenor submitted that the petitioners are seeking social acceptance of their relationships through an order the Court. This Court does not have powers of such magnitude.

56. Mr. Atulesh Kumar, Ms. Sanjeevani Agarwal, and Mr. Som Thomas appearing on behalf of various intervenors adopted the above arguments.

## C. Reliefs sought in the proceedings

57. The petitioners in this batch of petitions have made certain general prayers, in addition to the prayers specific to the facts of their case. The general reliefs sought are summarized below. The petitioners seek that this Court declare that:

a. LGBTQ persons have a right to marry a person of their choice regardless of religion, gender and sexual orientation;

b. The SMA is violative of Articles 14, 15, 19, 21, and 25 of the Constitution insofar as it does not provide for the solemnization of marriage between same-sex, gender non-conforming or LGBTQ couples;

c. The SMA applies to any two persons who seek to get married, regardless of their gender identity and sexual orientation;

d. The words “husband” and “wife” as well as any other gender-specific term in the SMA ought to be substituted by the word “party” or “spouse”;

e. All rights, entitlements and benefits associated with the solemnization and registration of marriage under the SMA are applicable to LGBTQ persons;

f. Sections 5, 6, 7, 8, 9, 10 and 46 of the SMA which contain requirements regarding the publication of a public notice of a proposed marriage and the domicile of the couple, and which empower the Marriage Registrar to receive and decide objections to the proposed marriage are violative of Articles 14, 15, 19 and 21 of the Constitution;

g. The validity of marriages already solemnized or registered under the SMA will not be jeopardized if one spouse transitions to their self-determined gender identity;

h. The word “spouse” in Section 7A(1)(d) of the Citizenship Act is gender-neutral and is applicable to all spouses of foreign origin regardless of sex or sexual orientation;

i. LGBTQ couples have a right to register their marriages under Section 5 of the HMA and under Section 17 of the FMA if they are lawfully married in a foreign jurisdiction and at least one of them is an Indian citizen;

j. The FMA violates Articles 14, 15, 19 and 21 of the Constitution of India and is unconstitutional and void insofar as it does not provide for the registration of marriages between same-sex or gender non-conforming or LGBTQ couples;

k. The FMA applies to any two persons who seek to get married, regardless of their gender identity and sexual orientation;

l. The words “bride” and “bridegroom” as well as any other gender-specific term in the FMA have to be substituted by the word “party” or “spouse”;

m. All rights, entitlements, and benefits associated with the solemnization and registration of marriage under the FMA are applicable to LGBTQ persons;

n. Regulations 5(2)(a) and 5(3) read with Schedules II, III and VI of the Adoption Regulations are unconstitutional and *ultra vires* the JJ Act insofar as they exclude LGBTQ couples from joint adoption;

o. The words “married couple” and “marital relationship” used in Regulations 5(2)(a) and 5(3) of the Adoption Regulations encompass LGBTQ couples married under foreign laws;

p. The phrases “male applicant” and “female applicant” are substituted by the phrases “Prospective Adoptive Parent 1” and “Prospective Adoptive Parent 2 (in case of applicant couples)” in Schedules II, III, VI and VII of the Adoption Regulations;

q. Section 5 of the HMA does not distinguish between homosexual and heterosexual couples and the former have a right to marry under the HMA;

r. LGBTQ persons have a constitutional right to a “chosen family” in lieu of next of kin under all laws as an intrinsic part of their right to a dignified life under Article 21;

s. An unmarried person can nominate “any person(s)” to act as their nominee or next of kin, irrespective of whether such person is a “guardian, close relative or family member,” with respect to healthcare decisions in case of incapacity such as the execution of Advance Directives and assigning any legal right, interest, title, claim or benefit accrued to the person;

t. The State Governments must apply all preventative, remedial, protective, and punitive measures including the establishment of safe houses similar to the Garima Greh welfare scheme, in order to guarantee the safety and security of all individuals irrespective of gender identity and sexual orientation;

u. The provisions of matrimonial statutes including the rules and regulations framed thereunder, to the extent that they are construed as requiring one “male” or “bridegroom” and one “female” or “bride” for the solemnization of marriage be read as neutral as to gender identity and sexual orientation; and

v. All marriages between couples in which either one or both partners are transgender or gender non-conforming or who otherwise do not identify with the sex assigned to them at birth, may be solemnized under matrimonial statutes regardless of their gender identity and sexual orientation.

58. In addition, the petitioners have sought directions to the Union Government, the State Governments, and district and police authorities to adopt and follow a protocol in cases which concern adult, consenting LGBTQ persons who require protection from their families, regardless of whether such persons are married;

## D. Analysis

### i. This Court is vested with the authority to hear this case

59. The respondents argued that this Court should not decide the issue of whether legal recognition in the form of marriage can be given to non-heterosexual relationships. It was argued that this issue must necessarily be decided by the people by themselves or through the elected representatives. It was also submitted that this Court, by deciding the issue one way or the other, would pre-empt any debate in the legislature.

60. The respondent's submission is two-fold: first, the Court does not have the power to decide this issue; and second, such a decision can be arrived at only through a process that reflects the electoral will.

#### *a. Article 32 vests this Court with the power to enforce the rights in Part III of the Constitution*

61. Part III of the Constitution of India enshrines the fundamental rights of the people of India. Article 13 of the Constitution stipulates that the State shall not make any law which takes away or abridges the rights conferred in Part III and that any law made in contravention of this condition, shall, to the extent of the

contravention, be void. Article 32 complements Article 13 and provides the right to a constitutional remedy for the enforcement of rights conferred by Part III:

> "Article 32. Remedies for the enforcement of rights conferred by this Part.
>
> (1) The right to move the Supreme Court **by appropriate proceedings** for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue **directions or orders or writs, including writs in the nature of** habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."
>
> (emphasis supplied)

62. The Constitution of India is unique in that its provisions expressly accord the judiciary with the power to review the actions of the legislative and executive branches of government, unlike in many other countries. Article 32 makes fundamental rights justiciable and is worded broadly. The right to approach this Court for the enforcement of the fundamental rights embodied in Part III is itself a fundamental right by virtue of Clause (1) of Article 32. It states that this Court may be moved "by appropriate proceedings." This expression means that the appropriateness of the proceedings depends on the relief sought by the petitioner.[61] Clause (1) of Article 32 does not place any constraints on the power of this Court to entertain claims that the rights enumerated in Part III have been violated.

[61] Daryao v. State of U.P, (1962) 1 SCR 574

63. Similarly, Clause (2) is worded expansively and enlarges the scope of the powers of this Court to enforce fundamental rights. This is evident from two parts of the clause:

a. First, Clause (2) provides this Court with the power to issue "directions, orders, or writs," which indicates that this Court may mould the relief according to the requirements of the case before it and that it is not constrained to a particular set of cases in which a particular relief or set of reliefs may be granted. This expression indicates that the power of this Court is not limited to striking down an offending statute, rule, or policy. Rather, it extends to issuing directions or orders or writs for the enforcement of fundamental rights. Put differently, this means that the power of this Court is not only 'negative' in the sense that it may restrain the state from doing something which infringes upon the fundamental rights of people but is also 'positive' in the sense that it may compel the state to do something or act in a manner which gives effect to such rights; and

b. Second, the word "including" in Clause (2) indicates that the five writs mentioned in that clause are illustrative. The word "including" is used as a word of enlargement. This Court may issue directions, orders, or writs other than the five writs specified.[62]

Therefore, the manner in which Article 32 has been drafted does not limit the powers of this Court. To the contrary, it clearly and unambiguously vests this Court

[62] State of W.B. v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571

with the power to conduct judicial review and give effect to the fundamental rights enumerated in Part III.

64. The extent of the powers vested in this Court by Article 32 as envisaged by the framers of the Constitution can be understood from the Constituent Assembly's discussion of the provision which was eventually adopted as Article 32.[63] Mr. H V Kamath was of the opinion that it was unwise to particularize the writs which this Court ought to issue, and that this Court should have the power to issue any directions it considered appropriate in a case.[64] In service of this idea, he moved an amendment to substitute clause (2) of the provision which is now Article 32. The substituted clause was to read:

> "The Supreme Court shall have power to issue such directions or orders or writs as it may consider necessary or appropriate for the enforcement of any of the rights conferred by this part."[65]

65. Responding to this proposal, Dr. B R Ambedkar underscored that this Court had been endowed with wide powers of a general nature:

> "…what has been done in the draft is to give general power as well as to propose particular remedies. The language of the article is very clear … These are quite general and wide terms.
>
> … these writs … ought to be mentioned by their name in the Constitution **without prejudice to the right of the Supreme Court to do justice in some other way if it felt it was desirable to do so.** I, therefore, say that Mr. Kamath need have no ground of complaint on that account."[66]
>
> (emphasis supplied)

[63] Vikram Aditya Narayan and Jahnavi Sindhu, 'A historical argument for proportionality under the Indian Constitution' (2018) Vol. 2(1) ILR 51
[64] Constituent Assembly Debates, Volume 7, 9 December 1948.
[65] Constituent Assembly Debates, Volume 7, 9 December 1948.
[66] Constituent Assembly Debates, Volume 7, 9 December 1948.

The power of this Court to do justice is not, therefore, limited either by the manner in which Article 32 has been constructed or by any part of the Constitution. It is amply clear from both the plain meaning of Article 32 as well as the Constituent Assembly Debates that this Court has the power to issue directions, orders, or writs for the enforcement of the rights incorporated in Part III of the Constitution.

*b. Judicial review and separation of powers*

66. The doctrine of separation of powers, as it is traditionally understood, means that each of the three organs of the state (the legislature, the executive, and the judiciary) perform distinct functions in distinct spheres. No branch performs the function of any other branch. The traditional understanding of this doctrine (also termed the "pure doctrine"[67]) does not animate the functioning of most modern democracies. That our Constitution does not reflect a rigid understanding of this doctrine has long been acknowledged by this Court.[68] In practice, a functional and nuanced version of this doctrine operates, where the **essential** functions of one arm of the state are not taken over by another arm and institutional comity guides the actions of each arm.[69] In other words, the functional understanding of the separation of powers demands that no arm of the state reigns supreme over another.

67. Thu Union of India suggested that this Court would be violating the doctrine of separation of powers if it determines the *lis* in this case. The separation of powers undoubtedly forms a part of the basic structure of the Constitution, but

[67] MJC Vile, *Constitutionalism and the Separation of Powers* (2nd ed. Liberty Fund 1967).
[68] Rai Sahib Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225
[69] Kalpana Mehta v. Union of India, (2018) 7 SCC 1

equally, the power of courts to conduct judicial review is also a basic feature of the Constitution.[70] The doctrine of separation of powers certainly does not operate as a bar against judicial review.[71] In fact, judicial review promotes the separation of powers by seeing to it that no organ acts in excess of its constitutional mandate. It ensures that each organ acts within the bounds of its remit. Further, as discussed in the previous segment of this judgment, the Constitution demands that this Court conduct judicial review and enforce the fundamental rights of the people. The framers of our Constitution were no doubt conscious of this doctrine when they provided for the power of judicial review. Being aware of its existence and what it postulates, they chose to adopt Article 32 which vests this Court with broad powers. The doctrine of separation of powers cannot, therefore, stand in the way of this Court issuing directions, orders, or writs for the enforcement of fundamental rights. The directions, orders, or writs issued for this purpose cannot encroach upon the domain of the legislature. This Court cannot make law, it can only interpret it and give effect to it.

68. The existence of the power of judicial review cannot be conflated with the manner in which the power is exercised. The exercise of the power of judicial review abides by settled restraints which acknowledge that the power of law making is entrusted to democratically elected legislative bodies and that the formulation and implementation of policy is entrusted to a government which is accountable to the legislature. In the exercise of its the legislative function the legislature may incorporate policies which will operate as binding rules of conduct

[70] S P Sampath Kumar v. Union of India, (1987) 1 SCC 124
[71] State of W.B. v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571

to operate in social, economic and political spaces. Judicial review is all about adjudicating the validity of legislative or executive action (or inaction) on the anvil of the fundamental freedoms incorporated in Part III and on the basis of constitutional provisions which structure and limit the exercise of power by the legislative and executive arms of the State.

69. Judicial review is a constitutionally entrenched principle which emanates from Article 13. It is not a judicial construct. The power of judicial review has been expressly conferred by the Constitution. In the exercise of the power of judicial review, the Court is cognizant of the fact that the legislature is a democratically elected body which is mandated to carry out the will of the people. It is in furtherance of this mandate that Parliament and the State legislatures enact laws. Courts are empowered to adjudicate upon the validity of legislation and administrative action on the anvil of the Constitution. In the exercise of the power of judicial review, the Court does not design legislative policy or enter upon the legislative domain. This Court, will hence not enter into the legislative domain by issuing directions which for all intents and purposes would amount to enacting law or framing policy.

*c. The power of this Court to enforce rights under Article 32 is different from the power of the legislature to enact laws*

70. In Powers, Privileges and Immunities of State Legislatures, In re,[72] a seven-Judge Bench of this Court held:

[72] (1965) 1 SCR 413

> "…whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens … If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the Judicature of this country…"

Hence, it falls squarely within the powers of this Court to adjudicate whether the fundamental rights of queer persons have been infringed, as claimed by the petitioners.

71. This Court will not issue a mandamus to Parliament but will determine the **scope and effect** of certain fundamental rights. What do these rights mean and what are their incidents? What do they require of the state? What are their boundaries? In answering these questions, this Court is not enacting law or framing policy but is performing its constitutionally mandated function of interpreting the Constitution and enforcing the rights it recognizes. This Court cannot ignore its duty to fulfil the mandate of Articles 13 and 32. The distinction between law-making and adjudicating the rights of the people by interpreting the Constitution and enforcing these rights, as required by Article 32, cannot be forgotten.

72. This Court has previously utilized its power under Article 32 to issue directions or orders for the enforcement of fundamental rights. This power does not extend only to striking down an offending legislation but also to issuing substantive directions to give effect to fundamental rights, in certain situations. In **Common**

**Cause** v. **Union of India**,[73] a Constitution Bench of this Court (of which one of us, Justice D Y Chandrachud was a part) found that the right to life, dignity, self-determination, and individual autonomy meant that people had a right to die with dignity. This Court delineated guidelines and safeguards in terms of which Advance Directives could be issued to cease medical treatment in certain circumstances. Similarly, in **Vishaka** (supra) this Court issued guidelines for the protection of women from sexual harassment at the workplace. These guidelines were grounded in the fundamental rights to equality under Article 14, to practise any profession or to carry out any occupation, trade or business under Article 19(1)(g), and to life and liberty under Article 21. The decisions of this Court in **Common Cause** (supra) and **Vishaka** (supra) are significant because this Court issued directions for the enforcement of fundamental rights in the absence of a law which was impugned before it.

*d. The power of judicial review must be construed in terms of the Constitution of India and not in terms of the position of law in other jurisdictions*

73. A common mistake in the legal community is to refer to the doctrines and decisions of other jurisdictions regardless of the context in which they arose. The jurisprudence of other countries no doubt facilitates an exchange of ideas and acquaints us with the best practices in the field. It illuminates the potential benefits and pitfalls of a particular approach and enables us to dwell on whether to accept and if we do so, whether to improve on that approach. However, a particular

[73] (2018) 5 SCC 1

doctrine or legal standard ought not to be borrowed blindly. The first and foremost authority is the Constitution or any law in India. An appropriate tool of interpretation must be used to discern the law as laid down by the Constitution or by any statute, rule, or regulation. This precept applies with equal force to the question of judicial review in India. Judicial review has to be conscious of our own social and cultural milieu and its diversity.

74. Parliament being sovereign in England, the courts of England do not have the power to strike down a statute as being contrary to its basic law. This status of affairs cannot, of course, be superimposed on the relationship between our legislative bodies and courts. In **Powers, Privileges and Immunities of State Legislatures, In re** (supra), this Court held that the Constitution is supreme and sovereign in India and that legislative bodies in India are not sovereign in the same way as Parliament is in England. Hence, the limitations which apply to the Supreme Court of the United Kingdom while it conducts judicial review do not apply to this Court. Similarly, the restrictions on judicial review in the United States of America cannot be imported without any regard to our Constitution.

75. The Union of India relied on various decisions of the Supreme Court of the United States of America including the decisions in **Day-Brite Lighting Inc.** v. **Missouri**[74] and the dissenting opinion of Oliver Wendell Holmes, J. in **Lochner** v. **New York**[75] for the proposition that this Court would be in danger of becoming a "super legislature" if it decided the issues which arise in the present proceedings. This argument misses the crux of the matter. The Supreme Court of the United

[74] 342 US 421 (1952)
[75] 198 US 45 (1905)

States of America established its power of judicial review in **Marbury** v. **Madison**.[76] The text of the US Constitution does not vest their courts with this power, unlike in India. The Constitution of India expressly authorises judicial review. While doing this the Constitution confers broad powers on this Court as discussed in the previous segment of this judgment. This being the case, it is injudicious to borrow from the jurisprudence of the US on judicial review, its boundaries, legitimacy, and the type of cases which warrant deference to legislative bodies. In **State of Madras** v. **V.G. Row**,[77] a Constitution Bench of this Court held:

> "20. …we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution, unlike as in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts … If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."

Similarly, in **Romesh Thappar** v. **State of Madras**,[78] this Court held that there was no remedy in the US which was analogous to the one provided by Article 32 of the Constitution of India. Therefore, the contours of the power of this Court to conduct judicial review must be construed in terms of the Constitution of India and not in terms of the position of law in other jurisdictions.

*e. The role of courts in the democratic process*

76. The argument of the respondents that any decision by this Court on this issue would be anti-democratic is not an argument that is specific to the issues

[76] 5 US 137 (1803)
[77] (1952) 1 SCC 410
[78] 1950 SCC 436

which have been raised before us in this batch of petitions. Rather, it is an argument which strikes at the legitimacy of the judicial branch. The argument that the decision of the elected branch is democratic and that of the judicial branch is not is premised on the principle of electoral representation. The proposition is that the exercise of the power of judicial review would constrain the right of citizens to participate in political processes. This is because courts are vested with the power to overturn the will of the people which is expressed through their elected representatives.

77. This is a narrow definition of democracy, where democracy is viewed through electoral mandates and not in constitutional terms. Additionally, it overlooks the importance of a Constitution which prescribes underlying values and rules of governance for the sustenance of a democratic regime. If **all** decisions of the elected wing of the State are considered to be democratic decisions purely because of the manner in which it is vested with power, what then, is the purpose of the fundamental rights and the purpose of vesting this Court with the power of judicial review? Framing the argument on the legitimacy of the decisions of this Court purely in terms of electoral democracy ignores the Constitution itself and the values it seeks to engender.

78. Electoral democracy – the process of elections based on the principle of 'one person one vote' where all citizens who have the capacity to make rational decisions (which the law assumes are those who have crossed the age of eighteen) contribute towards collective decision making is a cardinal element of constitutional democracy. Yet the Constitution does not confine the universe of a

constitutional democracy to an electoral democracy. Other institutions of governance have critical roles and functions in enhancing the values of constitutional democracy. The Constitution does not envisage a narrow and procedural form of democracy. When the people of India entered into a social contract in the form of a Constitution, they chose the conception of democracy which not only focused on rule by elected bodies but also on certain substantive values and on institutional governance. The Constitution defined democracy in terms of equal rights in political participation and of self-determination.

79. When democracy is viewed in this substantive and broad manner, the role of courts is not democracy-disabling but democracy-enabling. Much like the elected branch, the legitimacy of courts is also rooted in democracy. It is rooted in *not* operating in a democratic manner because if it was, then courts may be swayed by considerations which govern and guide electoral democracy.[79] By vesting the judicial branch with the power to review the actions of other institutions of governance (including the legislature and the executive) on the touchstone of constitutional values, the Constitution assigns a role to the judiciary.[80] The institutions of governance place a check on the exercise of power of the other institutions to further constitutional values and produce better, more democratic outcomes.

80. Courts contribute to the democratic process while deciding an issue based on competing constitutional values, or when persons who are unable to exercise

[79] Robert M Cover, 'The Origins of Judicial Activism in the Protection of Minorities', 1982 Yale law journal, Vol 1(7) June 1982

[80] Mathew EK Hall, Judicial Review as a Limit on Government Domination: Reframing, resolving, and replacing the counter-majoritarian difficulty, 2016 Perspectives on politics, Volume 14(2) June 2016 , 391

their constitutional rights through the political process knock on its doors. For instance, members of marginalized communities who are excluded from the political process because of the structural imbalance of power can approach the court through its writ jurisdiction to seek the enforcement of their rights.

ii. Is queerness 'un-Indian'? Who is an Indian? What practices are Indian?

*a. Queerness is a natural phenomenon which is known to India since ancient times*

81. The question of whether homosexuality or queerness is unnatural is no longer *res integra*, in view of the decision in **Navtej Singh Johar** (supra) where this Court held that it is innate and natural. The contention of the Union of India that heterosexual unions precede law while homosexual unions do not cannot be accepted in view of the decision in **Navtej Singh Johar** (supra) where this Court held that queer love has flourished in India since ancient times.

82. The respondents have also averred that homosexuality or gender queerness is not native to India. This contention does not hold any water. In India, persons with a gender queer identity who do not fit into the binary of 'male' and 'female' have long been known by different names including hijras, kothis, aravanis, jogappas, thiru nambis, nupi maanbas and nupi maanbis. In fact, the term 'transgender person' as it is understood in English or the 'third gender' does not always fully or accurately describe the gender identity of those who are known by some of these terms. Additionally, the social structure of the communities of transgender persons in India is unique and does not mirror 'western' structures. It is native to our country. The judgment of this Court in **NALSA** (supra) also explored

the presence of the transgender identity and other forms of gender queerness in Indian lore.

83. In *With Respect to Sex: Negotiating Hijra Identity in South India*,[81] Gayatri Reddy documents the different manifestations of kinship in hijra communities, including the guru-chela (or teacher-disciple) relationship, the mother-daughter relationship, and the 'jodi' (or bond) with a husband. She describes how many hijras enter into unions with men, who are referred to as their 'pantis.' These unions span over many months or many decades, depending on the couple in question. Many men in such unions have made their natal families aware about their relationship with their partner, and in some cases, the hijras would sometimes meet their partner's natal family. They sometimes referred to their relationship as one of 'marriage.' Men also assaulted their partners and displayed other violent tendencies. Some hijras maintained contact with their biological family, most notably the mother. Although many hijras were in romantic, long-lasting partnerships with men or in touch with their natal family, they considered other hijras as constituting their family as opposed to their 'pantis' or their biological families.[82] In many communities, hijras are customarily invited to auspicious events (such as the birth of a child) to bless the family in question.

84. Like the English language, some English words employed to describe queer identities may have originated in other countries. However, gender queerness, transgenderism, homosexuality, and queer sexual orientations are natural, age-old

[81] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (The University of Chicago Press 2005)
[82] ibid

phenomena which have historically been present in India. They have not been 'imported' from the 'west.' Moreover, if queerness is natural (which it is), it is by definition impossible for it to be borrowed from another culture or be an imitation of another culture.

*b. Queerness is not urban or elite*

85. The respondents, including the Union of India, have contended that homosexuality and queer gender identities or transgenderism are predominantly present in urban areas and amongst the elite sections of society. They assert that variations in gender and sexual identity are largely unknown to rural India and amongst the working classes. Nothing could be further from the truth. While they may not use the words "homosexuality," "queer," "lesbian," "gay" or any other term which populates the lexicon of English-speaking persons, they enter into unions with persons of the same sex as them or with gender queer persons; these unions are often long-lasting, and the couple performs a marriage ceremony. The incidence of queerness amongst the rural and working-class communities has been documented in academic scholarship as well as newspaper reports. In the absence of evidence aliunde, the details narrated in newspaper reports are not facts which are proved in terms of the Indian Evidence Act 1872.[83] However, in cases (such as the present one) which require this Court to examine social phenomena and their incidence, newspaper reports serve as a useful tool in the exercise of illuminating social realities.

[83] Laxmi Raj Shetty v. State of T.N., (1988) 3 SCC 319

86. This Court need look no further than the petitioners in this case to illustrate the point that queerness is neither urban nor elite:

a. One of the petitioners grew up in Durgapur, West Bengal and Delhi and states that she came to terms with her sexuality when she was an adult. Another petitioner in the same case grew up in Varanasi, Uttar Pradesh and states that she knew that she was a lesbian from a young age;

b. One of the petitioners hails from Muktsar, Punjab and happens to be OBC. Another petitioner in the same case happens to be Dalit. They come from working class backgrounds;

c. Another petitioner was born in Mumbai to Catholic parents. She attempted to die by suicide and later had to beg on the streets in order to survive;

d. Some petitioners before this Court are transgender persons and activists. One of them is a public personality – Akkai Padmashali. She hails from a non-English speaking, working class background. At a young age, she left home. She worked as an assistant in a shop selling ceramics but quit because she unable to hide her true gender identity. Circumstance forced her to become a sex worker to sustain herself. Later, she was awarded the Karnataka Rajyotsava Award, Karnataka's second highest civilian award, for her contribution to social service.

e. Yet another petitioner who is a transgender person was born in a family of farmers who grew coconuts and betel leaves. She later worked in a factory.

In her case, too, circumstance forced her to become a sex worker. She is now a social activist; and

f. One of the petitioners is a lesbian who lives in Vadodara, Gujarat.

87. Ruth Vanita, an academician, studied the history of queer marriage in India in her scholarly works. She narrates that she married a Jewish woman in 2000 with both Hindu and Jewish ceremonies.[84] Her book titled *Love's Rite: Same-Sex Marriage in India and the West*[85] records numerous instances of queer unions and partnerships in India:

a. Two young women who were classmates fell in love. One of them underwent a sex reassignment surgery in 1989. The two then married each other but one of their fathers (a wireless operator) opposed their union. He filed a complaint stating that the partner of his child had abducted her. When the young woman was produced in court, she stated that she wished to live with her husband. She was then released and the couple proceeded to live together;

b. In 1993, two women in Faridabad married each other in a Banke Bihari temple, with a priest officiating;

c. Two men, one Indian and the other American, married according to Hindu rites in a ceremony in New Delhi in 1993;

[84] Ruth Vanita, ''Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions' 2004 Journal of Feminist Studies in Religion, Vol 20(2)
[85] Ruth Vanita, *Love's Rite: Same-Sex Marriage in India and the West* (Palgrave Macmillan, 2005)

d. In 2004, a twenty-four year old Dalit woman and a twenty-two year old Jat woman travelled to Delhi and performed the rites of marriage in a temple. Their families opposed the union;

e. Two young women, whose parents were construction workers in Bhopal, Madhya Pradesh, lived in a slum. One of them was employed as a peon in a school and the other was unemployed. They ran away in 2004 and are reported to have told the police that they would live together regardless of any attempts to separate them;

f. Also in 2004, a twenty-one year old Christian woman and a twenty-three year old Hindu woman from a southern state in India declared their life-long commitment to one another after a tabloid alleged that they were lesbians;

g. Two young Muslim men (one aged twenty-two and the other aged twenty-eight) married in Ghaziabad, Uttar Pradesh. Their friends and family physically assaulted them for marrying but it was reported that they continued to intend to live together; and

h. Two nurses in Patel Nagar, Delhi met as students, fell in love, declared that they were life partners, and decided to live together. At the time the book was written, they had shared a home for fifteen years. Their neighbours were aware of their relationship and were unfazed by it.

88. In addition, other sources record varied instances of persons entering into atypical unions or expressing their homosexuality or gender identity:

a. Two women who happened to be Adivasi married according to the customs of their tribe, in a small village in Koraput district, Orissa;[86]

b. A woman who was the daughter of a government school teacher and a woman whose father was a labourer garlanded each other in Hamirpur district, Uttar Pradesh and sought to register their marriage at the local sub-registrar's office. They each divorced their husbands before entering into this union;[87]

c. Two women from Kanpur travelled to Delhi to marry each other;[88] and

d. Young, gay men in a small town called Barasat in West Bengal expressed their desire to be a part of the queer community. One of them worked in a clerical job.[89]

89. The AIDS Bhedbhav Virodhi Andolan (the AIDS Anti-Discrimination Movement) released a citizen's report on the status of homosexuality in India, titled 'Less Than Gay' in 1991.[90] The report discusses some of the arguments which were put forth more than three decades ago. In its attempt to address whether homosexuality is a 'western' concept or is restricted to the socioeconomically privileged classes, it asserts that the queer community is not a "*coherent, easily definable group*."[91] The report details the various lived experiences of gay men and lesbian women, information regarding which was collected by interviewing them. It

[86] Satyanarayan Pattnaik, 'Two Orissa girls defy norms, get married' (Times of India, 5 November 2006)
[87] India Today 'UP: In love for 7 years, two women divorce husbands to marry each other' (India Today, 1 January 2019)
[88] Deccan Herald 'Two girls from Kanpur elope, 'marry' each other in Delhi' (Deccan Herald, 19 September 2015)
[89] Paul Boyce and Rohit K Dasgupta, 'Utopia or Elsewhere: Queer Modernities in Small Town West Bengal' in Tereza Kuldova and Mathew A Varghese (eds.), *Urban Utopias* (Palgrave Macmillan, 2017)
[90] AIDS Bhedbhav Virodhi Andolan, 'Less Than Gay' (1991)
[91] ibid

tells the stories of a lesbian hostel warden, a gay teacher at a government polytechnic college in Madhya Pradesh, an auto-rickshaw driver in Pune, two male municipal sweepers in Mumbai who lived together and loved each other, and a gay man from a slum in Delhi.[92]

90. Ruth Vanita also documents attempted suicides and suicides arising from the difficulties faced by persons in queer relationships:[93]

a. In 1980, Jyotsna and Jayshree died by suicide after they jumped in front of a train in Gujarat. In a letter they left behind, they explained that they chose to die because they could not endure having to live apart after their marriages to men;

b. Gita Darji and Kishori Shah died by hanging in a village in Gujarat, in 1988. They were nurses and worked in a hospital; and

c. In January 2000, two young women named Bindu and Rajni were stopped from eloping. A few days later, they jumped into a granite quarry in Kerala and died. They each left behind notes to their families in which they explained that they wished to die because it was impossible for them to live together.

91. In *Loving Women: Being Lesbian in Unprivileged India*,[94] Maya Sharma gives an account of various persons (most of whom are women) in same-sex or queer relationships. The book was written after detailed interviews with its subjects,

[92] ibid
[93] Vanita (n 85)
[94] Maya Sharma, *Loving Women: Being Lesbian in Unprivileged India* (Yoda Press, 2006)

and focuses on working class persons. The author explains that one of the purposes of the book was to:

> "… dispel the myth that lesbians in India were all urban, Westernised and came from the upper and middle classes."

The author also highlights that public discourse has not created space for the voices and experiences of persons from the LGBTQ community who also belong to marginalized communities:

> "… the lives of most of our subjects are equally distant and alienated from upperclass, urban Indian as well as all Western representations of homosexuality, and their personal struggles, which cannot be separated from their socioeconomic struggles and traditional contexts, are largely unmirrored and therefore remain largely unknown."

The book variously gives accounts of women in queer relationships from different religions and communities, hailing from different parts of the country. They or their family members worked as domestic workers, factory workers, construction labourers, and Home Guards, amongst other professions.

92. The discussion in this segment has not scratched the surface of the rich history of the lives of LGBTQ persons in India, which continue into the present. Yet, even the limited exploration of the literature and reportage on the subject makes it abundantly clear that homosexuality or queerness is not solely an urban concept, nor is it restricted to the upper classes or privileged communities. The discussion in the preceding paragraphs reveals the diversity of the queer population. People may be queer regardless of whether they are from villages, small towns, or semi-urban and urban spaces. Similarly, they may be queer regardless of their caste and economic location. It is not just the English-speaking man with a white-collar

job who lives in a metropolitan city and is otherwise affluent who can lay claim to being queer but also (and equally) the woman who works in a farm in an agricultural community. Persons may or may not identify with the labels 'queer,' 'gay,' 'lesbian,' 'trans,' etc. either because they speak languages which are not English or for other reasons, but the fact remains that many Indians are gender queer or enter into relationships with others of the same sex. In the words of a person (assigned female at birth) who worked at a factory in Ajmer:

> "You ask if I have heard the word "lesbian". No, I have not heard it. … I consider myself a male. I am attracted to women. Why create categories, such deep differences between male and female? Only our bodies make us different. We are all human beings, aren't we? … When a human being is born, he does not know anything. He is told, "These are your parents, sisters, father and brothers". Similarly we are told, "You are boys, and you are girls". But I say I am a man. I choose to be one. Despite our physical differences, we can be who we want to be and do what we want to do. … But the final analysis, we are all the same, we are all human beings, we are all equal, regardless of what kind of bodies we have. This common factor should be considered, not the ways in which we are different."[95]

93. To imagine queer persons as existing only in urban and affluent spaces is to erase them even as they exist in other parts of the country. It would also be a mistake to conflate the 'urban' with the 'elite.' This renders invisible large segments of the population who live in urban spaces but are poor or otherwise marginalized. Urban centres are themselves geographically and socially divided along the lines of class, religion, and caste and not all those who live in cities can be termed elite merely by virtue of their residence in cities.

[95] ibid

94. Finally, it is essential to recognize that expressions of queerness may be more visible in urban centres for a variety of reasons. For one, cities may afford their inhabitants a degree of anonymity, which permit them to live their true lives or express themselves freely. This may not always be possible in smaller towns or villages, where the families or communities of queer persons may subject them to censure and disapprobation, or worse.[96] The experiences of queer persons may also be more visible in urban spaces because such persons have greater access to the various resources required to make one's voice heard. This only means that the marginalized are yet to be heard when they speak and not that they do not exist. This is not to say that society does not inflict violence upon the LGBTQ community in cities but only to indicate potential reasons for their increased visibility in cities. In conclusion, queerness is not urban or elite. Persons of any geographic location or background may be queer.

*c. The rise of Victorian morality in colonial India and the reasons for the re-assertion of the queer identity*

95. In pre-colonial times, the Indian subcontinent was home to a diverse population with its own, unique understanding of sexuality, companionship, morality and love. Stories, history, myths, and cultural practices in India indicate that what we now term 'queerness' was present in pre-colonial India. It would not be a faithful description of the times to say that queerness was "accepted" by the populace. Rather, society did not often view (many manifestations of) the queer

[96] For instance, many transmen migrate from villages to metropolitan cities to escape violence and discrimination. Agaja Puthan Purayil, '"Families We Choose": Kinship Patterns among Migrant Transmen in Bangalore, India' in Douglas A Vakoch (ed.), *Transgender India: Understanding Third Gender Identities and Experiences* (Springer 2022)

identity as something that required acceptance to begin with because it formed a part of ordinary, day-to-day life, similar to the heterosexual or cisgender identities. This was true for many parts of the country at many points of time, though perhaps not everywhere and at all times. This is not to suggest that society did not inflict any violence upon members of the LBGTQ community in pre-colonial times. Rather, it is to highlight that current beliefs, attitudes, and practices which are hostile to the LGBTQ community are not necessarily natural successors of the past.

96. The native way of life gradually changed with the entry of the British, who brought with them their own sense of morality. It was not their morality alone that they brought with them but also their laws. This Court discussed the legal legacy of the colonizers at length in **National Legal Services Authority** (supra) and **Navtej Singh Johar** (supra). To recapitulate, Section 377 of the IPC *inter alia* criminalized queer sexual acts and in so doing, imposed the morality of the British on the Indian cultural landscape. The British also enacted the Criminal Tribes Act 1871[97] to provide for the "*registration, surveillance and control of certain criminal tribes and eunuchs.*"[98] It permitted the government to declare a group of persons a "*criminal tribe*" if it was of the opinion that the group was "*addicted to the systematic commission of non-bailable offences*."[99] Part II of the Criminal Tribes Act regulated transgender persons (which it referred to as 'eunuchs') and subjected them to enormous indignity *inter alia* by permitting the government to medically examine them, providing for harsh penalties if they dressed "*like a woman*" or

[97] "Criminal Tribes Act"
[98] Preamble, Criminal Tribes Act
[99] Section 2, Criminal Tribes Act

danced or played music, preventing them from making gifts, and rendering their wills invalid. Although the Criminal Tribes Act was repealed by the government after independence, its underlying prejudices seem to continue in various central and state enactments on 'habitual offenders.'

97. The criminalization of the LGBTQ community and their resultant prosecution and conviction under these laws[100] coupled with the violence enabled by these laws drove large sections of the community underground and into the proverbial closet. Society stigmatized any sexual orientation which was not heterosexual and any gender identity which was not cisgender. Persons with an atypical gender identity and / or sexual orientation were therefore compelled to conceal their true selves from the world. Their presence in the public sphere gradually shrunk even as homophobia and transphobia flourished. Despite their alienation from mainstream society, many queer persons continued to live their lives in ways that were visible to the public eye. Indeed, many of them (such as hijras) often did not have a choice but to do so. Others expressed their sexual orientation only in the comfort of their homes, in the presence of their families and friends. Yet others led double lives – they pretended to be heterosexual in public and while with their families and made their sexual orientation known to a select few persons, who were often themselves of an atypical sexual orientation. Some people entered into 'lavender marriages' or 'front marriages' which are marriages of convenience meant to conceal the sexual orientation of one or both partners.

[100] See, for instance, Queen Empress v. Khairati, ILR (1884) 6 All 204; (Meharban) Nowshirwan Irani v. Emperor, AIR 1934 Sind. 206; D P Minwalla v. Emperor, AIR 1935 Sind. 78.

98. It is evident that it is not queerness which is of foreign origin but that many shades of prejudice in India are remnants of a colonial past. Colonial laws and convictions engendered discriminatory attitudes which continue into the present. Those who suggest that queerness is borrowed from foreign soil point to the relatively recent increase in the expression of queer identities as evidence of the fact that queerness is 'new,' 'modern,' or 'borrowed.' Persons who champion this view overlook two vital details. The first is that this recent visibility of queerness is not an assertion of an entirely novel identity but the **reassertion** of an age-old one. The second factor is that establishment of a democratic nation-state and the concomitant nurturing of democratic systems and values over six decades has enabled more queer persons to exercise their inherent rights. An environment has been fostered which is conducive to queer persons expressing themselves without the fear of opprobrium. This Court also recognizes that queer persons have themselves been crucial in the project of fostering such an environment. The constitutional guarantees of liberty and equality have gradually been made available to an increasing number of people. This seems to be true across the world – the global turn towards democracy has created the conditions for the empowerment of queer people everywhere. Progress has perhaps been inconsistent, non-linear, and at a less than ideal pace but progress there has been. We must recognize the vital role of Indian society in contributing to the evolving social mores. The evolution may at times seem imperceptible, but surely it is.

*d. Who is an Indian and what practices are Indian?*

99. The tenor of the arguments put forth by some of the respondents implied that a union between two persons of the same sex is not Indian. To determine whether this contention is correct, it is necessary to query when something or someone is 'Indian.' This question is all the more important in a country as diverse as ours, with twenty-eight States, eight Union Territories, a population of more than one billion persons, twenty-two languages recognized by the Constitution and scores more which are spoken by its people, at least eight religions, tribal and non-tribal populations, and varying cultures which are sometimes at odds with one another.

A thing, an occurrence, or a practice is 'Indian' when it is present in India, takes place here, or is practised by Indian citizens. Something which is Indian could be present from time immemorial or it could be a recent development. Regardless, this is not a game of numbers. The constitutional guarantee certainly does not fade based on the level of acceptability that a particular practice has achieved. Sexual and gender minorities are as Indian as their fellow citizens who are cisgender and heterosexual.

iii. Understanding the institution of marriage

*a. There is no universal conception of marriage*

100. There is no universal definition of marriage. Marriage is understood differently in law, in religion, and in culture. Some religions consider marriage a sacrament while others consider it a contract. The law defines the conditions for a

valid marriage, such as the minimum age required of a party to the marriage, whether both parties have consented to the marriage, or whether the parties are within the degrees of prohibited relationship. A marriage is valid in the eyes of the law as long as the preconditions in the concerned law(s) are satisfied. A precondition is different from a feature or characteristic in that the former is a prerequisite to a valid marriage whereas the latter is not. The law provides remedies which either party may avail of in the presence or absence of certain features or characteristics. For example, Section 27 of the SMA provides that a party to a marriage may present a petition for divorce on the ground that the other party is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the IPC. However, it does not automatically render a marriage void if one of the parties is imprisoned.

101. Once a couple marries, it is left to them to give meaning ang content to their relationship. It is their prerogative to determine the characteristics of their marriage and give meaning to their relationship. These aspects of a marriage vary with each relationship, and it is impossible for this Court to authoritatively state that a particular idea of marriage is the only valid understanding of marriage. This being the case, any attempt to formulate a general and universally applicable definition of marriage is fraught with difficulty. With this qualification, this Court will list some features of marriage that are considered its core components.

102. Marriage is a voluntary union – of the mind, the body, and the soul. Marriage signifies a deep and abiding commitment to one another and a devotion to the relationship. When two people marry, they intend to be in a life-long relationship.

Both the parties to the marriage provide emotional, financial, and spiritual support to the other. Each is an intellectual partner of the other, as also a friend. Love, respect and companionship are said to be the hallmarks of a successful marriage. Marriage is a gateway into the creation of a family through childbearing and childrearing, although it is not a precondition to the creation or existence of a family. The **sole** purpose of marriage is not to facilitate sexual relations or procreation, although that may be one of the main motivations for entering into a marriage. Marriage has emotional and associational components to it, which cannot be relegated to the background even as the sexual component is foregrounded. Important as they are, sexual relations and procreation alone are not the exclusive foundation for marriage. Although the aspects of marriage discussed in this paragraph are considered to be core components of marriage, the existence of a valid marriage (by legal, religious, or cultural definitions) is not predicated upon the existence of any of these elements. This may be due to choice or circumstance or even some combination of the two.

103. A married couple may not have biological children because of their age, problems with fertility, or simply because they choose not to. Many couples who choose to have children may do so through assisted reproductive technologies, surrogacy, adoption or other methods which are not traditional. Many married couples may choose not to engage in sexual relations for various reasons. In some marriages, the couple may not reside in the same home or even city, temporarily or permanently. The emotional, financial, or spiritual contribution to a marriage may vary with each couple. While the law identifies certain conduct or behaviour as grounds for divorce they do not render a marriage void in and of themselves. The

marriage continues to be a marriage, even if it is atypical or runs contrary to the notion of an 'ideal marriage' that a person may have. This is not only true for the legal conception of marriage, but also of the cultural and social conceptions. Society continues to consider a marriage to be a marriage even if, say, a married couple decides to live apart because they work in different cities or countries or if they do not have children. This is equally true of the other facets of marriage discussed in this paragraph. The exercise of defining the content of the institution of marriage as well as delineating its purpose is a subjective exercise undertaken by the couple in question.

104. The respondents suggested that an 'ideal marriage' has many or all of the components discussed in the preceding paragraphs. This argument acknowledges that many of these components are not necessarily present in the institution of marriage but places them in the realm of normative or aspirational values. In other words, the argument is that marriages ought to fit with these components even if a given marriage does not fit with them. The answer to this argument is straightforward – there is no legal basis to elevate these personals ideals to the status of normative requirements. To the contrary, every effort must be made to practice and inculcate constitutional ideas – the ideals of human dignity, liberty, equality, and fraternity – in our everyday lives. These constitutional ideals demand that we respect the autonomy and dignity of each person. We must respect their decisions and choices. It is only when a particular decision or action is contrary to the law or an affront to constitutional values that this Court may step in. In all other instances, citizens are empowered to define the content of their lives and find meaning in their relationships.

105. Different religions may have different understandings of marriage, for instance, whether marriage is a sacrament or a contract. There may be diverse social constructs of marriage within a religious grouping. Similarly, there may be different conceptions of marriage within a particular community. This is best understood with the aid of an example. Section 5(iv) of the HMA stipulates that a marriage may be solemnised between two persons if they are not within the degrees of prohibited relationship, unless a custom or usage governing the parties permits their marriage. One of the degrees of prohibited relationship is an uncle and his niece.[101] In many communities, an uncle cannot marry his niece because the community does not have a custom or usage which permits such a marriage. Yet, in many other communities such a marriage is customary and therefore permitted in terms of the HMA. The customs of many tribes of the country similarly permit an uncle to marry his niece. Many tribal communities are governed by their own customs and usages. Such marriages are valid and recognised by tribal customs although they are not recognised by the law governing other communities in the country. The solemnisation of a marriage, too, takes different forms in different communities. What may be customary, and therefore not only accepted but encouraged in a particular religion or community may not have a parallel in another religion or community.

106. While each individual is entitled to their own conception of marriage, a universal conception of marriage, its purpose, and content would be difficult to encapsulate in an exhaustive enumeration. Consequently, the argument advanced

[101] Section 3(g)(iv), HMA

by the respondents that the very conception of marriage does not permit queer individuals to marry cannot be accepted. Each religion, each community, each couple defines the institution of marriage for itself. The queer community is just as much a community as any other, though perhaps not in the traditional sense in which the term is used with respect to customs which govern marriage.

107. There is no gainsaying the fact that procreation and the human desire to have a family constitute significant characteristics of the institution of marriage. Yet, even heterosexual couples may find themselves unable or unwilling to procreate. Age, health and a variety of circumstances may bear on the decision of a heterosexual couple to bear or not to bear children. The inability of queer couples to procreate does not act as a barrier to the entry of queer persons to the institution of marriage just as it does not prevent heterosexual couples who are unable or choose not to procreate. Viewing marriage solely through the lens of sexual relations or procreation is a disservice to married couples everywhere including heterosexual couples because it renders invisible the myriad other aspects of a marriage as an emotional union. It relegates the aspects of companionship and love in a marriage to an inferior status. Such a conception of marriage is narrow and factually incorrect.

*b. The conception of marriage is not static*

108. The understanding of marriage – socially, culturally, and legally – has undergone a sea change over time. Some changes which are specific to India are discussed in this segment. This segment is not an exhaustive discussion of the

changes to the institution of marriage in India. It illustrates some changes in service of the point that the conception of marriage is not static.

### I. Sati

109. Although far from a universal practice, sati was once permitted and practiced in India. This abhorrent practice was inextricably intertwined with the institution of marriage because a widow was either tied to the funeral pyre of her deceased husband or pressed upon to jump into it. Various rules and regulations restricted and later, barred the practice in the colonial era. In modern day India, the Commission of Sati (Prevention) Act 1987 criminalizes attempts to commit sati, the abetment of sati, as well as its glorification.

### II. Widow remarriage

110. In accordance with long-standing custom, women (mostly from the dominant castes) were not permitted to remarry if their husbands died. In many communities, the heads of widows were shaved and they were prohibited from wearing jewellery or colourful clothes. This was considered a 'living death.' Many (including Mahatma Jyotirao Phule, the Brahmo Samaj, Ishwar Chandra Vidyasagar, and Tarabai Shinde) attempted to reform the institution of marriage to permit widows to remarry. Civil society offered tremendous resistance to their attempts at reform.[102] Ultimately, the Hindu Widows' Remarriage Act 1856 was enacted, permitting widows to remarry.

[102] Rosalind O'Hanlon, *Issues of Widowhood in Colonial Western India* (Institute of Commonwealth Studies, University of London, 1989)

### III. Child marriage and the age of consent

111. A discussion of the history of marriage in India would be incomplete without reference to child marriage and the legal age of consent. Child marriage was widespread in most religions and communities. The age of consent for girls was fixed at ten years in 1860. In 1890, a thirty-five year old man called Hari Mohan Maity caused the death of his ten year old wife Phulmoni Das (also known as Phulomonee Das) through violent sexual intercourse with her. While this would be considered rape and / or aggravated penetrative sexual assault of a child by prevailing legal standards, the concerned court ruled that Hari Mohan Maity had a legal right to engage in sexual relations with Phulmoni Das because she was above the age of consent at the time.[103] The age of consent for girls was then raised to twelve.

112. Decades later, the Child Marriage Restraint Act 1929 raised the minimum age of marriage for girls from twelve to fourteen. In 1949, the criminal law of the country stipulated that the age of consent for girls was fifteen years. The HMA set the minimum age of marriage at fifteen for girls and eighteen for boys. In 1978, the HMA was amended to raise the minimum age of marriage to eighteen for girls and twenty-one for boys. The Prohibition of Child Marriage Act 2006 provided that child marriages would be voidable at the option of the contracting party who was a child at the time of the marriage. Further, this statute criminalizes the act of performing, conducting, directing, abetting, promoting or permitting a child marriage.

[103] Flavia Agnes 'Controversy over Age of Consent' (2013) EPW Vol 48(29)

113. The Protection of Children from Sexual Offences Act 2012[104] was enacted about a decade ago. It is a child-specific legislation which *inter alia* criminalizes sexual abuse in its various forms. A "child" is defined as any person below the age of eighteen years. In **Independent Thought** v. **Union of India**,[105] this Court was confronted with the inconsistency between the POCSO Act which criminalized sexual relations with a child and Exception 2 to Section 375 of the IPC which provided that sexual intercourse by a man with his wife was not rape if the wife was above fifteen years of age. As a consequence of this inconsistency, a person could have been guilty under the POCSO Act but not under Section 375 of the IPC. This Court held that Exception 2 was violative of Articles 14, 15 and 21 of the Constitution and was an affront to constitutional morality. The Court read down Exception 2 as exempting a man from the offence of rape if his wife was above the age of eighteen. Currently, it is a punishable offence for a man to have sexual intercourse with a child, regardless of whether that child is his wife. It is evident that the law governing marriage has come a long way from Phulmoni Das' time.

### IV. Other violence in marriage

114. Acts which were once considered the norm in a marriage are no longer countenanced by the law. The giving and taking of dowry, which was and continues to be prevalent in most communities, was criminalised by the enactment of the Dowry Prohibition Act 1961. Prior to its enactment, there was no penalty in law for demanding, giving, or accepting dowry. The family of the bride was often expected to pay large sums of money or present "gift" items of value to the groom or his

[104] "POCSO Act"
[105] (2017) 10 SCC 800

family, as a condition of the marriage. The maternal families of innumerable women are harassed and violence is inflicted upon them, in relation to demands for dowry. Parliament inserted Section 498-A of the IPC in 1983. Section 498-A criminalizes the act of a husband or his relative subjecting her to cruelty, as defined in the section. In many cases, the matrimonial families (the husband, the mother-in-law, the father-in-law, and other relatives) murdered the woman because of what they viewed as insufficient dowry or unmet demands for dowry. This led to Parliament amending the IPC in 1986 to include Section 304-B which criminalises 'dowry death.'

115. These provisions of law did not, however, adequately account for gender-based violence in a marriage which are unconnected to dowry. Domestic violence was (and continues to be) prevalent. About two decades ago, the Protection of Women from Domestic Violence Act 2005 was enacted to protect the rights of women who were survivors or victims of domestic violence, either by their husbands or the relatives of their husbands. Prior to the enactment of the law, intimate partner violence which women are generally subject to was not criminalized.

## V. Inter-caste and interfaith marriage

116. Inter-caste and interfaith marriages were uncommon in the colonial era and established customs or usages did not govern such marriages. Then, as now, society subjected those who entered into inter-caste and interfaith marriages to discrimination and violence. There was initially no legal framework in place which governed such marriages. The Special Marriage Act 1872 was enacted to enable

the solemnisation of marriages independent of personal law. If two people belonging to different religions wished to marry, they were each required to renounce their respective religion in order to avail of its provisions. The law at the time did not supply a framework in terms of which two persons belonging to different religions could retain their association or spiritual connection to their respective religions and still marry one another.

117. Parliament was conscious of the limiting and restrictive character of the Special Marriage Act 1872 and enacted the SMA in 1954, which was a more permissive legislation in that any two persons could marry, without having to repudiate their respective religions. By stipulating that "*a marriage between any two persons may be solemnized under this Act*,"[106] the SMA also set out a mechanism for inter-caste marriages to be solemnized independent of personal law.

118. The families or relatives of couples who entered into inter-caste or interfaith marriages would frequently inflict violence upon them, even to the extent of brutally murdering them. Their communities would either ordain or participate in these atrocities. Such murders are colloquially referred to as "honour killings" and are more accurately termed as caste-based murders. It is a most unfortunate truth that this culture of violence persists to date. Couples who face this opprobrium have knocked on the doors of this Court *inter alia* seeking protection from their families and others who oppose their relationship[107] and this Court has otherwise been

[106] Section 4, SMA
[107] See, for instance, Lata Singh v. State of U.P., (2006) 5 SCC 475.

seized of cases arising from violence in this context.[108] In **Shakti Vahini** v. **Union of India**,[109] this Court took note of the violence against couples in inter-caste and interfaith marriages. It directed the state machinery to take preventive as well as remedial measures to protect such couples who wished to marry or who were recently married.

119. It is beyond dispute that couples in inter-caste and interfaith relationships have historically been forced to contend with and continue to contend with enormous difficulty while solemnizing their unions. As evident from the discussion in the preceding paragraph, large sections of society were and are fiercely opposed to such marriages. The opposition stems, at least in part, from a belief that a marriage ought to consist of two individuals from the same religion or caste. Parliament chose to enact the SMA despite the opposition to atypical marriages and has not chosen to repeal the SMA or otherwise exclude the celebration of inter-caste marriages under personal laws despite continuing hostility from the communities of such couples. Parliament has presumably done so because it is cognizant of the fact that the exercise of fundamental rights is not contingent upon the approval of the community. Similarly, this Court has carried out the constitutional mandate by protecting the rights of individuals and couples in the face of considerable opposition from their families. In a democracy, certain rights inhere in all individuals. If the exercise of rights was contingent upon everyone else or, at least a substantial portion of the community approving of such exercise, we would be doing a disservice to a constitutional democracy. The Constitution does

[108] See, for instance, Gang-Rape Ordered by Village Kangaroo Court in W.B., In re, (2014) 4 SCC 786; Vikas Yadav v. State of U.P., (2016) 9 SCC 541.
[109] (2018) 7 SCC 192

not require individuals to first convince others of the legitimacy of the exercise of constitutional rights before they exercise them.

## VI. Divorce

120. Section 10 of the Indian Divorce Act 1869, which is applicable to Christians, previously permitted the husband to file a petition for divorce on the ground that his wife was guilty of adultery. However, the wife was permitted to file a petition for divorce on the ground that her husband was guilty of adultery only in conjunction with certain other grounds (such as conversion to another religion or bigamy). In **Mary Sonia Zachariah** v. **Union of India**,[110] the Kerala High Court *inter alia* struck down a part of Section 10 and permitted Christian women to seek divorce on the ground of adultery alone. Parliament amended the Indian Divorce Act 1869 in 2001 by substituting Section 10 with a provision that made various grounds of divorce (including adultery) available to both the husband and the wife, equally.[111] It also introduced Section 10A, which permitted Christian marriages to be dissolved by mutual consent, for the first time.

121. In terms of Hindu customary law, certain communities permitted divorce whereas others did not. The HMA extended the right of divorce to all Hindus when it was enacted in 1955. In 1976, Section 13B was introduced in the HMA, permitting Hindus to dissolve their marriage by mutual consent, for the first time. In **Shilpa Sailesh** v. **Varun Sreenivasan**,[112] this Court held that it has the authority to grant divorce when there is a complete and irretrievable breakdown of marriage

[110] 1995 SCC OnLine Ker 288
[111] The wife was permitted an additional ground of divorce, *viz* "the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality." See Section 10(2), Indian Divorce Act 1869.
[112] 2023 SCC OnLine SC 544

notwithstanding the opposition of one of the parties to the marriage to its dissolution.

122. Islamic customary law permitted divorce in certain situations and through certain modes. One of the modes was talaq-e-biddat or triple talaq by which the husband could instantly, irrevocably, and unilaterally divorce his wife. In **Shayara Bano** v. **Union of India**,[113] this Court held that the practice of severing the marital bond through the mode of talaq-e-biddat was unconstitutional.

## VII. The implications of the discussion in this segment

123. Mahatma Jyotirao Phule, Ishwar Chandra Vidyasagar, Pandita Ramabai, Tarabai Shinde, Raja Ram Mohun Roy and countless others voiced their opposition (to varying degrees and to varying effects) to one or the other practice discussed in this segment. Their views were met with fierce opposition on the ground that the religious and cultural values of the subcontinent did not permit a departure from tradition. In some cases, the opposing groups relied on scriptures to justify their respective stances.[114] When Dr. B R Ambedkar introduced the Hindu Code Bill, many opposed the provision for divorce on the ground that the Hindu religion did not envisage divorce because it was a sacrament.[115] It is seen that there are competing understandings of the institution of marriage at every stage of its evolution. Yet, the understanding which was grounded in justice and the rights of the people has prevailed. Injustice in the law in relation to the institution of

[113] (2017) 9 SCC 1
[114] 'Social Reform' and the Women's Quest in Janaki Nair (ed), *Women and Law in Colonial India: A social history* (1996)
[115] *See, for instance,* Constituent Assembly of India (Legislative) Debates, Volume II, Speech by Pandit Lakshmi Kanta Maitra on 1 March 1949; Constituent Assembly of India (Legislative) Debates, Volume VI, Speech by Pandit Mukut Bihari Lal Bhargava on 12 December 1949

marriage (in the form of demands for dowry, dowry death, or child sexual abuse) or as incidental to the institution (as in the case of sati or widow remarriage) is slowly but surely in the process of being eradicated. While these practices were once permitted and encouraged, they are currently not only frowned upon but also criminalized.

124. This walk through history is not an attempt by this Court to take on the mantle of historians. The discussion demonstrates that the institution of marriage has not remained static or stagnant. To the contrary, it is change which characterizes the institution. All social institutions transmogrify with time and marriage is no exception. From sati and widow remarriage to child marriage and inter-caste or interfaith marriages, marriage has metamorphosed. The institution as we know it today would perhaps be unrecognizable to our ancestors from two hundred years ago. Despite vehement opposition to any departure from practice, the institution of marriage has changed. This is an incontrovertible truth. Here, it is also important to take note of the fact that these changes were brought about largely by acts of Parliament or the legislatures of the states. While the passage of many laws was preceded by significant social activism, it was the legislature which ultimately responded to the call for change. Even as Parliament (and in some cases, the courts) expand the liberties of the people to conduct their lives in a manner they see fit (in accordance with law), many sections of society remain opposed to these changes. Regardless of such opposition, the institution of marriage has undergone a sea change. It is therefore incorrect to characterise marriage as a static, stagnant or unchanging institution.

*c. The implications of this discussion for the right of queer persons to marry*

125. From the discussion in this segment of the judgment, it is evident that the institution of marriage is built and re-built by societies, communities, and individuals. A universal conception of marriage is not present nor is the conception of marriage static over time. The only facet of marriage which is constant across religion, community, caste, and region is that the couple is in a legally binding relationship – one which recognizes an emotional bond of togetherness, loyalty and commitment - that is recognised by the law. The law recognises the commitment that the couple has for one another by regulating the institution of marriage and conferring certain rights and privileges on them.

126. In **Shafin Jahan** (supra), a three-Judge Bench of this Court held:

> "84. … 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."

127. The consequence of the judgment of this Court in **National Legal Services Authority** (supra) and **Navtej Singh Johar** (supra) is that the members of the queer community are no longer second-class citizens of our country. Their individual and group rights are on par with any other citizen of this country. Their gender identity or sexual orientation cannot be a ground on which they are discriminated against.

128. Mr. Tushar Mehta, the learned Solicitor General, submitted during the course of his arguments that two persons from the LGBTQ community have the

right and the liberty to celebrate their union and label the union with any term they see fit, including ‘marriage.’ The Union of India does not, however, wish to accord legal recognition to such ceremonies and unions. If the marriages of queer people were to be recognized by law enacted by Parliament, it would be the next step in its progression.

iv. <u>The significance of marriage as a socio-legal institution</u>

129. One of us (DY Chandrachud, J.) in **Navtej** (supra) held that the members of the LGBTQIA+ community have a right to navigate public spaces without the interference of the State. The claim of the petitioners in this case, however, is on a slightly different footing. The petitioners seek the active involvement of the State in their relationships through conferring recognition. Through marriage, the State confers legal recognition to a relationship between two heterosexual persons. By doing so, it recognises that relationships in the form of marriage are not merely a lifestyle but an important constituent unit for the sustenance of social life. The State confers innumerable benefits, both tangible and intangible, to a family unit constituted by marriage. The petitioners seek that the State grant legal recognition to the relationship between non-heterosexual persons in the form of marriage because they are otherwise excluded from the express and implied benefits of marriage. They claim that non-heterosexual unions have not been able to attain social sanctity because their relationship is invisible in the eyes of the law.

130. Before we discuss the State’s interest in regulating the personal relationship between two persons to understand the necessity of its interference in the private

sphere, it is important to discuss the manner in which the State regulates marriages.

131. The State: *firstly,* prescribes conditions with respect to who can enter into a valid marriage; *secondly,* regulates the marital relationship during its sustenance; and *thirdly,* regulates the repercussions of the breakdown of a relationship of marriage.

132. The State prescribes various conditions for the solemnization of a valid marriage which *inter alia* includes the conditions of consent, a minimum age requirement, and whether the parties are within the degrees of prohibited relationship. The law regulates the conduct of the parties to a marriage in numerous ways. For example, the law penalises the husband and his family members if they treat the wife cruelly, including demands for dowry.[116] Similarly, the Protection of Women from Domestic Violence Act 2005[117] penalises persons for domestic violence in the course of a domestic relationship which has been defined to include marriage.[118] The grounds for divorce prescribed in various marriage laws also regulate the conduct of parties because their actions during the sustenance of a marriage may be a ground for the legal dissolution of that marriage. The valid grounds for divorce include where one of the parties has a sexual relationship outside of marriage,[119] or has deserted their spouse,[120] or treats the spouse with cruelty.[121] The State regulates the relationship between the parties

[116] Section 498A of IPC
[117] "DV Act"
[118] Sections 2(f) and 3 of the DV Act,
[119] Section 27(1)(a) of the SMA
[120] Section 27(1)(b) of the SMA
[121] Section 27(1)(d) of the SMA

after the divorce by prescribing the payment of maintenance. Under the SMA, the wife can claim alimony or maintenance and under the HMA, both the husband and the wife can claim maintenance. The above discussion elucidates that the State plays a crucial role in regulating marriage. Marriage has attained both social and legal significance because of the active involvement of the State at every stage of the marital relationship – during entry into it, during its subsistence, and in its aftermath.

133. Marriage was earlier a purely social institution unregulated by the State. What prompted the State to regulate personal relationships? There are two prominent reasons. The first reason was to regulate the social order. The State regulated social order by *firstly,* regulating the sexual conduct of persons through marriage, and *secondly,* by prescribing a legal mechanism for the devolution of property based on the legitimacy of the heir.

134. With respect to the first of the reasons, the State used marriage as a tool to regulate sexual behaviour.[122] The State prescribed social rules through the vehicle of law by devising marriage as an exclusive relationship. Engaging in sexual conduct outside of marriage is a ground for divorce under personal marriage laws and the civil marriage law. It is also crucial to note that impotency and not sterility is a ground for divorce.[123] Impotency is the inability of a man to engage in sexual intercourse. On the other hand, sterility is the inability of a man or a woman to procreate. By prescribing impotency as a ground for declaring a marriage void (and not sterility), the State emphasised the centrality of sexual relations in a marriage

[122] Laurence Drew, Sex, 'Procreation and the State Interest in Marriage, (2002) Columbia Law Review, Vol. 102(4)
[123] Section 27(1)(ii) of the SMA

as opposed to procreation. In this way, the State governs the conduct of society by regulating sexual conduct in a marital relationship.

135. Another manner in which the State intended to regulate social order by regulating marriage is by placing marriage at the centre of property devolutions. Ownership and control over property was viewed as being important for the establishment of a just social order. One of the reasons for the establishment of a social contract for the creation of a State by which individuals gave up their right to live as unregulated free individuals in exchange of protection of their rights and freedom is for safeguarding of property rights.

136. There must be rules for the devolution of property to avoid conflicts. These rules may vary in nature. Societies may establish rules for a common property system, or private property system, or a mixture of both. These legal rules have two primary components which concern how the title over the property is secured and how the title further devolves in case of intestate succession. Legal rules for the devolution of title are premised on marriage in modern societies.

137. Brian H Bix in the paper “State interest and Marriage” argues that there is sufficient material to establish that the State regulates marriage to respond to the special interests of specific social groups.[124] It has been argued that the propertied classes wanted to reduce any uncertainty about succession, which may have arisen because of a lack of clarity regarding the line of succession. It has also been argued that noble families desired to prevent their children’s marriages with

[124] Brian H Bix, State Interest and Marriage- The Theoretical perspective, (2003) 32 HOFSTRA L. REV. 93

partners of lower social status. Irrespective of whether the State regulated marriage to further entrench the existing social order or to transform the existing social order based on constitutional values, it is clear that property also plays a prominent role in the regulation of marriage.

138. The second reason for the State to be involved in the regulation of personal relationships was to remodel society, premised on the constitutional value of equality. A constitutional order premised on equality, dignity, and autonomy would be unworkable if personal relationships which are the building blocks of a just society are grounded on values that are antithetical to the Constitution. The Constitution declares that there shall be no discrimination on the grounds of religion, race, caste, and sex. How would it be a just society if on the one hand the Constitution declares that there shall be no discrimination, and on the other hand, inter-faith and inter-caste relationships bear the brunt of a brutal society through ostracization and “honour” killings or caste-based murders? How just would society really be if in spite of the constitutional guarantees of equality of women in public posts and educational institutions, they suffer patriarchal attitudes in the private sphere?

139. The State regulates marriage to create a space of equal living where neither caste, religion, and sex prevent any person from forming bonds for eternity nor do they contribute to the creation of an unequal relationship. The State’s regulation of marriage recognised that even though a married couple is a ‘unit’ for the purposes of laws, they still retain their individual identity and are entitled to constitutional guarantees. For example, one of the parties need not necessarily be at fault for the

couple to secure divorce. Our laws recognise divorce by mutual consent. They recognise that the parties to a marriage are in the best position to decide if they should continue with the marital relationship. Divorce by mutual consent is grounded on the principle of autonomy. The involvement of the State in the regulation of marriage opened up the space for inter-caste marriages and inter-faith marriages, and secured prominent constitutional rights.

140. The regulation by the State and its attempts to create a more equal personal sphere also contribute towards factual equality where women are empowered to defy patriarchal notions of gender roles in daily life. The impact of the State's involvement in creating a more just personal space by reforming the institution of marriage on the basis of constitutional ideals can be seen when a wife chooses to retain her surname after her marriage or where the partners equally contribute towards raising their child.

141. The State recognised that a Constitution which upholds the values of freedom, liberty, and equality cannot permit the sustenance of a feudal institution undermining the rights of marginalised communities. Thus, it is important to view the involvement of the State in regulating the institution of marriage in terms of its transformative potential in ensuring equality in the personal sphere and in family life.

142. Having discussed why and how the State regulates the institution of marriage, it is important that this Court recognise the effect of such regulation. Apart from the benefits of the State's involvement which are recognised above (that is, in creating a social order in consonance with the principles laid down in the

Constitution), there are other benefits. These benefits can be segregated into tangible and intangible benefits.

143. The intangible benefits of marriage are guided by hidden law. Hidden law comprises of norms and conventions which organize social expectations and regulate everyday behaviour.[125] The benefits which are conferred by a legal institution must not be measured solely in terms of the benefits which are conferred by the law. It must also include the benefits which are conferred by hidden law. These are benefits which are not traceable to law but which are created by norms. One such benefit of marriage which is traceable to hidden law is the social validity and recognition which marriage as an institution confers upon relationships.

144. It is pertinent to note that the State only regulates heterosexual marriages. The law confers numerous rights and benefits which flow from a marriage but ignores the existence of any other form of relationship. The invisibilization of relationships which are not in the form of marriage on the one hand bestows sanctity and commitment to marriages and on the other hand strengthens the perception that any other form of relationship is fleeting and non-committal.

145. The DV Act has come the closest to recognising the existence of relationships in forms other than marriage. The Act defines “domestic relationship” as a relationship between two persons who live together in a shared household, when they are related by consanguinity, marriage, or ‘through a relationship in the nature of marriage. In **Indra Sarma** v. **VKV Sarma**[126], the issue before this Court

[125] Jonathan Rauch, ‘Conventional Wisdom’, (*Reasons,* February 2000)
[126] (2013) 15 SCC 755

was whether live-in relationships can be considered to be a relationship in the nature of marriage. A two-Judge Bench of this Court observed that a relationship in the nature of marriage is distinct from a marriage. It was further observed that for a relationship to be considered to be in the nature of marriage, factors such as the duration of the relationship, whether the couple live in a shared household, the pooling of resources and financial arrangements such as long-term investment plans which indicate the existence of a long standing relationship, and domestic arrangements such as entrusting the responsibility especially on women to run the household and do household activities, the sexual relationship, procreation, socialisation in public, and the intention and conduct of the parties must be considered.

146. The observations of this Court in **Indra Sarma** (supra) elucidate that a relationship is in the nature of marriage only when an inference can be drawn from the surrounding circumstances that it will be a long-lasting relationship. Thus, while there is a positive presumption that marriages are long-lasting, there is also a negative inference that all other relationships which are not in the form of marriage are short-lived.

147. In addition, the observations of this Court in **Indra Sarma** (supra) indicate that marriage has always been understood and continues to be understood in terms of the stereotyped traditional gender roles. The wife is entrusted with the responsibility of taking care of household chores and the husband is expected to be the breadwinner of the family. The public-private divide is stark. Women are relegated to the private sphere where their contribution towards running the

household is diminished. An inherent feature of the institution of marriage is the unequal heteronormative setting in which it operates. It is important for us to observe that the State while recognising the relationship between two heterosexual individuals in the form of marriage does not recognise or promote the gendered division of labour in the home. The State by regulating marriage has sought to redefine heterosexual relationships by emphasising on the autonomy of both parties.

148. The intangible benefits of marriage extend beyond the conferment of social recognition to the relationship of the couple. It also confers benefits which cannot be measured in tangible form to the children born of the marital relationship. The law confers on children who are born of wedlock with benefits in succession. In addition, the law's recognition of the concepts of legitimate and illegitimate children have social repercussions in that illegitimate children are shunned by the society. These intangible benefits of marriage indicate that society regards marriage as the primary and sole unit through which familial relationships can be forged. As Marshall CJ observed in **Goodridge** v. **Department of Public Health**,[127] in a very real sense, there are three partners in a civil marriage: two willing partners and an approving State.

149. There are numerous tangible benefits conferred by the State which flow from marriage and touch upon every aspect of life. Tangible benefits conferred by marriage can be classified into (i) matrimonial and child care related benefits; (ii)

[127] 798 N.E.2d 941 (Mass. 20003)

property benefits; (iii) monetary benefits; (iv) evidentiary privilege; (v) civic benefits; and (vi) miscellaneous benefits.

150. Matrimonial and child care related benefits include the provisions of permanent alimony and maintenance,[128] maintenance if a person with sufficient means refuses to maintain his wife[129], to adopt a child as a couple[130], and to avail rights related to surrogacy[131]. Property benefits would include securing a share in case of intestate succession[132]. Legislation such as Section 16 of the HMA has conferred legitimacy on children born from void or voidable marriages with a consequential right to or in the property of the parents (and not of any other person). Monetary or financial benefits which flow from marriage include the provisions to be nominated for the payment of gratuity[133], to receive funeral expenditure for the deceased spouse, [134] for the payment of medical benefits to the spouse of the insured person,[135] and to claim provident fund as the dependent of

[128] Section 25 of the Hindu Marriage Act 1955; Section 37 of Special Marriage Act 1954 stipulates that the court can direct the husband to pay maintenance to his wife; Section 40 of the Parsi Marriage and Divorce Act 1936; Section 37 of the Divorce Act 1869 where the District Court is conferred with the power to secure maintenance to the wife from the husband.
[129] Section 125 of CrPC
[130] Section 57 of the Juvenile Justice (Care and Protection of Children) Act 2015 prescribes eligibility criteria for the adoption of children. The provision stipulates that if a couple wants to adopt, then the consent of both the spouses are required. However, the sub-section (5) of the provision states that any other criteria specified in the adoption regulations frame Authority shall be followed. Clause 5(3) of the Adoption Regulations dated 23.9.2022 (G.S.R. 726(E)) notified by the Ministry of Women and Child Development in exercise of powers conferred under Section 68(c ) read with Section 2(3) of the Juvenile Justice (Care and Protection of Children) Act 2014 prescribes that a child shall be given in adoption only if they have been in a stable two year *marital* relationship.
[131] Section 2(e) of the Assisted Reproductive Technology (Regulation) Act 2021 defines a commissioning couple as an infertile *married* couple who approach an assisted reproductive technology clinic or bank for services; Section 4(c)(II) of the Surrogacy (Regulation) Act 2021 stipulates that the eligibility condition for an intending couple to avail the services of surrogacy is that the intending couple must be *married* and between the age of 23 to 50 years in case of female and 26 to 55 in case of a male.
[132] Hindu Succession Act 1956 and the Indian Succession Act 1925.
[133] Section 55 of the Code of Social Security 2020 provides that each employee who has completed one year of service shall nominate from his family for the payment of gratuity. Section 55(3) states that any nomination made by the employee in favour of a person who is not a member of his family shall be void.
[134] Section 32 of the Code of Social Security 2020 stipulates that the eldest surviving member of the family (which has been defined to include spouse) of an insured person shall receive payment towards the expenditure on the funeral.
[135] Sections 32 and 39 of the Code of Social Security 2020

a deceased spouse.[136] Additionally, the provisions of the Income Tax Act 1961 provide numerous tax benefits for payments made on behalf of the spouse. For example, Section 80C of the Income Tax Act 1961 permits deduction of the insurance premia paid for the spouse's life insurance policy and Section 80D permits deduction of expenses towards the premium of spouses health insurance.

151. Evidentiary privilege includes the privilege accorded to communications during marriage under the Indian Evidence Act 1872[137]. Civic benefits include the provision to apply for citizenship or to be an overseas citizen of India by virtue of the spouse's citizenship[138]. Miscellaneous benefits include other benefits under law which cannot be grouped under the above categories which *inter alia* includes the recognition of a spouse as a 'near relative' for the purpose of the Transplantation of Human Organs and Tissues Act 1994[139].

152. At this juncture, it is important to recall the submission made by the learned Solicitor General that even today, as the law exists, there is no prohibition against two queer persons holding a marriage ceremony. However, they would not be recognised as married partners by State and non-State entities for the purposes of the law. The non-recognition of non-heterosexual marriages denies the petitioners the social and material benefits which flow from marriage which captures the true essence of marriage. Access to the institution of marriage is crucial to "individual

[136] Section 2(c ) of the Provident Funds Act 1925 defines a dependent to include a wife or a husband. Section 3 of the Act stipulates that the sum standing to the credit of any subscriber shall be paid to any dependent.
[137] Section 122 of the Indian Evidence Act 1872 states that no person who is or has been married shall be compelled to disclose any communication made during marriage.
[138] Section 5 of the Citizenship Act 1955 states that citizenship can be acquired through naturalization by a person who is married to a citizen of India and is ordinarily resident in India for seven years. Section 7A stipulates a foreign origin person whose spouse is a Indian citizen or overseas citizen of India shall apply for OCI if their marriage is registered and they have lived in India for a continuous period of two years.
[139] Section 2(i) of the Act defines "near relative" to include a spouse.

self-definition, autonomy, and the pursuit of happiness"[140] because of these expressive and material benefits which flow from marriage.

v. The nature of fundamental rights: positive and negative postulates

153. Before we embark on an analysis of whether the Constitution recognises the right to marry, it is imperative that we discuss how the courts recognise unenumerated rights or derivative rights. The Ninth Amendment to the US Constitution states that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". Though the Indian Constitution does not contain such a provision, it is implied that the rights enumerated in Part III are not exhaustive. The fundamental rights recognised in Part III are identified in the level of abstraction- that is, equality, liberty, and expression. The Constitution does not provide a detailed enumeration of the facets of each enumerated right. The Courts, while determining the scope of an enumerated right, lay down its facets and conceptions. For example, Courts have held that the true essence of the right to equality is not encompassed in formal equality where all persons are treated alike irrespective of the unequal socio-economic status but in substantive equality.[141] Similarly, this Court has in numerous judgments held that the right to life and liberty recognised under Article 21 would be obscure if other crucial facets of liberty are not recognised. It is in this

[140] Martha C. Nussbam, A right to marry? (2010) California Law Review Vol 98(3)
[141] State of Kerala v. NM Thomas, 1976 SCR (1) 906

vein that this Court recognised, *inter alia,* the right to livelihood,[142] the right to speedy trial,[143] and the right to education.[144]

154. Fundamental rights are characterized as positive rights and negative rights. In fact, some draw a distinction between fundamental rights (Part III) and the Directive Principles of State Policy (Part IV) by arguing that the former consists of negative rights and the latter of positive rights. In constitutional theory, negative rights are understood to involve freedom from governmental action whereas, positive rights place a duty on the State to provide an individual or a group with benefits which they would not be able to access by themselves.

155. Indian jurisprudence on the scope of fundamental rights can be divided into two thematical facets. In the first facet, the distinction between negative rights and positive rights faded with the harmonious reading of fundamental rights and Directive Principles of State Policy by the courts.[145] The Courts used the Directive Principles to inform the scope of fundamental rights. In **Unnikrishnan** v. **State of Andhra Pradesh**[146], the issue before this Court was whether the Constitution guarantees a fundamental right to education to its citizens. This Court held in the affirmative and traced the right to Article 21 and the Preamble of the Constitution. Jeevan Reddy, J. writing for the majority observed that education is of transcendental importance in the life of an individual without which the objectives set forth in the Preamble cannot be achieved. It was further emphasised that the Constitution expressly refers to education in Articles 41, 45, and 46 of the

[142] Olega Tellis v. Bombay Municipal Corporation, 1985 SCC (3) 545
[143] Hussainara Khatoon v. Home Secretary, (1980) 1 SCC81
[144] Unnikrishnan v. State of AP, (1993) 1 SCC 645
[145] Also see Mohd. Hanif Qureshi v. State of AP, 1959 SCR 629
[146] (1993) 1 SCC 645

Constitution which indicates the importance conferred to it. However, this Court limited the scope of the right to education in view of Article 45 which states that the State shall endeavour to provide free and compulsory education for all children until they complete the age of fourteen years. Thus, this Court held that the Constitution guarantees a right to free education for all children until they complete the age of fourteen years.

156. In the second facet, the Courts read fundamental rights to include both negative and positive postulates independent of the Directive Principles of State policy. YV Chandrachud, C.J. writing the opinion for the majority in **Minerva Mills** v. **Union of India**,[147] observed that fundamental rights deal with both negative and positive postulates. In **Indibily Creative Private limited v. Government of West Bengal**[148], one of us (DY Chandrachud, J. as he then was) observed that Article 19 imposes a negative restraint on the State to not interfere with the freedoms of all citizens and a duty on the State to ensure that conditions for the free and unrestrained exercise of the freedom are created. In **Justice KS Puttaswamy (9J)** (supra), a nine-Judge Bench of this Court held that the Constitution guarantees the right to privacy. This Court expressly held that the right to privacy includes both negative and positive postulates. The negative postulate consists of the right to be left alone and the positive postulate places a duty on the State to adopt measures for protecting and safeguarding individual privacy.[149]

[147] AIR 1980 C 1789
[148] (2020) 12 SCC 436
[149] Plurality opinion authored by Justice DY Chandrachud (paragraph 158)

157. The second facet on the scope of fundamental rights is now cemented in Indian constitutional jurisprudence. Fundamental rights consist of both negative and positive postulates preventing the State from interfering with the rights of the citizens and creating conditions for the exercise of such rights respectively. This understanding of fundamental rights is unique to Indian constitutional jurisprudence. Fundamental rights have been construed in this wide manner by Indian Courts because of the constitutional conception of the role of the State. Viewing fundamental rights purely as negative rights runs the risk of undermining the role of the State.

158. Fundamental rights are not merely a restraint on the power of the State but provisions which promote and safeguard the interests of the citizens. They require the State to restrain its exercise of power and create conducive conditions for the exercise of rights. If such a positive obligation is not read into the State's power, then the rights which are guaranteed by the Constitution would become a dead letter. This is because the question of whether the State is curtailing the rights of citizens would only arise if the citizens have the capacity and capability to exercise such rights in the first place.

159. Thus, if the Constitution guarantees a fundamental right to marry then a corresponding positive obligation is placed on the State to *establish* the institution of marriage if the legal regime does not provide for it. This warrants us to inquire if the institution of marriage is in itself so crucial that it must be elevated to the status of a fundamental right. As elucidated in the previous section of this judgment, marriage as an institution has attained social and legal significance because of its

expressive and material benefits. This Court while determining if the Constitution guarantees the right to marry must account for these considerations as well.

vi. Approaches to identifying unenumerated rights

160. The courts identify unenumerated rights by tracing them either to specific provisions of Part III of the Constitution or to the chief values which the Constitution espouses. The premise of this exercise undertaken by courts is that the rights guaranteed in Part III of the Constitution can only be effectively secured if certain other entitlements are safeguarded. That is, the rights guaranteed expressly by the Constitution would remain parchment rights, if conditions for the effective exercise of them are not created. To put it differently, rights will only be secured if citizens possess capabilities to exercise the right.[150] In fact, the positive and negative postulations of fundamental rights arise from this broad understanding of the purpose served by fundamental rights. In this method of deriving rights, the court traces unenumerated rights to specific provisions of the Constitution such as liberty (Article 21) or freedom of expression (Article 19) or equality (Article 14).

161. In the second method used by courts to derive unenumerated rights, rights are not traced to specific fundamental rights but to the values or the identity of the Constitution. This method of deriving unenumerated rights attained prominence after the judgment of this Court in **RC Cooper** v. **Union of India**[151] which held that fundamental rights are not water-tight compartments and that the thread of reasonableness contemplated in Article 14 runs through Article 21 aswell. The

[150] Martha C Nussbaum, Capabilities as fundamental entitlements: Sen and Social Justice, (2003) Feminist Economics 9 (203) 33
[151] (1970) 1 SCC 248

aspirational values of the Indian Constitution reflected in the preamble is to secure justice, liberty, equality, and fraternity to all its citizens. However, constitutional identity is not readily borrowed from preambular values. Constitutional identity is secured by a gradual process which is characterized by a dialogue between the institutions of governance (such as the legislature, the executive, the courts, and the statutory commissions) and the public over internal and external dissonances.[152] There is external dissonance when there is an apparent conflict between a Constitution's aspirational ideals and the socio-political reality.[153] It is characterized by internal dissonance when there is a conflict between the provisions of the Constitution. The Indian jurisprudence on the equality code is an apt example of how constitutional identity has evolved through dialogue between various stakeholders to advance the conception of factual equality. This Court has been using both the above mentioned approaches to identify unenumerated rights. For example, this Court in **Justice KS Puttaswamy (9J)** held that the Constitution guarantees the right to privacy by using both the specific rights approach and the identity approach. This Court grounded the right to privacy in the concepts of liberty,[154] freedom,[155] dignity,[156] and the idea of individual self-development which runs through the provisions of the Constitution.[157]

[152] Gary Jeffrey Jacobson, Rights and American Constitutional identity, (2011) Vol. 43 (4) 409
[153] ibid
[154] Opinion of Justice Chelameshwar
[155] Opinion of Justice DY Chandrachud
[156] Opinion of Justice Bobde
[157] Opinions of Justice RF Nariman and Justice Sapre

vii. The scope of the State's regulation of the 'intimate zone'

162. The learned Solicitor General made the following two arguments: (i) Intimate relationships, whether between homosexual or a heterosexual couples cannot be subject to State regulation because it falls in the 'intimate zone of privacy'; (ii) The State regulates heterosexual marriages only because there is public interest in sustaining the human population through procreation.

163. For this Court to determine if the State has a duty to confer recognition upon all relationships, it must firstly delineate the contours of the State's regulation of intimate relationships vis-à-vis privacy concerns. The plurality opinion authored by one of us (Justice D.Y. Chandrachud) in **Justice KS Puttaswamy (9J)** (supra), while discussing the scope of the right to privacy, refers to an article titled "A typology of privacy"[158] which classifies privacy into nine categories.

164. In addition to listing various forms of privacy, the authors have also classified the forms of privacy based on those which are necessary for the fulfilment of the freedom to be let alone and the freedom to self-development. The intimate zone of privacy subsumes spatial privacy (which corresponds to the freedom to let alone) and decisional privacy (which corresponds to the freedom of self-development). The formation of human relationships falls within the intimate zone because relationships are relegated to the sphere of the home or the private zone and they involve intimate choices.

[158] Bert-Jaap Koops et al., "A Typology of Privacy", (2017) University of Pennsylvania Journal of International Law (2017), Vol. 38(2) 566

165. The intimate zone is shielded from State regulation because relationships operate in a 'private space' and decisions taken in a private space in exercise of an individual's autonomy (such as the choice of partner, or procreation) are 'private activities.' This Court in **Justice KS Puttaswamy (9J)** (supra) held that privacy is intrinsic to the realization of constitutional values and entrenched fundamental rights. The judgment emphasized the importance of being left alone and the autonomy of individuals to take crucial decisions affecting their personhood, such as procreation and abortion.[159]

166. At this juncture, it must be noted that the Indian Constitution does not recognize family or partnerships as a unit for securing rights. For example, the Irish Constitution recognizes the family as a natural unit of society and a moral institution possessing inalienable rights.[160] The Constitution by not recognizing the family as a rights bearing unit has rejected the school of thought where rights of individuals in a family or partnership are subsumed within the larger unit of the family. The Constitution does not promote a framework of rights where the rights of a family are given precedence over individual rights of citizens constituting that family.

167. Relegating actions to the 'private' zone has certain shortcomings. The disadvantage must be understood in consequentialist terms, that is, by identifying the effect of classifying certain activities as 'private.' One of the prominent effects of classifying actions as 'private' is that such actions are protected from regulation by the State.

---

[159] Paragraphs 90 and 157 and conclusion (F) of Justice DY Chandrachud's opinion; paragraph 46 of Justice RF Nariman's opinion; paragraph 78 of Justice SK Kaul opinion 8

[160] Article 41 of the Irish Constitution stipulates that the State pledges to guard with special care the institution of marriage on which the family is founded.

168. Depending on how relationships are organized and managed, they can be "a beacon of freedom, or a prison."[161] While there are relationships which are characterized by love, mutual-respect, and devotion to one another, certain relationships are also characterized by the hierarchical power structure in which they operate. Identities such as caste, religion, gender and sexuality more often than not contribute towards the unequal power structure in the private sphere. To recall, in a segment above, we observed that the State's interest in regulating relationships in the form of marriage is to democratize the private space by ensuring that actions in the intimate space are in consonance with constitutional values. For the reasons in the preceding paragraph, the argument of the learned Solicitor General that the State regulates relationships in the form of marriage solely because they result in procreation is erroneous. The State's interest in democratizing personal relationships is not specific to the institution of marriage. The State's regulation of marriage is merely one of the many ways by which it can fulfill these State aims. However, it is open to the State to use other forms of regulation to fulfill the interests identified above. There is public interest in the State's regulation of all relationships because relationships involving two persons may be unequal by their very nature. Scholars have emphasized that the democratization of personal relationships serves two purposes. First, it contributes towards eliminating the inequality of the power structure in a relationship thereby preventing exploitation and subjugation; and second, it contributes towards

[161] Tammy R Pettinato, "Transforming Marriage: The Transformation of Intimacy and the Democratizing Potential of Love" JL & Fam. Stud. 9, 101

creating a more independent and self-sufficient citizenry which would have the ability to see alternative viewpoints.[162]

169. The withdrawal of the State from the domestic space leaves the disadvantaged party unprotected since classifying certain actions as being private has different connotations for those with and without power. In the case of personal relationships which are characterized by inequality, the actions of the more powerful person gains immunity from scrutiny and a degree of legitimacy.[163] Thus, all activities in the 'private space' dealing with intimate choices must not readily and blindly be categorized to be beyond the scope of the State's regulation. The State must assess if its interest in democratizing the private space overrides the interests of privacy in a given situation.

170. The State has identified specific areas in the private sphere where the interest in democratizing that space overrides the interests of privacy. For example, the State regulates relationships which are in the nature of marriage through the DV Act. The preamble to the DV Act provides that the statute was enacted to protect the rights of women "who are victims of violence of any kind occurring within a family." The Act regulates the conduct of persons in a domestic relationship which has been defined as a relationship between two persons who live together in a shared household where they are related by marriage, a relationship in the nature of marriage, adoption, or consanguinity. By criminalizing actions of domestic violence against women, the State recognizes that there is an unequal power

[162] ibid
[163] Frances Olsen, "Constitutional law: Feminist Critique of the public/private distinction" Vol. 10 (1993), Constitutional Commentary, p. 319 (1990)

structure which operates in heterosexual relationships. The State also recognizes that the party with lesser power and autonomy may be subjected to violence and suppression and consequently, seeks to democratize the space through regulation.

171. However, in certain other circumstances, the State and the Courts have recognized that there is no State interest in regulating the personal space. For example, this Court has recognized that Article 21 protects a woman's reproductive choices which includes whether she wants to terminate her pregnancy.[164] The Medical Termination of Pregnancy Act 1971 recognizes the decisional autonomy of women over procreation, which is an intimate aspect of their lives. In very narrow circumstances, the State regulates intimate choices about child birth and procreation. For example, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 regulates the intimate zone by prohibiting sex-selection before and after conception. In this case, the State recognizes that the interest in preventing female foeticide and infanticide overrides the privacy interests and decisional autonomy of individuals.

The argument that the State has an interest in regulating heterosexual marriages only to sustain society through procreation is fallacious because the state does not impose a compelled choice of procreation on married heterosexual couples. Moreover, heterosexual couples need not be married to procreate nor is marriage a criteria for procreation.

[164] See Deepak Gulati v. State of Haryana, (2013) 7 SCC 675

viii. The right to marry

*a. Have the courts recognised the right to marry?*

172. The petitioners submit that this Court has held that the Constitution guarantees the right to marry in **Shafin Jahan** (supra) and **Shakti Vahini** (supra). In **Shafin Jahan** (supra), Ashokan, the father of Akhila alias Hadiya moved a habeas corpus petition before the High Court of Kerala with the apprehension that his daughter was likely to be transported out of the country. During the course of the hearing, the High Court was informed that she had married the petitioner. However, the High Court allowed the petition and directed that (i) Hadiya shall be escorted from the hostel in which she was residing to the house of the father; and (ii) the marriage between Hadiya and Shafin Jahan was void. The High Court observed that twenty-four year old Hadiya was capable of being exploited and that the Court is concerned with her welfare in exercising *parens patriae* jurisdiction. On appeal, this Court set aside the judgment of the High Court. Dipak Misra, C.J. writing for the majority observed that Hadiya was entitled to choose a partner of her choice and curtailing the expression of choice would amount to clipping a person's identity. One of us (D.Y. Chandrachud, J. as he then was) authoring the concurring judgment observed that the High Court's exercise of jurisdiction to declare the marriage null and void amounted to judicial overreach. This Court observed that the choice of a partner, whether within or outside of marriage lies in the exclusive domain of the individual, and that the State cannot dictate or limit the freedom to choose a partner. In this context, this Court observed that the right to

marry a person of one's choice is integral to Article 21 of the Constitution. The relevant observations are extracted below:

> "84. […] The absolute faith 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 propogate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an areas where individual autonomy is supreme. **The law prescribes conditions for a valid marriage. It provides remedies when relationships run aground. Neither the State not the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.**
>
> 86. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. […] Society has no role to play in determining our choice of partners.
>
> […]
>
> 88.[…] Intimacies of marriage, including the choices which individuals make on whether or not to marry and on whom to marry, lie outside the control of the State. Courts as upholders of constitutional freedoms must safeguard these freedoms."
>
> (emphasis supplied)

173. In **Shakti Vahini** (supra), proceedings under Article 32 of the Constitution were instituted seeking directions (i) to State Governments and the Central Government to initiate steps to combat "honour crimes" or caste-based or religion-based murder and submit a national plan of action and a State plan of action to curb such crimes; (ii) to direct State Governments to constitute special cells in each district; and (iii) to launch prosecutions in each case of "honour killing" or caste-

based or religion-based murder. This Court disposed of the writ petition by directing preventive steps, remedial measures, and punitive measures to curb honour killings. Writing for a three-Judge Bench, Dipak Misra, C.J. observed that the ability of an individual to make choices is an inextricable part of dignity and "that when two adults choose to marry out of their own volition […] they have a right to do so."[165]

174. In **Justice KS Puttaswamy (9J)** (supra), Justice Nariman (in his concurring opinion) observed that the right to privacy extends beyond the right to be let alone to recognising the vital personal choices such as the right to abort a fetus, and the right of same sex to marry. In **Navtej** (supra), this Court while decriminalising homosexuality did not hold that the Constitution recognises a right to marry. Dipak Misra, C.J. writing for the majority held that an individual has a right to a union which encompasses physical, mental, sexual or emotional companionship under Article 21 of the Constitution.

175. In **Shafin Jahan** (supra) and **Shakti Vahini** (supra), the issue before this Court was whether State or non-State actors could interfere with a person's choice of whom to marry. The law prescribes certain essential conditions for a valid marriage. In both these cases, this Court dealt with situations where State or non-State actors prevented a couple which was otherwise entitled to marry, from marrying. In the case of **Shafin Jahan** (supra), the restriction was sought to be imposed because the partners belonged to different religions and in **Shakti Vahini** (supra), this Court dealt with the issue of restraints placed by the society on the

[165] Paragraph 45 of the judgment.

exercise of a person's right to marry a person of a difference caste and religion. In **Shafin Jahan** (supra) this Court held that religion and caste cannot be impediments in the exercise of a person's right to choose whom to marry. In **Shafin Jahan** (supra) this Court held that no State or non-State entity can interfere with their right to marry a person of their choice.

176. Neither the majority in **Justice KS Puttaswamy (9J)** (supra) nor the majority in **Navtej** (supra) hold that the Constitution guarantees the right to marry. Moreover, the opinion of Justice Nariman in **Justice KS Puttawamy (9J)** (supra) only made a passing reference to the right to marry. It did not trace the right to marry to any of the entrenched fundamental rights nor did it comment on the scope of such a right. In **Justice KS Puttaswamy (9J)**, the issue before this Court was whether the Constitution recognises a right to privacy. Thus, this case did not address the issue of whether the Constitution recognises the right to marry. It now falls upon this Court for the first time to decide if the Constitution recognises such a right.

*b. There is no fundamental right to marry*

177. The petitioners relied on the judgment of the US Supreme Court in **Obergefell** (supra) in which the right to marry was recognised as a fundamental right. In **Obergefell** (supra), the Supreme Court of the United States held that the Fourteenth Amendment of the Constitution of the United States imposes a positive obligation on the State to license a marriage between two people of the same sex. In Michigan, Kentucky, Ohio, and Tennessee, marriage was defined as a union between one man and one woman. The petitioners (who were same-sex couples)

claimed that their exclusion from the institution of marriage violated the Fourteenth Amendment of the US Constitution.[166] The petitioners filed suits in US district courts in their home States. The district courts ruled in their favour. On appeal, the United States Court of Appeal consolidated the cases and reversed the judgment of the District Court holding that the State has no constitutional obligation to license same-sex marriages or to recognise same-sex marriages performed out of State.

178. The issue before the US Supreme Court was not whether the Constitution recognises the right to marry but whether the Fourteenth Amendment requires a State to license a marriage between two people of the same-sex. Various decisions of the US Supreme Court had already recognised the right to marry.[167] Justice Kennedy (writing for the majority) observed that the right to marry consists of the following four components: (i) the right of choice; (ii) the protection of intimate association by supporting the union of two persons; (iii) safeguards for children and families, and (iv) cornerstone of social order because marriage is the basis for governmental rights, benefits, and responsibilities.

179. The opinion of the majority held that the components of marriage are not exclusive to heterosexual couples. Thus, the State by not recognising a same-sex union (which is legal) and by not granting benefits which accrue from a marriage was held to be treating same-sex couples unequally, violating the equal protection clause.

[166] Section 1 to the Fourteenth Amendment to the US Constitution states that no State shall deprive any person of life, liberty, or property without due process of law and equal protection of the laws.
[167] In Loving v. Virginia, 388 U.S 1, 12 (1967), the US Supreme Court invalidated bans on inter-racial unions holding that marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men; In Turner v. Safley, 482 U.S. 78, 95(1987) the US Supreme Court held that the right to marry was abridged by regulations limiting the privilege of prison inmates to marry.

180. Earlier judgments of the US Courts had held that marriage is a civic right because it is fundamental to existence and survival[168], is part of the fundamental right to privacy[169], and essential to the orderly pursuit of happiness.[170] It was also held that without the right to marry, one is excluded from the full range of human experience and is denied "full protection of the laws for one's avowed commitment to an intimate and lasting relationship."[171] The jurisprudence which has emanated from the US Courts indicates that the right to marry is recognised as a fundamental right because of the benefits (both expressive and material) attached to it.

181. Entry 5 of the Concurrent List of the Seventh Schedule to the Constitution grants both the State legislature and Parliament the power to enact laws with respect to marriage. The provision reads as follows:

> "**Marriage** and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."
>
> (emphasis supplied)

182. In pursuance of the power conferred by Articles 245 and 246 read with Entry 5 of the Concurrent List, Parliament has enacted laws creating and regulating the socio-legal institution of marriage. The State legislatures have made amendments to such laws with the assent of the President, since the subject of marriage is in the Concurrent list. The petitioners seek that the Court recognise the right to marry as a fundamental right. As explained above, this would mean that even if

[168] Skinner v. Oklahoma, 316 U.S 535
[169] Zablocki v. Redhail, 434 U.S 374
[170] Loving v. Virginia, 388 US 1
[171] Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass.2003)

Parliament and the State legislatures have not created an institution of marriage in exercise of their powers under Entry 5 of the Concurrent list, they would be obligated to create an institution because of the positive postulate encompassed in the right to marry. This argument cannot be accepted.

183. As explained in the previous section, the State through the instrument of law characterises marriage with two constituent elements: the expressive component and the material component. Marriage may not have attained the social and legal significance it currently has if the State had not regulated it through law. Thus, while marriage is not fundamental in itself, it may have attained significance because of the benefits which are realised through regulation.

184. This Court in **Justice KS Puttaswamy (9J)** (supra) while holding that privacy is a fundamental right was not guided by the content given to privacy by the State. This Court was of the opinion that if the right to privacy is not secured, the full purport of the rights entrenched in the Constitution could not be secured. Similarly, this Court in **Unnikrishnan** (supra) held that the right to education is a fundamental right. The right to education was derived from the provisions of the Directive Principles of the State Policy and their centrality to development of an individual. Entry 25 of the Concurrent list authorizes Parliament and State legislatures to enact laws on "education." The State in pursuance of this power has enacted numerous legislations relating to education such as laws establishing and regulating universities and colleges. However, the right to education was held to be a fundamental right, not because of any statute or law but because of its centrality to the values that the Constitution espouses. The arguments of the

petitioners that the Constitution recognises a right to marry is hinged on the meaning accorded to marriage by statutes, which cannot be accepted.

185. The Constitution does not expressly recognize a fundamental right to marry. Yet it cannot be gainsaid that many of our constitutional values, including the right to life and personal liberty may comprehend the values which a marital relationship entails. They may at the very least entail respect for the choice of a person whether and when to enter upon marriage and the right to choose a marital partner.

*c. The challenge to the SMA*

**I. The scheme of the SMA**

186. The SMA was enacted to provide a special form of marriage for couples belonging to different religions and castes. Section 4 of the SMA prescribes conditions relating to the solemnization of special marriages. The relevant portion of the provision is extracted below:

> "4. Conditions relating to solemnization of special marriages.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—
>
> (a) neither **party** has a spouse living;
>
> [(b) neither **party**—
>
> (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
>
> (ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an

> extent as to be unfit for marriage and the procreation of children; or
>
> (iii) has been subject to recurrent attacks of insanity
>
> (c) the **male** has completed the age of twenty-one years **and** the **female** the age of eighteen years**;**
>
> (d) the parties are not within the degrees of prohibited relationship:
>
> Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship;
>
> […] ”
>
> (emphasis supplied)

187. Section 4(a) and (b) use the gender-neutral word ‘party.’ However, Section 4(c) stipulates that the male must have completed twenty-one years **and** the female must have completed eighteen years. Section 4(d) stipulates that the parties should not be within the degrees of prohibited relationship. Section 2(b) defines “degrees of prohibited relationship: as follows:

> “(b) “degrees of prohibited relationship”-**a man and any of the persons** mentioned in Part I of the First Schedule and **a woman and any of the persons** mentioned in Part II of the said Schedule are within the degrees of prohibited relationship.
>
> (emphasis supplied)

188. Part I of the First Schedule consists only of women’s relationships with men, such as mother and daughter. Part II of the First Schedule consists only of men’s relationships with women, such as father and son. The conditions stipulated in

Section 4 when read with the definition of prohibited relationship in Section 2(b), limit the application of the SMA to heterosexual unions.

189. Chapter IV of the enactment lays down the consequences of marriage under the SMA. Section 19 stipulates that the marriage solemnized under the SMA of any member of an undivided family who professes the Hindu, Buddhist, Sikh, or Jain religions shall be deemed to effect their severance from such family. Section 20 provides that subject to the provisions of Section 19, any person whose marriage is solemnized under this Act shall have the same rights and shall be subject to the same disabilities in regard to the right of succession as a person to whom the Caste Disabilities Removal Act 1850 applies. The Caste Disabilities Removal Act 1950 provides that any law or usage which inflicts the forfeiture of rights or property, or which would affect the right of inheritance because of renouncing religion, having been excluded from the communion of religion, or being deprived of caste shall cease to be enforced by law. Thus, subject to Section 19 of the Act, a person's right to inheritance shall be not forfeited because they married a person of another religion or caste.

190. Section 21 states that succession to the property of any person whose marriage is solemnized under this Act shall be regulated by the provisions of the Indian Succession Act 1925. Section 21A provides a special provision in certain cases. The provision states that Sections 19, 20 (to the extent that it creates a disability), and 21 shall not apply when a marriage is solemnized between a person who professes the Hindu, Buddhist, Sikh, or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion. The rules of succession under

the ISA shall not apply where two persons who solemnize their marriage under the SMA belong to the Hindu, Buddhist, Sikh, or Jain religion. Section 21 essentially ruptured the cord between a Hindu, Buddhist, Sikh, or Jain and their personal laws if they married under the provisions of the SMA. Section 21A was introduced in 1976 as a progressive provision. Section 21A links the SMA with the HSA if both the parties belong to a religion to which the HSA applies. Section 21A was introduced to remedy the disability brought in by Section 21.

191. Section 27 deals with divorce. Section 27(1A) grants the wife additional grounds of divorce. Section 31 stipulates the Court to which a petition for divorce must be made. Sub-Section (2) of the Section is a special provision available to the wife for the presentation of a divorce petition. Section 36 stipulates that the husband may be directed to pay expenses of the proceedings and such sum based on the income of the husband when the wife has no independent income, sufficient to support herself and necessary for divorce proceedings. Section 37 stipulates that the court may order the husband to pay the wife permanent alimony and maintenance.

192. The petitioners argue that Section 4 of the SMA is unconstitutional not because it expressly excludes or bars the marriage between two persons of the same-sex but because it excludes the solemnization of marriage between non-heterosexual persons by implication since it only governs a heterosexual union.

### II. The decision of the South African Constitutional Court in *Fourie*

193. The petitioners have relied on **Fourie** (supra), a case which emanated from South Africa, to argue that provisions of the SMA must be read in a gender-neutral

manner. In **Fourie** (supra), the common law definition of marriage and Section 30(1) of the Marriage Act (Act 25 of 1961)[172] were challenged. The common law definition of marriage in South Africa is that it is a "union of one man with one woman, to the exclusion, while its lasts, of all others." The formula for marriage prescribed by Section 30(1) of the Marriage Act is extracted below:

> "Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful **wife (or husband)?**', and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: 'I declare that A.B. and C.D. here present have been lawfully married."
>
> (emphasis supplied)

194. The petitioners in **Fourie** (supra) argued that the reference of "husband or wife" in Section 30(1) excluded same-sex couples. The South African Constitutional Court allowed the petition by holding that Section 30(1) was unconstitutional because it excluded same-sex couples. The opinion of the majority authored by Justice Albie Sachs suspended the declaration of invalidity for one year to cure defects in view of Section 172(1)(b) of the South African Constitution. If the defect was not cured within the time frame stipulated, the word 'spouse' was to be read in the place of "wife (or husband)". Justice Kate O Regan who authored the minority opinion disagreed with the majority on the question of the remedy. The learned Judge observed that the scales of justice and equity necessitate immediate relief and not a suspended declaration of invalidity.

[172] "South African Marriage Act"

195. The Court observed that Section 30(1) of the South African Marriage Act was underinclusive because it excluded same-sex unions by silence and omission. Such omission was as effective in law and practice as if effected by express language. The Court held that it would be discriminatory if same-sex couples were not given the benefits (both tangible and intangible) which were available to heterosexual couples through marriage. The State justified the exclusion of same-sex couples from the institution of marriage because of the social nature of marriage and strong religious beliefs. The Court rejected this argument on the ground that the reasons which were used to justify the exclusion were grounded in prejudice and that it was not a valid justification for the violation of fundamental rights.

196. On the question of relief, the Court made the following observations:

a. Parliament had expressly and impliedly recognised same-sex partnerships. The Domestic Violence Act 116 of 1998 defined a domestic partnership as a relationship between a complainant and a respondent who are of the same or opposite sex and who live/lived together in a relationship in the nature of marriage. The Estate Duty Act 45 of 1955 stipulated that the spouse in relation to a deceased person includes a person who at the time of death of the deceased person was a partner of such person in a same-sex or heterosexual union;

b. Section 172(1)(b) of the Constitution granted the Court the power to issue such order including suspending the declaration of invalidity for any period

and on any conditions, to allow the competent authority to correct the defect;

c. There was extensive consultation with the public on the issue of same-sex marriage. The South African Law Reform Commission's memorandum on domestic partnership harmonised family law principles with the Bill of Rights which was preceded by extensive public consultation; and

d. The Court instead of reading in must grant the remedy of suspended declaration because reading in would be a temporary remedial measure which would be far less likely to achieve equality. Legislative action was well-suited for this purpose.

197. Though facially the case mounted by the petitioners before us is similar to the case mounted by the petitioners in **Fourie** (supra), the legal and the constitutional regime in South Africa and India varies. *First*, it must be noticed that unlike the SMA, there was only one provision in the South African Marriage Act (that is, Section 30(1)) which made a reference to heterosexual relationships. However, as indicated above, various provisions of the SMA (Sections 4, 27(1A), 31, 36, and 37) confine marriage to a union between heterosexual persons. *Second*, various enactments in South Africa already recognised same-sex unions unlike the Indian legal landscape where no law even remotely recognises the union between a same-sex couple. Thus, the canvas of the challenge before the South African Constitutional Court in **Fourie** (supra) and the legal and constitutional regime in place varies widely from that in India.

### III. The decision of the UK House of Lords in *Ghaidan*

198. Learned counsel for the petitioners argued that this Court ought to interpret the SMA to make it 'constitutionally compliant.' They relied on the decision of the House of Lords of the United Kingdom in **Ghaidan** (supra) and urged this Court to adopt the principle of interpretation which had been adopted in that case.

199. In that case, the respondent was in a stable and monogamous homosexual relationship with his partner who was a tenant in the house that the couple shared. The respondent and his partner were living together when the latter died. The appellant (being the landlord) claimed possession of the house. The respondent resisted the claim on the ground that he ought to be considered a 'statutory tenant' in terms of UK's Rent Act 1977.[173] This enactment provided that a surviving spouse of the original tenant shall be the statutory tenant if the surviving spouse was residing in the house in question immediately before the death of the original tenant. It also stipulated that a person who was living with the original tenant "*as his or her wife or husband*" shall be treated as the spouse of the original tenant. In essence, the Rent Act protected the tenancy rights of a heterosexual couple when the couple was in a relationship that was of a similar character as marriage. The surviving partner in a homosexual relationship could have become entitled to an 'assured tenancy' which was less advantageous than a statutory tenancy.

200. The respondent contended that the difference in the treatment of heterosexual couples and homosexual couples was based on their sexual orientation alone, and lacked justification, infringing Article 14 (prohibition of

[173] "Rent Act"

discrimination) read with Article 8 (right to respect for private and family life) of the European Convention on Human Rights.[174] He further argued that the court had a duty under Section 3 of the UK's Human Rights Act 1998[175] to read and give effect to the Rent Act in a way which was compliant with the ECHR. In other words, he urged the court to read the Rent Act such that it granted the surviving partner in a close and stable homosexual relationship the same rights as the surviving partner in a heterosexual relationship of a similar nature – the right to succeed the tenancy as a statutory tenant. The court of first instance rejected the respondent's arguments. The first appellate court allowed the appeal, leading to proceedings before the final appellate authority, the House of Lords (now, the Supreme Court of the UK).

201. The House of Lords accepted the respondent's arguments.[176] It noted that the rationale of the Rent Act was that the security of tenure in a house which a couple had made their home ought not to depend upon which of them dies first. It held that there was no legitimate state aim which justified the difference in treatment of heterosexual and homosexual couples, and found that the Rent Act therefore violated the rights of the respondent under the ECHR. Having so found, it relied on Section 3 of the Human Rights Act to interpret the Rent Act to mean that the survivor of a homosexual couple would have rights on par with the survivor of a heterosexual relationship for the purposes of succession as a statutory tenant.

[174] "ECHR"
[175] "Human Rights Act"
[176] By a majority of 4-1.

202. Section 3 of the Human Rights Act reads as follows:

> "3. Interpretation of legislation
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

As noticed by the House of Lords in **Ghaidan** (supra):

a. This provision was one of the primary means by which rights under the ECHR were brought into the law of the UK;

b. Section 3 permitted courts in the UK to depart from the unambiguous meaning of a statute, if required;

c. It also authorized courts in the UK to depart from legislative intent in interpreting the language used in a statute, if required;

d. It allowed courts to read in words to a statute which changed the meaning of that statute, to make it compliant with the ECHR as long as the new meaning was compatible with the underlying thrust of that enactment; and

e. Section 3 did not authorize courts to make decisions for which they were not equipped, such as when there were many ways of making a particular provision compliant with the ECHR.

The House of Lords also noted that difficult problems could arise in some cases.

203. It is not open to this Court to adopt the interpretative principle laid down in Section 3 of the Human Rights Act for a simple reason: the House of Lords derived the power to depart from legislative intent and read words into a statute such that

it was compliant with the ECHR from the Human Rights Act, a statute enacted by the Parliament of UK. It did not rely on a common law principle or fashion a principle of interpretation based on common law. The House of Lords itself noted that "*the interpretative obligation decreed by section 3 is of an unusual and far-reaching character*."[177] In India, there is no legislation which permits this Court to depart from legislative intent and read words into a legislation such that it is compliant with the Constitution.[178] As discussed in the previous segment of this judgment on the power of judicial review, courts in India must be circumspect in relying on the law in other jurisdictions, torn from the context in which those decisions have been crafted. It is not permissible for this Court to exercise a power which the Parliament of another country conferred on its courts, absent a similar conferment of power under the Indian Constitution. This Court must exercise those powers which it has by virtue of the Constitution of India or any other Indian law. In any event, as the House of Lords held, courts may not exercise this power to make decisions for which they are ill equipped. This Court is not equipped to recognize the right of queer persons to marry under the SMA for reasons discussed in subsequent segments.

### IV. Institutional limitations with respect to the interpretation of SMA

204. It must be noted that this Court in the beginning of the hearing restricted the breadth of the challenge to non-personal marriage law. However, on a careful perusal of the provisions of the SMA, it is evident that Section 21A links the SMA

[177] Opinion of Lord Nicholls of Birkenhead, *Ghaidan* (supra).
[178] Principles of interpretation which are well accepted in India must guide this Court's decision. For example, when two constructions of a provision are possible, courts ought to prefer the construction which gives effect to the provision rather than the one which renders it inoperative. M. Pentiah v. Veeramallappa Muddal, 1961 (2) SCR 295; Tinsukhia Electric Supply Co. Ltd. v. State of Assam, (1989) 3 SCC 709

to personal and non-personal laws of succession. In fact, such is the complexity of the SMA that the petitioners themselves had to submit lengthy charts on workability, which in effect reworked the structure of the SMA to include non-heterosexual unions.

205. Dr. Abhishek Manu Singhvi, appearing for one of the petitioners submitted that there are three plausible interpretations of Section 21A in its application to marriages between two Hindus under the provisions of the SMA:

a. The Court may choose not to decide on the applicability of Section 21A to non-heterosexual Hindu couples in the present litigation and leave the question of succession open for future litigation;

b. The succession of Hindu non-heterosexual couples will be governed by the HSA and that of other interfaith non-heterosexual couples will be governed by the ISA (similar to interfaith heterosexual couples or heterosexual couples of other religions). This requires a gender-neutral reading of the HSA and the ISA. The words “widow” and “widower” in the ISA and “male Hindu”, “female Hindu”, “widow”, and “widower” in the HSA can be interpreted in a gender neutral manner. This interpretation must only be limited to issues related to marriage. To include transgender persons, the Court may hold that the words “male” and “female” under Sections 8 and 15 of the HSA may be read as “persons”; or

c. Since by agreement of parties, religious and personal law related issues are beyond the scope of this litigation, it follows that provisions of secular law that relate back to personal laws (like Section 21A) are excluded from

consideration. Since Section 21A was introduced as an exception to the regime under Sections 19 to 21, non-consideration of the issue would revert the law to the position before the introduction of Section 21A which is that ISA would apply to all marriages under the SMA.

206. In addition to the 'reading in' of the provisions of other statutes such as ISA and HSA, the petitioners argue that the Court must also read into the following provisions of the SMA:

a. The words "widow" and "widower" in Schedules II and III of SMA must be read as "widow or widower" and "widower or widow"; and

b. Section 4(c) of SMA may be interpreted in the following way:

   i. For same-sex couples, the provision may be read as prescribing eighteen years as the minimum age for both parties in a lesbian relationship, and twenty-one years for both parties in a gay relationship;

   ii. For transgender persons, the minimum age requirement would depend on whichever gender/sex they identify as. So, a trans-man would be eligible to marry at twenty one years of age while a trans-woman would be eligible to marry at eighteen years; and

   iii. For those who do not identify either as a man or a woman, the following approach shall be adopted to ensure the inclusion of non-binary and intersex individuals:

## PART D

A. The silence of the SMA on the minimum age qualification for persons other than 'men' and 'women' may be read as imposing no restriction other than the restriction imposed by other laws that stipulate the age at which persons are capable of making decisions for themselves, which is eighteen years; and

B. Alternatively, the Court may lay down guidelines as an interim measure and until Parliament fills the legislative vacuum.

207. If the Court finds that a provision is contrary to Part III of the Constitution, it shall declare that it is void,[179] or read it down (by deleting phrases) or read words in (by adding or substituting phrases) to save it from being declared void. If, in the present batch of petitions, this Court holds that Section 4 is unconstitutional because it is underinclusive to the extent that it excludes, by implication, the marriage between same-sex couples, the court could either strike down Section 4 of the SMA or follow the workability model submitted by the petitioners. If the Court follows the first approach, the purpose of a progressive legislation such as the SMA would be lost. The SMA was enacted to enable persons of different religions and castes to marry. If the SMA is held void for excluding same-sex couples, it would take India back to the pre-independence era were two persons of different religions and caste were unable to celebrate love in the form of marriage. Such a judicial verdict would not only have the effect of taking the nation back to the era when it was clothed in social inequality and religious intolerance but would also push the

[179] Article 13 of the Constitution

courts to choose between eradicating one form of discrimination and prejudice at the cost of permitting another.

208. If this Court takes the second approach and reads words into the provisions of the SMA and provisions of other allied laws such as the ISA and HSA, it would in effect be entering into the realm of the legislature. The submissions of the petitioners indicate that this Court would be required to extensively read words into numerous provisions of the SMA and other allied laws. The Court is not equipped to undertake an exercise of such wide amplitude because of its institutional limitations. This Court would in effect be redrafting the law(s) in the garb of reading words into the provisions. It is trite law that judicial legislation is impermissible. We are conscious that the court usually first determines if the law is unconstitutional, and then proceeds to decide on the relief. However, in this case, an exercise to determine whether the SMA is unconstitutional because of under-inclusivity would be futile because of the limitations of this Court's power to grant a remedy. Whether a change should be brought into the legislative regime of the SMA is for Parliament to determine. Parliament has access to varied sources of information and represents in itself a diversity of viewpoints in the polity. The Court in the exercise of the power of judicial review must be careful not to tread into the legislative domain. It is clarified that this Court has not adjudicated upon the validity of any laws other than the SMA, the FMA, the Adoption Regulations, and the CARA Circular.

*d. The challenge to the FMA*

209. Some petitioners have challenged the constitutionality of the FMA and have sought a declaration that it applies to any two persons who seek to get married, regardless of their gender identity and sexual orientation. The FMA applies to two categories of persons – to parties who seek to solemnize their marriage under the FMA in a foreign country[180] and to those who seek to register their marriage under the FMA when their marriage has been solemnized in a foreign country in accordance with the law of that country.[181] In both cases, at least one of the parties to the marriage must be a citizen of India.[182] Section 4 of the FMA specifies certain conditions which must be fulfilled before the parties can avail of its provisions:

> "4. Conditions relating to solemnization of foreign marriages. — A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:—
>
> (a) neither party has a spouse living,
>
> (b) neither party is an idiot or a lunatic,
>
> (c) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage, and
>
> (d) the parties are not within the degrees of prohibited relationship:
>
> Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship."

[180] Chapter II, FMA
[181] Chapter III, FMA
[182] Section 4, FMA; Section 17(2), FMA

210. Clauses (c) and (d) contain requirements which prevent this Court from interpreting the FMA as applying to persons regardless of their sexual orientation. Clause (c) requires the bridegroom to be at least twenty-one years and the bride to be at least eighteen years of age. If this Court were to interpret Section 4 as applying to same-sex relationships, the question of how clause (c) would apply to such relationships would arise. Various approaches were proposed including reading the provision as requiring a minimum age of twenty-one for all men and eighteen for all women, such that two men who sought to marry would both be required to be twenty-one years and two women who sought to marry would both have to be eighteen years. Another approach that was proposed was to interpret the provision as requiring a common minimum age for all same-sex couples. This Court is of the opinion that such an exercise would amount to judicial legislation. When there are various options open for a legislative change and policy considerations abound, it is best left to Parliament to engage in democratic decision-making and settle upon a suitable course of action.

211. Clause (d) requires the parties not to be within the degrees of prohibited relationship. Section 2(a) defines the phrase ‘degrees of prohibited relationship’ as having the same meaning as in the SMA. The reasons why the degrees of prohibited relationship cannot be interpreted by this Court to include same-sex relationships has been discussed in the preceding paragraphs. The same reasons apply to Clause (d) of the FMA.

212. The FMA recognizes the right of an Indian citizen to marry outside India or to a marry a person from a foreign country. In essence, it recognizes the right of a

citizen of India to choose a life partner who is not a citizen of India. It follows that citizens of India may enter into an abiding union with a person of their choice, including a person of the same sex as them, even if that person is not a citizen of India. It is accordingly clarified that the right of a citizen of India to enter into an abiding union with a foreign citizen of the same sex is preserved.

ix. <u>The right to enter into a union</u>

> "The need to love is as important a force in human society as is the will to power. Power wants to destroy or consume or drive away the other, the one who is different, whose will is different. Love wants the other to remain, always nearby, but always itself, always other."[183]

*a. The goal of self-development and what it means to be human*

213. Over the years, through dialogue both inside and outside the courts, it has been established that the negative and positive postulates of fundamental freedoms and the Constitution as a whole *inter alia* secure conditions for self-development at both an individual and a group level. This understanding can be traced to numerous provisions of Part III of the Constitution, the preambular values, and the jurisprudence which has emanated from Courts. For example, this Court has held that the right to live under Article 21 secures more than the right of physical existence. It includes, *inter alia,* the right to a quality life which has been interpreted to include the right to live in an environment free from smoke and pollution,[184] the right to access good roads,[185] and a suitable accommodation which would enable them to grow in every aspect – mental, physical, and intellectual.[186]

[183] Margaret Trawick, *Notes on Love in a Tamil Family* (University of California Press 1992)
[184] MC Mehta v. Union of India, (2019) 17 SCC 490
[185] State of Himachal Pradesh v. Umed Ram Sharma, (1986) 2 SCC 68
[186]Shantistar Builders v. Narayan Khimalal Totame (1990) 1 SCC 520

Similarly, it has been established that a free exchange of ideas recognized under Article 19 is an integral aspect of the right to self-development.[187] The rights against exploitation[188] and against discrimination and untouchability[189] secure the creation of equal spaces in public and private spheres, which is essential for self-growth. The right to quality education without discrimination[190] also ensures that every citizen secures basic education to develop themselves. The freedom to profess and practice religion[191] also enables individuals to evolve spiritually.

214. This understanding of the Constitution is substantiated on a reading of Part IV of the Constitution. To illustrate, Article 38 states that the State shall strive to promote the welfare of the people, Article 42 stipulates that the State shall endeavour to secure just and humane conditions of work, and Article 47 places a duty on the State to raise the level of nutrition and the standard of living. The Constitution, through both positive and negative postulations, *inter alia* capacitates citizens in their quest to develop themselves. Such capacity-building enables them to achieve their full potential in both the private and the public space, and to be happy. The Indian Constitution (unlike, say, the South African Constitution) does not expressly provide that the Constitution seeks to improve the quality of life and free the potential of each person. However, such an understanding can be gleaned from the provisions of Part III and Part IV of the Constitution. Thus, one of the purposes of the rights framework is to enable the citizenry to attain the goal of self-development.

[187] D.C Saxena v. Hon'ble Chief Justice of India, (1996) 5 SCC 216
[188] Articles 23 and 24 of the Constitution
[189] Articles 15 and 16 of the Constitution
[190] Article 21A of the Constitution
[191] Articles 25 to 28 of the Constitution

215. Martha C. Nussbaum laid down a list of ten capabilities which are central requirements to live a quality life.[192] Two of the identified capabilities are crucial for our discussion.[193] The first is 'emotions' which is characterized as follows:

> "5. Emotions: Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development)"
>
> (emphasis supplied)

The second is 'affiliation' which is characterized as follows:

> "7. Affiliation: A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means **protecting institutions that constitute and nourish such forms of affiliations,** and also protecting the freedom of assembly and political speech)."
>
> (emphasis supplied)

216. The capabilities of 'emotions' and 'affiliations' identified by Nussbaum for self-development and sustaining a quality life are crucial for two important reasons. *First*, both capabilities focus on the human side of a person, that is, the ability and necessity of a person to emote and form relationships and associations. *Second*, the distinction between the capabilities of 'emotions' and 'affiliation' is that in the former, the emphasis is upon the agency of the individual and the freedom they

[192] Martha (n 150)
[193] The other capabilities listed by Martha C. Nussbaum include 'life', 'bodily health', 'bodily integrity', 'senses, imagination and thought', 'practical reason', 'other species', and 'play'.

have to form bonds with other people while in the latter, the emphasis is upon granting recognition to such associations.

217. Humans are unique in many respects. We live in complex societies, are able to think, communicate, imagine, strategize, and do more. However, that which sets us apart from other species does not by itself make us human. These qualities are necessary elements of our humanity but taken alone, they paint an incomplete picture. In addition to these qualities, our ability to feel love and affection for one another makes us human. We may not be unique in our ability to feel the emotion of love but it is certainly a fundamental feature of our humanity. We have an innate need to see and to be seen – to have our identity, emotions, and needs fully acknowledged, recognized, and accepted. The ability to feel emotions such as grief, happiness, anger, and affection and the need to share them with others makes us who we are. As human beings, we seek companionship and most of us value abiding relationships with other human beings in different forms and capacities. These relationships may take many forms – the natal family, cousins and relatives, friends, romantic partnerships, mentors, or students. Of these, the natal family as well as the family created with one's life partner form the fundamental groups of society.[194] The need and ability to be a part of a family forms a core component of our humanity. These relationships which nourish the emotional and spiritual aspects of our humanity are important in and of themselves. Further, they are as important to self-development as the intellectual (and

[194] The Preamble of the United Nations Convention on the Rights of the Child recognizes the importance of the family in the following terms: "…Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community…"

eventually, financial) nourishment we receive through education. Self-development cannot be measured solely in terms of educational qualifications and financial capabilities. Such a description is to forget what makes as human.

218. It is insufficient if persons have the ability and freedom to form relationships unregulated by the State. For the full enjoyment of the such relationships, it is necessary that the State accord **recognition** to such relationships. Thus, the right to enter into a union includes the right to associate with a partner of one's choice, according recognition to the association, and ensuring that there is no denial of access to basic goods and services is crucial to achieve the goal of self-development.

*b. The rights under Article 19*

**I. The right to freedom of speech and expression and to form intimate associations**

219. Article 19(1)(a) of the Constitution recognizes the right to **freedom** of speech and expression. Freedom postulates within its meaning, both, an absence of State control as well as actions by the State which create the conditions for the exercise of rights and freedoms. Article 19(1)(c) of the Constitution recognizes the **freedom** to form associations or unions or co-operative societies. The freedom of speech and expression is not limited to expressive words. It also includes other forms of expression such as the manifestation of complex identities of persons through the expression of their sexual identity, choice of partner, and the expression of sexual desire to a consenting party. Earlier judgments of this Court have held that expression of gender identity is a protected freedom under Article 19(1)(a). In

**NALSA** (supra), this Court held that the expression of gender identity is a form of protected expression under Article 19(1)(a). In **Navtej** (supra), this Court held that Section 377 of the IPC infringes upon the freedom of expression of queer persons, protected under Article 19(1)(a).

220. Courts have traditionally interpreted the right to form an association guaranteed under Article 19(1)(c) to mean associations formed by workers or employees for collective bargaining to attain equitable working conditions. However, the entire gamut of the freedom protected under Article 19(1)(c) cannot be restricted to this singular conception. The ambit of the freedom under Article 19(1)(c) is much wider. The provision does not merely protect the freedom to form an association to create spaces for political speech or for espousing the cause of labour rights. While that is a very crucial component of the freedom protected under Article 19(1)(c), the provision also protects the freedom to engage in other forms of association to realize all forms of expression protected under Article 19(1)(a).

221. In **Roberts** v. **United States Jaycees**,[195] the US Supreme Court read 'freedom of association' widely to include the freedom to form intimate associations. The factual matrix before the Court was that regular membership to the respondent-corporation was restricted to men between the ages of fifteen to thirty-five. Associate membership was offered to those to whom regular membership was not available. Complaints were filed alleging that the exclusion of women from full membership violated the Minnesota Human Rights Act which made it discriminatory to deny to any person the full and equal enjoyment of the

[195] 468 U.S 609 (1984)

goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. The US Supreme Court had to decide if any interference with the organization's membership policy would violate the respondent's freedom of association guaranteed under the First Amendment. Justice Brennan, writing for the majority, observed that the freedom of association constitutes two facets. *First,* the freedom to enter into intimate human relationships secure from undue state interference ("the intrinsic element"); and *second,* the freedom to form associations to engage in activities protected by the First Amendment such as speech, assembly, and the exercise of religion ("the instrumental element"). The Court observed that individuals have the freedom to form intimate associations because individual liberty can be secured only when the State does not unjustifiably interfere with the formation and preservation of certain kinds of highly personal relationships. The Constitution protects such relationships because individuals draw emotional enrichment from close ties such as those created by marriage, children, and cohabitation, which contribute towards identity building and self-development. Justice Brenan qualified the freedom by observing that only personal relationships (which are characterized by their attributes such as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, the seclusion from others in critical aspects of the relationship) are protected.[196]

[196] The right to form an intimate association has been expanded upon by the Supreme Court of US in Lawrence v. Texas, 539 U.S 558 (2003) by which the sodomy laws were held unconstitutional.

222. Kenneth L. Karst, who developed the idea of the freedom of intimate association[197] argues that the Courts have traditionally not permitted the State to interfere or regulate in certain kinds of personal relationships, thereby elevating it to a distinct freedom. Intimate association is characterized by a sense of collectivity which exists beyond two individuals. One of the prominent ideas embraced by the freedom of intimate association is the opportunity it affords to enjoy the society of the other person who is a part of the relationship and the ability to choose to form and maintain such a relationship.[198] The opportunity to enjoy the society of one's partner may be denied either directly or indirectly. It could be denied directly when the law prohibits such an association. The operation of Section 377 of the IPC criminalizing homosexual activity is a form of direct restriction on the freedom of association.

223. On the other hand, the State could indirectly infringe upon the freedom when it does not create sufficient space to exercise that freedom. A formal associational status or recognition of the association is necessary for the **free** and **unrestricted** exercise of the freedom to form intimate associations. Needless to say, there may be reasonable restrictions on this right. However, other than legally valid and binding restrictions, the right to intimate associations must be unrestricted. The State by not **endorsing** a form of relationship encourages certain preferences over others.[199] In a previous segment of this judgment, we have discussed the tangible and intangible benefits of recognizing relationships in the form of marriage. While the tangible benefits of marriage are traceable to the *content* of law, the intangible

[197] Kenneth L Karst, The freedom of intimate association, (1980) The Yale Law Journal, Vol. 89 (4) 624-692
[198] ibid
[199] Evan Gerstmann, *Same-sex marriage and the Constitution*, (Cambridge University Press 2017)

benefits are secured merely because State recognises the relationship through the instrument of law. Intangible benefits in the form of expressive advantages exist irrespective of the content of the law. Even if the law does not grant any special material benefits to a relationship, the relationship would still be considered to be legitimate in the eyes of the society. The freedom to choose a partner and the freedom to enjoy their society which are essential components of the right to enter into a union (and the freedom of intimate association) would be rendered otiose if the relationship were to be discriminated against. For the right to have real meaning, the State must recognise a bouquet of entitlements which flow from an abiding relationship of this kind. A failure to recognise such entitlements would result in systemic discrimination against queer couples. Unlike heterosexual couples who may choose to marry, queer couples are not conferred with the right to marry by statute. To remedy this, during the course of the hearing, the Solicitor General of India made a statement that a Committee chaired by the Cabinet Secretary will be constituted to set out the rights which will be available to queer couples in unions. The Committee shall set out the scope of the benefits which accrue to such couples.

### II. The right to settle in any part of India

224. Article 19(1)(e) of the Constitution stipulates that all citizens shall have the right to reside and settle in any part of the territory of India. In exercise of this right, citizens may reside in any village, town, or city in any state or union territory irrespective of the state in which they were born or are domiciled. Article 19(1)(e) proscribes differentiation on the basis of the native place of a person. As with other

fundamental rights, it is subject to reasonable restrictions. In **Maneka Gandhi** v. **Union of India**,[200] this Court observed that it was a historical fact that there were rivalries between some states in the country. It was therefore not beyond the realm of possibility that a particular state would restrain individuals domiciled in another state from residing or settling in the first state. In view of this, the Court held that the intention behind Article 19(1)(d) (the right to move freely throughout the territory of India) and Article 19(1)(e) was to prevent the states from imposing such restrictions. In this way, the provision was thought to emphasize the unity and oneness of India.

225. Article 19(1)(e) uses the expressions "reside" and "settle." The term "reside" can mean either a temporary residence or a permanent residence but there is a certain level of permanency attached to the word "settle" in India. One can reside in a particular place in the course of their education or employment but to settle down in that place means to build one's life there and reside their permanently.[201] In P. Ramanatha Aiyar's *Law Lexicon* (1997 edition), it is stated:

> "The word "settled" has no precise or determinate meaning. In popular language, it intends going into a town or place to live and take up one's abode. A person is said to be settled where he has his domicile or home."

Colloquially, people say that a person has "settled down" when they are well established in their careers or when they have chosen a life partner or married somebody.

---

[200] (1978) 1 SCC 248

[201] The term "settle down" has previously been used by this Court in this sense. See, for instance, Pradeep Jain v. Union of India, (1984) 3 SCC 654

226. Citizens of India have the right to **settle** in any part of the territory of India in terms of Article 19(1)(e). They, like all other citizens, may exercise this right in two ways:

a. *First*, they may build their lives in a place of their choosing (in accordance with law) either by themselves or with their partner. They may reside in that place permanently (subject to other reasonable restrictions including those intended to protect the rights of tribal communities). This right is uniquely significant to persecuted groups (such as queer persons, inter-caste couples, or interfaith couples) who migrate from their hometowns to other places in the country, including cities;[202] and

b. *Second*, they may "settle down" with another person by entering into a lasting relationship with them. In fact, this mode of the exercising the right under Article 19(1)(e) is encompassed by the first mode because to many people, building a life includes choosing their life partner.

Hence, the right to enter into a union is also grounded in Article 19(1)(e).

*c. Facets of the right to life and liberty under Article 21*

**I. The atypical family**

227. One's natal family usually consists of one's immediate relatives. The people who constitute one's 'immediate relatives' vary from society to society. For instance, many Indians grow up in a Hindu Undivided Family which is commonly

[202] Purayil (n 96)

known as a 'joint family' and which is recognised by the law. The family is typically thought of as comprising a mother and a father, to which a life partner is added (usually in a heterosexual relationship). Later, children join this family, and so the cycle continues. While this conception of a family dominates our collective understanding, it is not the only valid mode by which a family can be formed. Myriad persons do not follow this blueprint for the creation of a family. They instead have their own, atypical blueprint.

228. In **Deepika Singh** (supra), this Court rightly acknowledged the existence of atypical families:

> "26. The predominant understanding of the concept of a "family" both in the law and in society is that it consists of a single, unchanging unit with a mother and a father (who remain constant over time) and their children. This assumption ignores both, the many circumstances which may lead to a change in one's familial structure, and the fact that many families do not conform to this expectation to begin with. Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. A household may be a single parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers (who traditionally occupy the roles of the "mother" and the "father") of children may change with remarriage, adoption, or fostering. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones."

229. Queer relationships may constitute one's family. Persons in such relationships are fulfilling their innate and human need to be a part of a family and to create their family. This conception of a family may be atypical but its atypical nature does not detract from the fact that it is a family. Further, queer persons are

often rejected by their natal families and have only their partner or their chosen community to fall back on. In addition to the different forms of kinship recognized in **Deepika Singh** (supra), the guru-chela bond of transgender persons (discussed in the previous section of this judgment) may also be a familial bond. Unlike hijras who often have the option of joining the hijra community and forming the guru-chela bond, transmen do not have traditions or customs which may lead to the creation of non-biological familial bonds with other transmen as a group. Regardless, they form close bonds with other transmen and many consider these bonds to be familial.[203] These atypical manifestations of the family unit equally constitute the fundamental groups of society. The Constitution accounts for plural identities and values. It protects the right of every person to be different. Atypical families, by their very nature, assert the right to be different. Difference cannot be discriminated against simply because it exists. Articles 19 and 21 protect the rights of **every** citizen and not some citizens.

230. Some petitioners have suggested that the atypical family is a queer person's 'chosen family.' Chosen families comprise people who are selected to be one's kin, with the exercise of one's agency.[204] Some have argued that the entire spectrum of queer relationships in India may not always be based on choice, with guru-chela relationships often assigned rather than chosen.[205] Hence, while some queer relationships may accurately be described as the 'chosen family,' all of them are the 'atypical family.'

[203] Purayil (n 96)
[204] See generally, Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press 1997)
[205] Reddy (n 81)

## II. The right to dignity, autonomy, and privacy

231. It is not only formal freedom which is significant but also substantive freedom or the opportunity to achieve what one sets out to achieve and the conditions which enable this. The freedom guaranteed under the Constitution is realised in substance only when the conditions for their effective exercise are created. Formal freedom is translated into substantive freedom through the formulation of schemes and policies. When citizens are prevented from exercising their rights, the courts of the country create the conditions for their exercise by giving effect to the laws enacted by the legislative wing or the schemes formulated by the executive wing. In the process, courts interpret the Constitution and the rights and freedoms it recognizes. This exercise lies at the core of Article 21 of the Constitution, which guarantees the right to life and personal liberty.

232. A few paragraphs ago, this Court discussed what it means to be human. The question of what it means to be free – or to have liberty – is of equal significance. It is a question which has plagued philosophers, ethicists, and economists alike. The answer may mean different things to different people and may change depending on the circumstances in which the question is asked. Simply put, the ability to do what one wishes to do and be who one wishes to be (in accordance with law) lies at the heart of freedom.

233. Article 21 is available to all persons including queer persons. Article 21 encompasses the rights to dignity, autonomy, and privacy. Each of these facets animates the others. It is not possible to speak of the right to enter into a union without also speaking of the right to intimacy, which emanates from these

rights. These rights demand that each individual be free to determine the course of their life, as long as their actions are not barred by law. Choosing a life partner is an integral part of determining the course of one's life. Most people consider this decision to be one of the most important decisions of their lives – one which defines their very identity. Life partners live together, spend a significant amount of time with one other, merge their respective families, create a family of their own, care for each other in times of sickness, support one another and much more. Hence, the ability to choose one's partner and to build a life together goes to the root of the right to life and liberty under Article 21. Undoubtedly, many persons choose not to have a life partner – but this is by choice and not by a deprivation of their agency. The law constrains the right to choose a partner in certain situations such as when they are within prohibited degrees of relationships or are in a consanguineous relationship.

234. Principle 24 of the Yogyakarta Principles (on the application of international human rights law in relation to sexual orientation and gender identity)[206] states that all people have the right to found a family:

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

While India is not a signatory to the Yogyakarta Principles, this Court has recognized their relevance to the adjudication of cases concerning sexual minorities.[207] Depriving someone of the freedom to choose their life partner robs

[206] "Yogyakarta Principles"
[207] NALSA (supra); Navtej Singh Johar (supra)

them of their autonomy, which in turn is an affront to their dignity. Preventing members of the LGBTQ community from entering into a union also has the result of denying (in effect) the validity of their sexuality because their sexuality is the reason for such denial. This, too, would violate the right to autonomy which extends to choosing a gender identity and sexual orientation. The act of entering into an intimate relationship and the choices made in such relationships are also protected by the right to privacy. As held by this Court in **Navtej** (supra) and **Justice KS Puttaswamy (9J)** (supra), the right to privacy is not merely the right to be left alone but extends to decisional privacy or privacy of choice.

### III. The right to health

235. The right to health is also a crucial component of the right to life and liberty.[208] The health of a person includes both, their physical and their mental wellbeing. Parliament enacted the Mental Healthcare Act 2017[209] to regulate the provision of mental healthcare services. An assessment of the mental health of a person cannot be limited to considering whether they have a mental illness or disease but must also include an assessment of whether their mental health is thriving. The Constitution of the World Health Organization declares that:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

Mental health is therefore a state of **complete** mental wellbeing and not merely the absence of mental illnesses. Parliament is also cognizant of this fact as evident

[208] Common Cause v. Union of India, (2018) 5 SCC 1; Union of India v. Moolchand Kharaiti Ram Trust, (2018) 8 SCC 321
[209] "Mental Healthcare Act"

from the overall scheme and provisions of the Mental Healthcare Act. Though this statute is primarily concerned with mental illnesses and access to healthcare, Chapter VI recognizes the value of complete mental wellbeing by providing for the promotion of and awareness about mental health. A person's mental well-being can only be secured if they are allowed the freedom and liberty to make choices about their lives. If their choices are restrained, their overall mental well-being would undoubtedly be degraded. Choices may be restrained by expressly denying them their freedom or by failing to create conditions for the exercise of such freedom.

236. The right of queer persons to access mental healthcare is recognized by Section 18 which stipulates that persons have a right to access mental healthcare without being discriminated against on the basis of their sex, gender, or sexual orientation. This is undoubtedly a progressive step in line with constitutional ideals. The mental health of members of the LGBTQ community may suffer not only because of the discrimination they may face at the hands of their families or society in general but also because they are prevented from choosing their life partner and entering into a meaningful, long-lasting relationship with them. The effect of the right to life under Article 21 read with Section 18 of the Mental Healthcare Act is that queer people have the right to **complete** mental health, without being discriminated against because of their sex, gender, or sexual orientation. A natural consequence of this is that they have the right to enter into a lasting relationship with their partner. They also have a right not to be subjected to inhumane and cruel practices or procedures.

*d. The right to freedom of conscience under Article 25*

237. Article 25(1) of the Constitution is as follows:

> "25. Freedom of conscience and free profession, practice and propagation of religion
>
> (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

Article 25(1) has four components – the first component makes the right available to **all** persons. The second component indicates that all persons are equally entitled to the rights it codifies. The third component deals with two distinct concepts: the right to freedom of conscience and the right freely to profess, practice and propagate religion. While the freedom of conscience subsumes within its fold the right to profess, practice and propagate religion, it is not restricted to this right alone. The rights with respect to religion are one aspect of the freedom of conscience. The fourth component makes the rights codified in Article 25 subject to public order, morality, health, and the other provisions of Part III. The right under Article 25 is an individual right because conscience inheres in an individual.[210]

238. The right under Article 25 is also available to members of the LGBTQ community since it is available to all persons. But what does this freedom entail, beyond religious rights? Black's Law Dictionary defines conscience in the following terms:

> "Conscience. The moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception and

[210] Indian Young Lawyers Assn. v. State of Kerala & Ors. (2019) 11 SCC 1

> judgment of the moral qualities of his own conduct, but in a wider sense, denoting similar application of the standards of morality to the acts of others. The sense of right and wrong inherent in every person by virtue of his existence as a social entity. …"[211]
>
> (emphasis supplied)

239. All persons, including members of the queer community, have the right to judge the moral quality of the actions in their own lives, and having judged their moral quality, have the right to act on their judgment in a manner they see fit. This attribute is of course not absolute and is capable of being regulated by law. In the segment of this judgment on the right to life and liberty, this Court noticed that the meaning of liberty is – at its core – the ability to do what one wishes to do and be who one wishes to be, in accordance with law. All persons may arrive at a decision regarding what they want to do and who they want to be by exercising their freedom of conscience. They may apply their sense of right and wrong to their lives and live as they desire, in accordance with law. Some of the decisions the moral quality of which they will judge include the decision on who their life partner will be and the manner in which they will build their life together. Each individual is entitled to decide this for themselves, in accordance with their conscience.

240. The right under Article 25 is subject to four exceptions – public order, morality, health, and the other provisions of Part III. The respondents have not demonstrated that public order will be in peril or that the health of the public at large or of individuals will be adversely impacted, if queer persons enter into a union with their partners. As for morality, it is settled law that Article 25 speaks of constitutional

[211] Black's Law Dictionary (5th edn.; 1979)

morality and not societal morality. In **Indian Young Lawyers Assn.** v. **State of Kerala**,[212] a five-Judge Bench of this Court (of which one of us, DY Chandrachud, J. was a part) held:

> "Morality for the purposes of Articles 25 and 26 cannot have an ephemeral existence. Popular notions about what is moral and what is not are transient and fleeting. Popular notions about what is or is not moral may in fact be deeply offensive to individual dignity and human rights. Individual dignity cannot be allowed to be subordinate to the morality of the mob. Nor can the intolerance of society operate as a marauding morality to control individual self-expression in its manifest form. … The expression has been adopted in a constitutional text and it would be inappropriate to give it a content which is momentary or impermanent. Then again, the expression 'morality' cannot be equated with prevailing social conceptions or those which may be subsumed within mainstream thinking in society at a given time. … The content of morality is founded on the four precepts which emerge from the Preamble. The first among them is the need to ensure justice in its social, economic and political dimensions. The second is the postulate of individual liberty in matters of thought, expression, belief, faith and worship. The third is equality of status and opportunity amongst all citizens. The fourth is the sense of fraternity amongst all citizens which assures the dignity of human life."

Hence, the content of morality must be determined on the basis of the preambular precepts of justice, liberty, equality, and fraternity. None of these principles are an impediment to queer persons entering into a union. To the contrary, they bolster the proposition that queer persons have the right to enter into such a relationship. Finally, the other provisions in Part III (which may also restrict the exercise of the right under Article 25) do not act as a bar to the exercise of the right in the present case. Similar to the preambular values, they give rise to the right to enter into a union.

---

[212] (2019) 11 SCC 1

241. A union may emerge from an abiding, cohabitational relationship of two persons – one in which each chooses the other to impart stability and permanence to their relationship. Such a union encapsulates a sustained companionship. The freedom of all persons (including persons of the queer community) to form a union was recognised by this Court in **Navtej** (supra):

> "167. … There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others."

Such a union has to be shielded against discrimination based on gender or sexual orientation.

242. In **K.S. Puttaswamy (Privacy-9J.)** v. **Union of India**,[213] one of us (Dr. DY Chandrachud, J.) held that discrimination against an individual on the basis of sexual orientation is offensive to their dignity and self-worth:

> "144. … Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does 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. … **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

[213] (2017) 10 SCC 1

> sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."
>
> (emphasis supplied)

243. This Court recognized that equality demands that queer persons are not discriminated against. An abiding cohabitational relationship which includes within its fold a union of two individuals cannot be discriminated against on the basis of sexual orientation. Material and expressive entitlements which flow from a union must be available to couples in queer unions. Any form of discrimination has a disparate impact on queer couples who unlike heterosexual couples cannot marry under the current legal regime.

244. As a consequence of the rights codified in Part III of the Constitution, this Court holds that all persons have a right to enter into an abiding union with their life partner. This right, undoubtedly, extends to persons in queer relationships. At this juncture, it is necessary to clarify the difference between relationships and unions of the kind which this Court speaks of, and unions and marriages. Any person may enter into a consensual romantic or sexual relationship with another person. This may last for a few months or for years. Regardless of the period for which the relationship continues, no legal consequences attach to it, except where provided by law (such as in terms of the DV Act). However, when two persons enter into a union with a person whom they consider to be their life partner, certain legal consequences will follow. For instance, if one of them happens to die, their partner will have the right to access the body of the deceased.

x. Restrictions on the right to enter into a union

*a. The right to enter into a union cannot be restricted based on sexual orientation*

245. In **Navtej** (supra), the concurring opinion authored by one of us (Justice DY Chandrachud) noted that Article 15 prohibits discrimination, direct or indirect, which is founded on a stereotypical understanding of the role of sex. It was observed that the usage of the word 'sex' in Article 15(1) encapsulates stereotypes based on gender. The judgment expanded on this understanding of the provision by holding that sexual orientation is also covered within the meaning of 'sex' in Article 15(1) because (i) non-heterosexual relationships question the male-female binary and gendered roles which are attached to them; and (ii) discrimination based on sexual orientation **indirectly** discriminates based on gender stereotypes which is prohibited by Article 15. Thus, a law which, directly or indirectly, discriminates based on sexual orientation is constitutionally suspect. In **Navtej** (supra), Justice Indu Malhotra observed that Article 15(1) prohibits discrimination based on sexual orientation because it is analogous to the other grounds on which discrimination is prohibited. The learned Judge observed that the common thread which runs through the grounds mentioned in Article 15 is that they impact the personal autonomy of an individual.

246. We find it necessary to supplement the observations of this Court in **Navtej** (supra) on the impermissibility of discrimination based on sexual orientation. The causal relationship between homophobia and gender stereotypes is not the **only** constitutional approach to grounding the prohibition of discrimination based on

sexual orientation in Article 15. Subsuming the discrimination faced by queer persons into the sex-gender debate runs the risk of being reductionist. Gender theory only captures one part of the complex construction of sexual deviance. Over-emphasizing gender norms as a reason for the discrimination faced by the queer community will be at the cost of reducing their identity.

247. At this juncture, it is important to address the argument of the learned Solicitor General that Article 15 of the Constitution does not include sexual orientation because it is not an 'ascriptive' characteristic since there is a degree of 'choice' in identifying as a queer person. This submission is premised on the erroneous understanding that the common thread which runs through the grounds mentioned in Article 15 is that they are all ascriptive characteristics.

248. Article 15 of the Constitution states that no citizen shall be discriminated against based on "*religion, race, sex, place of birth, or any of them*." Ascribed status is described to be "*assigned to individuals without reference to their innate differences or abilities*" and achieved status is described as "*acquiring special qualities*" and "*open to individual achievement*."[214] Thus, characteristics attained on birth are termed as ascribed status and characteristics or qualities achieved after birth are termed as achieved status. Before proceeding further, a preliminary point must be made. Status is not a biological phenomenon. It is a social phenomenon.[215] The status of a person is identified based on how a person is

[214] Ralph Linton, The Study of Man: An introduction (1936)
[215] Irving S. Falodare, A Clarification of "Ascribed Status" and "Achieved Status", *The Sociological Quarterly,* Vol. 10, No. 1 (Winter, 1969), pp 53-61

*perceived.* It depends on how the society (conditioned by social norms) *sees* an individual as a part of a group.

249. This Court has in many judgments held that caste is an ascribed status.[216] The argument of Dr Abhishek Manu Singhvi that Article 15 prohibits discrimination on the ground of sexual orientation because it is an ascribed characteristic, and the argument of the learned Solicitor General that sexual orientation is not a ascribed characteristic (and is thus, not protected under Article 15) fails to give effect to the full purport of the anti-discrimination principle encompassed in Article 15. A core difference between ascribed and achieved status is that the former is considered to be irreversible (where a person is born with it) but the latter is reversible.[217] The assumption that Article 15 only protects the **status** that a person is born with and not an **identity** they choose runs the risk of viewing persons as *helpless individuals.* It also misses the crucial point that a person who chooses an identity can also be discriminated against. A few of the grounds stipulated in Article 15 may be reversed by the exercise of choice. For example, persons undergo sex-reassignment surgeries to alter their body to align it with their gender. When a person wishes to choose a different label for their gender, they face other forms of discrimination and stigma different from the discrimination that they faced earlier. Merely because a person by exercise of choice changes their sex, it cannot be argued that the protection provided under Article 15 is not available to them.

[216] See Madhu Kishwar v. State of Bihar, (1996) 5 SCC 125; Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1; Indian Medical Assn. v. Union of India, (2011) 7 SCC 179; Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217
[217] Ibid.

250. The Court must also be conscious of the fact that a person may face discrimination both due to their chosen identity and imposed identity. For example, even after a person changes their religion, it is possible that they face discrimination due to their new religious identity and their old caste or religious identity. This is not to say that all persons choose to change the characteristics that they are born with. While a few people by exercising their choice (successfully and unsuccessfully) alter what is assumed by the society to be their ascribed status, a few others may not wish to change their trait.

251. The discussion above clearly elucidates that the distinction between ascribed and achieved status is not as clear-cut as it may seem. The understanding of Article 15(1) cannot be premised on the distinction between ascribed and achieved status. Such an understanding does not truly capture the essence of the anti-discrimination principle. The anti-discrimination principle incorporated in Article 15 identifies grounds on the basis of which a person shall not be discriminated. These grounds are markers of identity. The reason for constitutionally entrenching these five markers of identity (that is, religion, caste, race, sex, and place of birth) is that individuals (and groups) have historically and socially been discriminated against based on these markers of identities. These identities must be read in their historical and social context instead of through the narrow lens of ascription.

252. When Article 15 is read in the broader manner indicated above, the word “sex” in Article 15 of the Constitution takes within its meaning “sexual orientation” not only because of the causal relationship between homophobia and sexism but

also because 'sex' is used as a marker of identity. The word 'sex' cannot be read independent of the social and historical context. Thus, 'sex' in Article 15 includes within its fold other markers of identity which are related to sex and gender such as sexual orientation. Thus, a restriction on the right to enter into a union based on sexual orientation would violate Article 15 of the Constitution.

*b. Recognizing the right of queer persons to enter into a union will not lead to social chaos*

253. The Union of India submitted that if non-heterosexual couples are permitted to enter into a union, then the State will also have to extend the right to incestuous, polygamous, or polyandrous relationships. To answer this question, this Court has to deal with the issue of whether the State has the power to place restrictions on the right to enter into a union and if so, what is the extent of such restrictions.

254. The right to enter into a union like every other fundamental right can be restricted by the State. It is now established that the Courts must use the four-prong proportionality test to assess if the infringement or restriction of a right is justified.[218] The courts must use the integrated proportionality standard formulated in **Akshay N Patel** v. **Reserve Bank of India**[219] to test a violation of the right to enter into a union because the right is traceable to more than one provision of Part III. However, if the State restricts the right or has the effect of restricting the right (both directly and indirectly) based on any of identities mentioned in Article 15, such a restriction would be unconstitutional.

[218] See Modern Dental College & Research Centre v. State of Madhya Pradesh, (2016) 4 SCC 346; Puttaswamy (9J) (supra)
[219] Civil Appeal No. 6522 of 2021

255. We do not accept the argument of the Union of India that permitting non-heterosexual unions would lead to allowing incestuous, polyandrous, and polygamous unions for all communities (the personal laws of some religious and trial communities currently permit polygamy or polyandry). The restriction on the ground of sexual orientation will violate Article 15 of the Constitution. On the other hand, the restriction on incestuous, polygamous or polyandrous unions would be based on the number of partners and the relationships within the prohibited degree. The Court in that case will determine if the State's interest in restricting the right based on the number of partners and prohibited relationships is proportionate to the injury caused due to the restriction of choice. In view of the discussion above, a restriction based on a marker of identity protected by Article 15 cannot be equated to a restriction based on the exercise of choice. For this reason, we find that the apprehension of the Union of India is unfounded when tested on constitutional principles.

xi. <u>The right of transgender persons to marry</u>

256. Some petitioners have sought a declaration that the right to marry a person of their choice applies to transgender persons. The Union of India seems to have a mixed response to this claim. On one hand, it asserts that marriage must only be between 'biological' men and 'biological' women. On the other hand, the written submissions of the learned Attorney General state that "*The issues relating to transgender* persons *arising out of The Transgender Persons (Protection of Rights) Act, 2019 stand on a different footing and can be addressed without reference to the Special Marriage Act.*" Before addressing the issue, it is necessary to briefly

advert to the difference between sex, gender, and sexual orientation, as well as to note the development of the law in relation to transgender persons.

*a. Sex, gender, sexual orientation*

257. The term 'sex' refers to the reproductive organs and structures that people are born with.[220] Intersex persons are those whose sex characteristics do not fit the typical notions of 'male' and 'female.'[221] Sex and gender are not the same. The Yogyakarta Principles describe one's gender identity as:

> "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."[222]

The gender of a person may not correspond to the sex they were assigned at birth. A transgender person is one whose gender identity does not conform with their sex. Transgender people may choose to undergo hormonal therapy or surgery (commonly known as gender affirming surgery or sex reassignment surgery) to alter their bodies to make them conform to their gender. People may be transgendered regardless of whether they choose to or are able to undergo a surgery. As noted in preceding segments of this judgment, the term 'transgender' does not fully capture the rich variation in gender identities in India. Historically and socio-culturally, Indian persons[223] with a genderqueer identity go by different

[220] "Sex." Merriam-Webster.com Dictionary, Merriam-Webster <https://www.merriam-webster.com/dictionary/sex>
[221] 'Intersex people,' Office of the United Nations High Commissioner for Human Rights <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people>
[222] Introduction to the Yogyakarta Principles, Yogyakarta Principles
[223] As also persons in other South Asian countries

names including hijras, kothis, aravanis, jogappas, thiru nambis, nupi maanbas and nupi maanbis. Persons who are known by these names may identify as male, female, or the 'third gender.' Intersex persons are not the same as transgender persons. They have atypical reproductive characteristics. Intersex people may identify as male, female, or transgender.

258. Sexual orientation differs from both sex and gender. The Yogyakarta Principles describe sexual orientation as:

> "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."[224]

The sex of a person is determined by their reproductive organs and structure, their gender identity depends on their internal experience of gender, and their sexual orientation is defined by the gender of the people that they are attracted to. The present batch of petitions seeks the recognition of the right of persons to marry regardless of their gender identity or sexual orientation. While previous segments of this judgment dealt with the rights of all persons regardless of gender identity or sexual orientation, this segment deals exclusively with the rights of persons who are transgender or intersex.

*b. The judgment of this Court in NALSA and the Transgender Persons Act*

259. The judgment of this Court in **NALSA** (supra) recognized the right of transgender persons to be identified by the gender identity of their choice, as well as their right to full protection under the Constitution, on equal terms with any other

[224] Ibid

citizen of the country. The government was enjoined to recognize what the Court termed the 'third gender.' The Court also noticed the absence of a suitable legislation dealing with the rights of the transgender community. It issued directions to the Union and State Governments to take steps to ensure that the transgender community was able to realize its rights to the fullest extent. The judgment in **NALSA** (supra) was affirmed by this Court in **Justice KS Puttaswamy** (supra) and again, in **Navtej** (supra). The judgement in **NALSA** (supra) was critiqued for generalizing the gender identities of hijras as belonging to the third gender alone.[225] The directions at paragraphs 135.1 and 135.2 of **NALSA** (supra) must be read as recognizing the right of all transgender persons (including hijras and those who are socio-culturally known by other names) to be recognized by a gender of their choice.

260. In 2019, Parliament enacted the Transgender Persons Act to provide for the rights of transgender persons and their welfare. This statute proscribes discrimination against transgender persons,[226] provides for a system by which their identity may be recognized,[227] prescribes that the appropriate government shall take welfare measures,[228] recognizes the right of residence[229] and provides for the obligations of various parties with respect to their right to education, social security, and health.[230] It also creates a National Council for Transgender Persons.[231] A challenge to the constitutional validity of the Transgender Persons Act is pending

[225] H.R. Vasujith Ram, 'Combatting Exclusions through Law: Rights of Transgender People in India', in Zoya Hasan, and others (eds), *The Empire of Disgust: Prejudice, Discrimination, and Policy in India and the US* (Delhi, 2018; online edn., OUP 2019)
[226] Chapter II, Section 9
[227] Chapter III
[228] Chapter IV
[229] Section 12
[230] Chapter VI
[231] Chapter VII

before a different Bench of this Court. We leave the challenge to the validity of the statute to be decided in that or any other appropriate proceeding.

261. During the course of the hearings, the Solicitor General advanced the argument that the Transgender Persons Act prohibits discrimination against any member of the queer community and that consequently, the queer community in India no longer faces any stigma due to their gender identity or sexual orientation. He argued that the Transgender Persons Act is a broad-based legislation which includes all persons of the queer community within its ambit. This argument does not hold any water. The legislation applies only to persons with a genderqueer or transgender identity and not to persons whose sexual orientation is not heterosexual. This is evident from the definition of a transgender person as:

> "…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."[232]

From the definition, it is clear that the enactment applies to persons whose gender does not match with that assigned to them at birth, which includes:

a. Transgender men and women;
b. Intersex persons;
c. Other genderqueer persons; and
d. Persons with socio-cultural identities such as hijras.

[232] Section 2(k), Transgender Persons Act

The word ‘genderqueer’ in Section 2(k) does not refer to sexual orientation but to gender identity. As discussed in the preceding paragraphs, gender identity is not the same as sexual orientation. The term ‘transgender’ is not commonly understood as referring to persons with a sexual orientation other than heterosexual, nor does the Transgender Persons Act use the word ‘transgender’ to include persons of a different sexuality. The Union of India’s argument that the Transgender Persons Act applies to all queer persons including persons who are homosexual, bisexual etc. cannot be accepted. This legislation is clearly applicable only to those people with a gender identity that does not match the one assigned at birth.

262. It is incorrect to state that transgender persons do not face any stigma or discrimination post-2020, when the Transgender Persons Act came into force. Enacting a statute does not have the same effect as waving a magic wand. For instance, the prohibition against discrimination has not resulted in society abstaining from discrimination overnight. The ground reality is that society continues to discriminate against transgender persons in various ways. Consistent respect for the rights of transgender persons may someday ensure that they are treated as equals (as is their right) but that day is yet to arrive. Hence, the contention of the Union of India that transgender people are no longer stigmatized in view of the enactment of the Transgender Persons Act cannot be accepted. Since the legislation does not apply to homosexual persons or persons of other sexual orientations, there is no question of such persons being free from discrimination or violence as a result of its enactment.

263. Pursuant to the decision in **NALSA** (supra), Parliament enacted the Transgender Persons Act which aims to give substance to the rights recognized by this Court in its judgment. However, no such statute was forthcoming pursuant to the decision in **Navtej** (supra). Although the primary issue in **Navtej** (supra) was whether Section 377 of the IPC was constitutional, the ruling of this Court made it amply clear that sexual orientation cannot be a valid ground for discrimination or hostile treatment. The decision in **Navtej** (supra) was a clear indication of the fact that the LBGTQ community is entitled to equal treatment before law. Parliament is yet to enact a law to this effect. This Court is of the opinion that there is an urgent need for a law which *inter alia* prohibits discrimination on the basis of sexual orientation and gives full effect to the other civil and social rights of LGBTQ persons. In the absence of such a law, members of the LGBTQ community will be unable to exercise their rights and freedoms to the fullest extent and will have to approach the courts for their enforcement on a case-by-case basis. This is not a desirable outcome. As in this case, courts are not always equipped to deal with all issues which are brought before them. Even if the courts are institutionally equipped to address the grievances in the case before them, no citizen should have to institute legal proceedings for the enforcement of their rights every time they seek to exercise that right. This would be contrary to the very concept of the guarantee of rights.

*c. Transgender persons in heterosexual relationships can marry under existing law*

264. We are in agreement with the submission of the Union of India that the issue of whether transgender persons can marry ought to be decided separately from the issues arising under the SMA in relation to homosexual persons or those of a queer sexual orientation. Parliament has recognized the rights of the transgender community by enacting the Transgender Persons Act. This Court is therefore bound to apply this statute while adjudicating the issue of whether transgender persons can marry under existing law.

## I. The right against discrimination under the Transgender Persons Act

265. The right of transgender persons to equality under the Constitution and the right against discrimination was recognized by this Court in **NALSA** (supra). To be equal means to be able to live without discrimination. Section 3 of the Transgender Persons Act codifies the prohibition against discrimination in the following terms:

> "3. Prohibition against discrimination. — No person or establishment shall discriminate against a transgender person on any of the following grounds, namely: —
>
> (a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;
>
> (b) the unfair treatment in, or in relation to, employment or occupation;
>
> (c) the denial of, or termination from, employment or occupation;
>
> (d) the denial or discontinuation of, or unfair treatment in, healthcare services;

> (e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;
>
> (f) the denial or discontinuation of, or unfair treatment with regard to the right of movement;
>
> (g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;
>
> (h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and
>
> (i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be."
>
> (emphasis supplied)

266. As evident from Clauses (a) to (i), this provision is a catch-all provision which seeks to eliminate discrimination against the transgender community both in public as well as private spaces. It is worded in exceptionally broad terms:

267. The prefatory portion of Section 3 states that "*no person or establishment*" shall discriminate against a transgender person. 'Establishment' is defined as any body or authority established by or under a Central Act or a State Act or an authority or body owned or controlled or aided by the Government or a local authority or a Government company[233] and includes a Department of the Government.[234] An establishment also means any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, or

[233] As defined in Section 2 of the Companies Act, 2013.
[234] Section 2(b)(i), Transgender Persons Act

institution.[235] 'Establishment' therefore includes any public or private entity, authority, or body, including any 'body of individuals.' Individuals are, of course, covered by the word 'person.'

268. Clauses (a) to (i) of Section 3 list the spheres in which transgender persons cannot be discriminated against. They include the spheres of education,[236] employment,[237] healthcare,[238] movement,[239] property,[240] public or private office,[241] care and custody.[242] It also bars any discrimination with respect to goods, accommodation, service, facility, benefit, privilege, or opportunity which is dedicated to the use of the public or customarily available to the public.[243]

269. The prefatory portion of Section 3 read with Section 2(b) delineates **who** the prohibition against discrimination operates against. In other words, it defines the **actors** who are prohibited from discriminating against transgender persons. The term 'establishment' has been defined in the broadest possible terms to include all manner of undertakings or groups of people. Clauses (a) to (i) of Section 3 set forth the **content** of the anti-discrimination principle. They describe the **actions** which amount to discrimination as well as the **sphere** in which the discrimination operates. The actions which amount to discrimination vary depending upon the sphere they refer to and they include denial, discontinuation, unfair treatment, termination, and removal. The spheres, too, are broadly defined and extend to

[235] Section 2(b)(ii), Transgender Persons Act
[236] Section 3(a), Transgender Persons Act
[237] Section 3(b), 3(c), Transgender Persons Act
[238] Section 3(d), Transgender Persons Act
[239] Section 3(f), Transgender Persons Act
[240] Section 3(g), Transgender Persons Act
[241] Section 3(h), Transgender Persons Act
[242] Section 3(i), Transgender Persons Act
[243] Section 3(e), Transgender Persons Act

practically every aspect of life. In order to establish a violation of Section 3, an aggrieved person would have to demonstrate:

a. That the person against whom they seek a remedy is either an establishment as defined in Section 2(b) or a person;

b. That they have been discriminated against in one of the spheres listed by Section 3; and

c. That the discriminatory action corresponds to that sphere (for example, a person alleging a violation of the right to movement must prove that there has been a denial, discontinuation of, or unfair treatment of that right[244]).

### II. Remedies for the infringement of Section 3

270. While Section 18 of the Transgender Persons Act stipulates that certain actions amount to offences which may attract a penalty between six months and two years as well as a fine, violations of Section 3 attract no such penalty. In fact, the Transgender Persons Act does not expressly provide for a remedy for the infringement of Section 3.

271. Section 8 enjoins the appropriate Government to take steps to secure "*full and effective participation of transgender persons and their inclusion in society*." Since clauses (a) to (i) of Section 3 are with a view to ensure the full and effective participation of transgender persons in all arenas of life, Section 8, properly understood, tasks the appropriate Government with ensuring that Section 3 is

[244] Section 3(f), Transgender Persons Act

complied with by all whom it governs. Rule 10(4) of the Transgender Persons (Protection of Rights) Rules 2020[245] provides that the appropriate Government shall take adequate steps to prohibit discrimination in any Government or private organisation, or private and public educational institution under their purview, and ensure equitable access to social and public spaces, including burial grounds. Rule 11 of these rules requires the appropriate Government to take adequate steps to prohibit discrimination in any Government or private organisation or establishment including in the areas of education, employment, healthcare, public transportation, participation in public life, sports, leisure and recreation, and opportunity to hold public or private office. Under Section 8 read with Rule 10(4) and Rule 11, the appropriate Government has a duty not only to prevent discrimination against transgender persons (by persons and public as well as private establishments) but also to address it where it is found to take place.

272. Sections 10 the Transgender Persons Act *inter alia* requires establishments to comply with the statute. This provision places a duty on establishments to comply with Section 3 and ensure that they do not discriminate against transgender persons. Section 11 requires establishments to set up a grievance redressal mechanism by designating a person as the complaint officer to deal with complaints relating to the violation of the provisions of the statute. Section 11 is one of the ways in which a person who alleges the violation of the Transgender Persons Act can seek a remedy. However, Section 11 only goes as far as to

[245] "Transgender Persons Rules"

provide for a mechanism by which the establishment in question can be approached for a remedy.

273. As noticed previously, the prohibition against discrimination operates against public as well as private bodies. If a public body or actor which falls within the definition of 'establishment' in Section 2(b) of the Transgender Persons Act infringes Section 3, it is open to the aggrieved person to invoke the extraordinary jurisdiction of the High Courts under Article 226 of the Constitution. The High Courts are empowered to issue directions, order, or writs to any person or authority for the enforcement of the rights codified by Part III and **for any other purpose**. The body which satisfies the definition in Section 2(b) must be a "person or authority" under Article 226. The High Courts may exercise their jurisdiction against a body which is performing a public duty as well.[246] While the jurisdiction of this Court under Article 32 is not as expansive as that of the High Courts under Article 226, this Court may rely on Section 3 to guide its interpretation of the law, to enforce the rights recognized by Part III of the Constitution.

274. Aggrieved persons may also approach the High Court under Article 226 for the issuance of a direction, order, or writ against the appropriate Government directing it to fulfil the mandate of Section 8 of the Transgender Persons Act. As discussed in the preceding paragraphs, Section 8 obligates the appropriate Government to prevent and address discrimination *inter alia* by private bodies. The High Court may direct the appropriate Government to perform its duties vis-à-vis private bodies. This is no doubt an imperfect remedy and there is a need for the

[246] Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691; Praga Tools Corpn. v. C.A. Imanual, (1969) 1 SCC 585

Transgender Persons Act to provide for a remedy for its enforcement, especially Section 3.

### III. Harmonious interpretation of the laws governing marriage and the Transgender Persons Act

275. Section 3 of the Transgender Persons Act prohibits the state from discriminating against transgender persons. Section 20 of the Transgender Persons Act indicates that the statute is in addition to, and not in derogation from any other law for the time being in force. Parliament was no doubt cognizant of the statutes governing marriage when it enacted the Transgender Persons Act and Section 3(e) in particular.

276. The laws which govern marriage in the country specify conditions which the bride and the bridegroom must satisfy for their marriage to be recognized. This is true of personal laws[247] as well as the SMA.[248] The structure of these enactments also regulates marriage between a husband and a wife.[249] They use the words "bride" and "bridegroom," "wife" and "husband," "male" and "female," or "man" and "woman." These legislations regulate heterosexual marriages in India. Laws which are incidental to marriage such as the DV Act, the Dowry Prohibition Act 1961 or Section 498A of the IPC seek to address the hetero-patriarchal nature of the relationship between a man and a woman.

[247] See, for instance, Section 5, HMA; Section 60, Indian Christian Marriage Act 1872; Section 3, Parsi Marriage and Divorce Act 1936
[248] Section 4, SMA
[249] See, for instance, Section 2, Dissolution of Muslim Marriages Act 1939

277. The gender of a person is not the same as their sexuality. A person is a transgender person by virtue of their gender identity. A transgender person may be heterosexual or homosexual or of any other sexuality. If a transgender person is in a heterosexual relationship and wishes to marry their partner (and if each of them meets the other requirements set out in the applicable law), such a marriage would be recognized by the laws governing marriage. This is because one party would be the bride or the wife in the marriage and the other party would be the bridegroom or the husband. The laws governing marriage are framed in the context of a heterosexual relationship. Since a transgender person can be in a heterosexual relationship like a cis-male or cis-female, a union between a transwoman and a transman, or a transwoman and a cisman, or a transman and a ciswoman can be registered under Marriage laws. The transgender community consists of *inter alia* transgender men and transgender women. A transgender man has the right to marry a cisgender woman under the laws governing marriage in the country, including personal laws. Similarly, a transgender woman has the right to marry a cisgender man. A transgender man and a transgender woman can also marry. Intersex persons who identify as a man or a woman and seek to enter into a heterosexual marriage would also have a right to marry. Any other interpretation of the laws governing marriage would be contrary to Section 3 of the Transgender Persons Act and Article 15 of the Constitution.

278. In **Kanailal Sur** v**. Paramnidhi Sadhu Khan**,[250] this Court held that the first and primary rule of construction was that the intention of the legislature must be

[250] AIR 1957 SC 907

found in the words used by the legislature itself. The terms “bride” and “bridegroom,” “wife” and “husband,” “male” and “female,” and “man” and “woman” in the statutes which regulate marriage cannot be read as governing marriages between cisgender men and cisgender women alone. Nothing in these statutes indicates that their intended application is solely to cisgender men and cisgender women. The plain meaning of the gendered terms used in these statutes indicates transgender persons in heterosexual relationships fall within their fold. The contention of the Union of India that “biological” men and women alone fall within the ambit of these statutes cannot be accepted. No law or tool of interpretation supports the interpretation proposed by the Union of India. The provisions on the prohibited degrees of relationship in the laws governing marriage continue to apply. The judgment in **NALSA** (supra) also recognized the importance of the right of transgender persons to marry. Moreover, State Governments have formulated and implemented schemes which encourage and support transgender persons vis-à-vis marriage.[251]

279. In **Arunkumar** v. **Inspector General of Registration**,[252] the first petitioner was a man and the second petitioner was a woman who happened to be transgender. They married each other at a temple in Tuticorin and sought to have their marriage registered by the state, which refused. They then approached the Madras High Court under its writ jurisdiction. The Court held that:

[251] For instance, the Kerala State Government announced Rs. 30,000/- by way of ‘marriage assistance’ to couples where at least one person was a transgender person. Government of Kerala, Social Justice Department, ‘Marriage assistance for legally married Transgender couples’ <http://sjd.kerala.gov.in/scheme-info.php?scheme_id=IDE1MnNWOHVxUiN2eQ==>

[252] 2019 SCC OnLine Mad 8779

a. The expression “bride” in the HMA cannot have a static and immutable meaning and that statutes must be interpreted in light of the legal system in its present form; and

b. The fundamental right of the petitioners under Article 25 was infringed.

The Court directed the concerned respondent to register the marriage solemnized between the petitioners.

xii. <u>The conditions for the exercise of the rights of LGBTQ persons</u>

*a. The right of queer persons under the Mental Healthcare Act*

280. The first segment of this judgment detailed how the families or relatives of queer persons compel them to undergo “conversion” therapies (to “convert” their sexual orientation from homosexual to heterosexual) or make them marry a person of the opposite sex to “cure” their homosexuality or for other reasons. Other pseudo-medical treatments are similarly designed to “cure” queerness. Such practices violate the right to health of queer persons as also their right to autonomy and dignity. In terms of Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. “Conversion” therapies and other “treatments” which are aimed at altering sexual orientation amount to cruel, inhuman and degrading treatment of queer persons. They have the effect of denying their full humanity. The mental well-being suffers to no end because cruel techniques are used in these so-called treatments. The treatment is by its very nature cruel. It is the duty of the state to ensure that these

inhumane practices do not continue. The deleterious effects of discrimination on the mental health of queer persons was also noticed by this Court in **Navtej** (supra). Other segments of this judgment discussed instances of queer persons and couples being driven to die by suicide as a result of the discrimination and violence meted out to them. This phenomenon is undoubtedly related to the mental health of queer persons and the state is equally under an obligation to prevent suicides because of one's gender identity or sexual orientation. Section 29 of the Mental Healthcare Act stipulates that:

> "(1) The appropriate Government shall have a duty to plan, design and implement programmes for the promotion of mental health and prevention of mental illness in the country.
>
> (2) Without prejudice to the generality of the provisions contained in sub-section (1), the appropriate Government shall, in particular, plan, design and implement public health programmes to reduce suicides and attempted suicides in the country."

The programmes for the promotion of mental health (envisaged by Section 29(1)) must include provisions for the mental health of queer persons. Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity and oppression arising from that identity as causes for suicidal tendencies or feelings. We direct the Union Government as well as the State Governments or governments of Union Territories (where they exist) to carry out the mandate of Section 29 in terms of the observations in this paragraph and to include appropriate modules or provisions which address the unique concerns of the queer community.

281. In exercise of the rights to dignity, autonomy, privacy and health an individual (regardless of their gender identity) may choose to enter into a union with a person (who may be of the same sex as them). Once they enter into an relationship as life partners, a couple has the right and the freedom to determine the significance of that relationship as well as its consequences. A denial of this freedom would be a denial of the many facets of Article 21.

*b. The right of LGBTQ persons to freedom from coercion from their families, the agencies of the state, and other persons*

282. The right to enter into a union would be an illusion without the conditions which permit the unrestricted exercise of that right. Various parts of this judgment have detailed the violence and discrimination meted out to members of the LGBTQ community, either because of their gender identity or because of their sexual orientation. One form of this violence is that society often attempts to prevent LGBTQ persons from being with their partner, in a short-term relationship, a long-term relationship, a relationship where they choose to live together or any other kind of union. This happens in different ways – the couple may be forcibly separated from one another, their families may file complaints with the police which lead to the registration of FIRs and the consequent harassment of one or both of them, or they may be married off to third parties without their consent. The families of LGBTQ persons as well as the police are the primary actors in such violence.

283. The fundamental rights and freedoms codified by the Constitution demand that the LGBTQ community be left alone so that its members can live their lives as they see fit, in accordance with law. This Court has discussed these rights and

freedoms in detail in this judgment. It is the duty of the state machinery (acting through any authority including the police) to protect these rights instead of participating in their violation. Unfortunately, the police often acts in concert with the parents of LGBTQ persons to prevent the latter from exercising their rights. This Court finds this to be unacceptable.

284. In **Mansur Rahman** v. Superintendent **of Police, Coimbatore District**,[253] the petitioner was a man who had married a woman who happened to be transgender. He claimed that his parents and some persons who belonged to a political outfit were harassing and threatening him and approached the Madras High Court seeking police protection. The Court allowed the petition and directed the police to ensure that no harm befalls the petitioner and his wife.

285. In **Latha** v. **Commissioner of Police**,[254] the Madras High Court dismissed a writ petition for the issuance of a habeas corpus filed by the petitioner for the production of her sibling, who happened to be a transgender person. The Court found that the sibling had attained the age of majority and had voluntarily joined other transgender persons.

286. **Sushma** v. **Commissioner of Police**[255] concerned a lesbian couple whose families opposed their relationship. Both their families filed complaints with the police that they were missing and an FIR was registered. The police visited the couple and interrogated them. The couple then filed a writ petition before the Madras High Court seeking a direction to the police not to harass them as well as

[253] 2018 SCC OnLine Mad 3250
[254] 2021 SCC OnLine Mad 7495
[255] WP 7248 of 2021, Madras High Court

for protection from any form of threat or danger to their safety and security from their families. The Court directed the parties to undergo counselling (and the judge personally underwent counselling to understand queerness). Counsel informed the Court that the FIR would be closed and the parents agreed to let their daughters live their lives as they wished to. The Court also issued directions to ensure the protection of LGBTQ couples.

287. We affirm the approach adopted in these cases, which protects the fundamental rights of LGBTQ persons.

xiii. <u>The right of queer persons to adopt children</u>

*a. Challenge to the Adoption Regulations*

288. The JJ Act was enacted to consolidate and amend the law catering to the basic needs of children. Chapter VIII (Sections 56 to 73) deals with the provisions relating to adoption. Section 2(49) of the JJ Act defines "prospective adoptive parents" to mean a person or persons eligible to adopt a child according to the provisions of Section 57. Section 57 prescribes the eligibility criteria for prospective adoptive parents:

> "57. Eligibility of prospective adoptive parents.—
>
> (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him.
>
> (2) In case of a couple, the consent of both the **spouses** for the adoption shall be required.
>
> (3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority.

> (4) A single male is not eligible to adopt a girl child.
>
> (5) Any other criteria that may be specified in the adoption regulations framed by the Authority."
>
> (emphasis supplied)

289. Section 57(1) prescribes general conditions to do with the physical, mental, and financial well-being of the prospective parents as well as their motivations. Sub-Section (2) states that the consent of both the parties is required if a couple is adopting a child. Sub-Sections (3) and (4) of Section 57 state that single and divorced persons are not precluded from adopting. The only restriction is that a single male cannot adopt a girl child.

290. The Ministry of Women and Child Development notified the Regulations framed by the Central Adoption Resource Authority[256] in exercise of the powers conferred under Section 68(c) read with Section 2(3) of the JJ Act. Regulation 5 of the Adoption Regulations prescribes the eligibility criteria for prospective adoptive parents. The relevant portion of the provision is extracted below for reference:

> "5. Eligibility criteria for prospective adoptive parents.— (1)The prospective adoptive parents shall be physically, mentally, emotionally and financially capable, they shall not have any life threatening medical condition and they should not have been convicted in criminal act of any nature or accused in any case of child rights violation.
>
> (2) Any prospective adoptive parent, **irrespective of their marital status** and whether or not they have biological son or daughter, can adopt a child subject to the following, namely:—

[256] "CARA"

> (a) the consent of both the spouses for the adoption shall be required, in case of a married couple;
>
> (b) a single female can adopt a child of any gender;
>
> (c) a single male shall not be eligible to adopt a girl child.
>
> (3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption."
>
> (emphasis supplied)

291. Clause (1) of Regulation 5 states that prospective adoptive parents must be physically, mentally, emotionally, and financially stable. In addition, they must also not have any life-threatening medical condition or should not have been convicted in a criminal act or should not have been accused in a case concerning a violation of child rights. The general conditions in clause (1) are aimed at securing the best interest of the child. The conditions focus on physical, emotional, and financial stability. Clause (2) stipulates that any person irrespective of their marital status and irrespective of whether they already have a biological child can adopt. To this extent, the provision is expansive. However, clause 2(a) states that: (a) in case of a married couple, the consent of both the spouses is required; and (b) though a single female can adopt a child of any gender, a single male shall not be eligible to adopt a girl child. Clause (3) prescribes a further restriction on the conditions to be met before someone can adopt. The provision states that a child shall be given in adoption to a couple only if they have at least two years of a stable marital relationship (except in cases of relative or step-parent adoption).

292. Though Regulation 5(2)(a) taken alone does not preclude unmarried couples from being prospective adoptive parents, a combined reading of

Regulations 5(2)(a) and 5(3) elucidates that: (a) only **married** couples can be prospective adoptive parents; and (b) such couples must be in "at least two years of **stable** marital relationship". A reading of the Adoption Regulations indicates that while a person can in their individual capacity be a prospective adoptive parent, they cannot adopt a child together with their partner if they are not married.

293. The Adoption Regulations are framed in exercise of the power conferred under the JJ Act. Section 57(5) of the JJ Act grants the Authority (which means CARA in terms of Section 2(3) of the JJ Act) the power to specify any other criteria. Set out below is a table comparing the criteria to be prospective adoptive parents prescribed under the JJ Act and the Adoption Regulations:

| **JJ Act** | **Adoption Regulations** |
|---|---|
| The prospective adoptive parents must be physically fit, financially sound, mentally alert and highly motivated to provide a good upbringing. | In addition to the criteria prescribed under the JJ Act, the prospective parents should not have been convicted of a criminal act and should not have a life-threatening medical condition. |
| Couples can adopt. The consent of both spouses is required in case a couple chooses to adopt. | Only married couples can adopt. A married couple should have been in two years of stable marital relationship to be eligible to adopt. |
| A single male is not eligible to adopt a girl child. | A single male is not eligible to adopt a girl child but a single female is eligible to adopt a child of any gender. |

294. The petitioners submitted that the Adoption Regulations are ultra *vires* the provisions of the JJ Act because they bar unmarried couples from adopting. It was

also submitted that the distinction between married and unmarried persons for the purpose of adoption is violative of Article 14 of the Constitution.

295. It is settled law that delegated legislation must be consistent with the parent act and must not exceed the powers granted under the parent Act (JJ Act).[257] The rule making authority must exercise the power for the purpose for which it is granted. The provisions of the delegated legislation will be *ultra vires* if they are repugnant to the parent Act or exceed the authority which is granted by the parent Act. Section 57(5) delegates to CARA the power to prescribe any other criteria in addition to the criteria prescribed by the provision. However, in view of the line of cases on subordinate law-making, this power cannot be read expansively. CARA's power to prescribe additional criteria is limited by the express provisions and legislative policy of the JJ Act.

296. The Adoption Regulations place two restrictions on a couple who wish to adopt: *first,* the couple must be married, and *second,* the couple must have been in a stable marital relationship. We will now determine if the prescription of these two additional conditions is violative of the provisions of the JJ Act and the Constitution.

### I. Regulation 5(3) of the Adoption Regulations exceeds the scope of the JJ Act

297. Section 3 of the JJ Act prescribes the general principles to be followed in the administration of the Act. The provision, *inter alia,* includes the principle of best

[257] See J K Industries Limited v. Union of India, (2007) 13 SCC 673; Indian Express Newspapers (Bombay) P Ltd. V. Union of India, (1985) 1 SCC 641

interest, which stipulates that all the decisions regarding the child shall be based on the best interest of the child which will help the child develop their full potential.

298. The provisions of the JJ Act promote the best interest of the child and ensure their development.[258] In fact, the eligibility criteria prescribed in Section 57 are an extension of that principle. The legislative intent behind prescribing the conditions of physical and mental fitness is to ensure that the parents are able to prioritise the well-being of the child. Similarly, the condition requiring the consent of **both** spouses ensures that the child is able to receive the attention and care of both partners. The intent is not to give a child for adoption to a couple where one of them is unwilling to take up the responsibility of being a parent. Similarly, the criterion prohibiting a single male from adopting a girl child is in the State's interest of preventing child sexual abuse. It can be garnered that the State has prescribed the criteria in Section 57 keeping in mind the welfare of the child.

299. Section 57(2) does not stipulate that only married couples can adopt. It states that "in case of a couple" the consent of both the **spouses** must be secured. This is a clear indicator that adoption by a married couple is not a statutory requirement. Section 57(2) provides that the consent of both the parties must be received **if** the prospective adoptive parents are in a married relationship. The usage of the phrase **spouse** in Section 57(2) does not mean that it excludes unmarried couples from adopting.

[258] See Gaurav Jain v. Union of India, (1997) 8 SCC 114; Karan v. State of M.P., (2023) 5 SCC 504; Barun Chandra Thakur v. Bholu, 2022 SCC OnLine SC 870; Shilpa Mittal v. State (NCT of Delhi), (2020) 2 SCC 787

300. However, Regulation 5(3) of the Adoption Regulations bars unmarried partners from being prospective adoptive parents. These Regulations only permit persons to adopt in an individual capacity and not jointly as an unmarried couple. Regulation 5(2) states that every person irrespective of whether they are married or unmarried will be able to be prospective adoptive parents. The subsequent criteria in clause (a) (that is, the requirement for the consent of both spouses if they are married) does not exclude an unmarried couple from adopting. It only states that if the couple is married, then the consent of both the parties shall be secured. However, Regulation 5(3) in express terms excludes unmarried couples from adopting by prescribing the condition that the couple must have been in two years of a 'stable **marital** relationship.' As observed in the previous paragraph, the JJ Act does not preclude unmarried couples from adopting. Though Section 57 of the JJ Act grants CARA the power to prescribe additional criteria, the criteria must not exceed the scope of the legislative policy. Neither the general principles guiding the JJ Act nor Section 57 in particular preclude unmarried couples from adopting a child. In fact, all the other criteria ensure the child's best interests. The Union of India has not proved that precluding unmarried couples from adopting a child (even though the same people are eligible to adopt in their individual capacity) is in the child's best interests. Thus, CARA has exceeded its authority by prescribing an additional condition by way of Regulation 5(3), which is contrary to tenor of the JJ Act and Section 57 in particular.

301. Further, the usage of the phrase 'stable' in Regulation 5(3) is vague. It is unclear if the provision creates a legal fiction that all married relationships which have lasted two years automatically qualify as a stable relationship or if there are

specific characteristics in addition to those prescribed in Regulation 5(1) (that is, physical, mental, and emotional wellbeing) which would aid in the characterization of a married relationship as a stable one. Hence, Regulation 5(3) exceeds the scope of the JJ Act.

### II. Regulation 5(3) of the Adoption Regulations violates Article 14 of the Constitution

302. Regulation 5(3) of the Adoption Regulations has classified couples into married and unmarried couples for the purpose of adoption. The intent of CARA to identify a stable household for adoption is discernible from Regulation 5(3). However, CARA has proceeded under the assumption that **only married couples** would be able to provide a stable household for the child. Such an assumption is not backed by data. Although married couples may provide a stable environment, it is not true that all couples who are married will automatically be able to provide a stable home. Similarly, unmarried relationships cannot be characterized as fleeting relationships which are unstable by their very nature. Marriage is not necessarily the bedrock on which families and households are built. While this is the traditional understanding of a family, we have already elucidated above that this social understanding of a family unit cannot be used to deny the right of other couples who are in domestic partnerships or live-in relationships to found a family.

303. It is now a settled position of law that classification *per se* is not discriminatory and violative of Article 14. Article 14 only forbids class legislation

and not reasonable classification. A classification is reasonable, when the following test is satisfied:[259]

a. The classification must be based on an intelligible differentia which distinguishes the persons or things that are grouped, from others left out of the group; and

b. The differentia must have a rational nexus to the object sought to be achieved by the statute.

304. The Adoption Regulations use marriage as a yardstick to classify couples. There is an intelligible differentia in using marriage as an indicator to classify couples in the sense that married couples can easily be distinguished from unmarried couples. However, the differentia does not have a rational nexus with the object sought to be achieved by the CARA Regulations which is to ensure that the best interest of the child is protected. Placing a child in a stable family is undoubtedly in pursuance of a child's interest. However, the respondents have not placed any data on record to support their claim that only married relationships can provide stability. It is true that separating from a married partner is a cumbersome process when compared to separating from a partner with whom a person is in a live-in relationship. This is because separation from a married partner is regulated by the law while live-in relationships are unregulated by law (other than for the limited purpose of domestic violence). For instance, the law deters a person from securing a divorce immediately by prescribing conditions such as a six-month

[259] See Anwar Ali Sarkar v. State of West Bengal, 1952 SCR 284

waiting period after a petition for divorce by mutual consent is filed.[260] Merely because a marriage is regulated by the law, it cannot be assumed that marriage alone or that every marriage accords stability to a relationship. Similarly, it can also not be inferred that couples who are not in a married relationships are not 'serious' about the relationship. The stability of the household depends on various factors such as the effort and involvement of the partners in establishing and running a household, creating a safe space at home, creating a healthy work-life balance, and a household where mental, physical, and emotional violence is not inflicted on one another. There is no **single form** of a stable household. There is no material on record to prove the claim that only a married heterosexual couple would be able to provide stability to the child. In fact, this Court has already recognized the pluralistic values of our Constitution which guarantee a right to different forms of association.

305. The Union of India is required to submit cogent material to support its claim that only married partners are able to provide a stable household. However, it has not done so. The Union of India has submitted four studies titled "Child Attention-Deficit Hyperactivity Disorder (ADHD) in same sex parents families in the United States: Prevalence and Comorbidities,"[261] "High School graduation rates amongst children of same sex households,"[262] "Children in planned lesbian families:

[260] Section 13(B) (2) of the Hindu Marriage Act 1955; A Constitution bench of this Court in **Shilpa Sailesh** v. **Varun Sreenivasan**[260] held that this Court in exercise of its powers under Article 142 can dissolve a marriage on its irretrievable breakdown dispensing of the six month cooling period prescribed by law in certain circumstances.
[261] D Paul Sullins, Child Attention-Deficit Hyperactivity Disorder (ADHD) in same-sex parent families in the United States: Prevalence and Comorbidities, British Journal of Medicine & Medical Research 6(10):987-998, 2015
[262] Douglas W.Allen, High School graduation rates among children of same sex households, Rev Econ Household (2013) 11:635-658

stigmatization, psychological adjustment and protective factors,"[263] and "Children in three contexts: Family, Education and Social Development."[264] The studies submitted by Ms. Aishwarya Bhati, learned ASG conclude that non-heterosexual couples cannot effectively take up the role of parents. The studies neither indicate that only married (and not unmarried) couples can be in a stable relationship nor that only married couples have the ability to effectively parent children. Thus, the Union of India has not submitted any cogent material to substantiate the claim that unmarried couples cannot be in a stable relationship. The Union of India has not been able to demonstrate that a single parent who adopts a child will provide a more stable environment for a child who is adopted than an unmarried couple. For all these reasons, Regulations 5(2)(a) and 5(3) of the Adoption Regulations are violative of Article 14 of the Constitution.

306. Further, in terms of Section 58(2) of the JJ Act, the Specialised Adoption Agency is required to prepare a home study report of the prospective adoptive parents. It is only when the prospective adoptive parents are found eligible after the home study report that a child is referred to them for adoption. Section 58(5) provides that the progress and wellbeing of the child shall be ascertained after the adoption. The procedure for adoption provides for the assessment of a couple and their capacity and ability to care for a child. Any areas of concern relating to a couple's capability as a parent would be discernible in the home study. This is true

[263] Henry M.W Bos & Frank Van Balen, Children in planned lesbian families: Stigmatisation, psychological adjustment and protective factors, Culture, Health and Sexuality: An International Journal for Research, Intervention and Care, 10:3, 221-236.
[264] Solirios Sarantakos, Children in three contexts: Family, education, and social development, Children Australia Volume 21, No. 3, 1996

of both heterosexual couples as well as queer couples. The home study must consider the couple's capability without reference to their sexual orientation.

### III. Regulation 5(3) of the Adoption Regulations violates Article 15 of the Constitution

307. Ms. Aishwarya Bhati referred to the judgment of this Court in **Shabnam Hashmi** v. **Union of India**[265] to argue that the fundamental right to adopt is not recognised under the Constitution and thus, the exclusion of queer persons from the scheme for adoption is not violative of Part III of the Constitution. In **Shabnam Hashmi** (supra), a petition was filed under Article 32 of the Constitution seeking a declaration that the Constitution guarantees the right to adopt, and in the alternative, requesting the court to law down guidelines enabling adoption by persons irrespective of religion, caste, and creed. This Court disposed of the petition by observing that the adjudication of the question of whether adoption must be elevated to the status of a fundamental right must await the "dissipation of conflicting thought processes":

> "16. […] While it is correct that the dimensions and perspectives of the meaning and content of the fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a fundamental right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. … All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt

[265] (2014) 4 SCC 1

> and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution."

308. The observations of this Court in **Shabnam Hashmi** (supra) that it is not the appropriate time to recognise a right to adopt and to be adopted does not affect the case of the petitioners. The petitioners' challenge to Regulation 5(3) of Adoption Regulations is mounted on the ground that is discriminates against the queer community. The challenge is not on the ground that it violates the right to adopt nor is it the petitioners case that they have a fundamental right to adopt. The crux of the petitioners case is that Regulation 5(3) discriminates against the queer community because it disproportionately affects them.

309. Regulation 5(3), though facially neutral, indirectly discriminates against atypical unions (such the relationship between non-heterosexual partners) which have not been recognised by the State. Queer marriages have not been recognized by the state and queer persons in atypical unions cannot yet enter into a marriage which is recognized by the state. Though the additional criteria prescribed by the Adoption Regulations would also affect a heterosexual person's eligibility to adopt a child, it would disproportionately affect non-heterosexual couples.[266] This is because the State has not conferred legal recognition to the unions between queer persons, in the form of marriage. Consequently, an unmarried heterosexual couple who wishes to adopt a child has the option of marrying to meet the eligibility criteria for adoption. However, this option is not available to queer couples. When Regulation 5(3) is understood in light of this

[266] See Lt. Col. Nitisha v. Union of India, 2021 SCC OnLine SC 261

position, a queer person who is in a relationship can only adopt in an **individual** capacity. This exclusion has the effect of reinforcing the disadvantage already faced by the queer community.

310. The National Commission for Protection of Child Rights ('NCPCR') has submitted that excluding queer persons from adopting children is backed by cogent reasons. As stated above, Ms. Aishwarya Bhati submitted four studies to support the claim that permitting non-heterosexual couples to adopt is not in the best interest of the child. The paper titled "Child Attention-Deficit Hyperactivity Disorder (ADHD) in same-sex parent families in the United States: Prevalence and Comorbidities,"[267] examines a sample of 1,95,240 children including 512 children with same-sex parents. The paper concluded that children with same-sex parents in the United States were twice as likely to suffer from ADHD than children with opposite-sex parents. The paper titled "High School graduation rates among children of same-sex households"[268] uses the 2006 Canada census to study high school graduation probabilities of children of parents belonging to the queer community. The paper concluded that children living with parents belonging to the queer community perform more poorly in school when compared to children living with married heterosexual parents. The paper titled "Children in planned lesbian families: stigmatisation, psychological adjustment and protective factors"[269] conducted a study to assess the extent to which children between eight and twelve

[267] D Paul Sullins, Child Attention-Deficit Hyperactivity Disorder (ADHD) in same-sex parent families in the United States: Prevalence and Comorbidities, British Journal of Medicine & Medical Research 6(10):987-998, 2015
[268] Douglas W.Allen, High School graduation rates among children of same sex households, Rev Econ Household (2013) 11:635-658
[269]Henry M.W Bos & Frank Van Balen, Children in planned lesbian families: Stigmatisation, psychological adjustment and protective factors, Culture, Health and Sexuality: An International Journal for Research, Intervention and Care, 10:3, 221-236.

years in planned lesbian families in the Netherlands experience stigmatization. For the purpose of this assessment, data was collected from questionnaires filled out by mothers and by children. It was concluded that higher levels of stigmatization were associated with such children. Boys were found to be more hyperactive and girls were found to suffer from a lower self-esteem. The paper titled "Children in three contexts: Family, education, and social development"[270] collected a sample of 174 primary school children living with married heterosexual couples, cohabiting heterosexual couples, and homosexual couples to explore the relationship between family environment and the behaviour of primary school children. The study concluded that the children of married couples are more likely to do well at school, in academic and social terms, than children of cohabiting heterosexual and homosexual couples. However, the author cautions that there may be additional factors such as biases which the teachers may have held while assessing the children, based on their cultural beliefs.

311. On the other hand, Dr. Menaka Guruswamy appearing for the intervenor, Delhi Commission for Protection of Child Rights argued that there is no evidence or empirical data to show that non-heterosexual couples are unfit to be parents or that the psychosocial development of children brought up by same-sex couples will be compromised. The learned counsel relied on the paper titled "Lesbian and Gay Parenting" by the American Psychological Association[271] in which it was concluded that the home environment provided by non-heterosexual couples is not different from that provided by heterosexual parents. In another study titled "Same-sex

[270] Solirios Sarantakos, Children in three contexts: Family, education, and social development, Children Australia Volume 21, No. 3, 1996
[271] American Psychological Association, 'Lesbian and Gay Parenting'

parenting in Brazil and Portugal: An integrative review",[272] the authors found that the adoption of children by one of the individuals in a non-heterosexual partnership because of the delay in the recognition of same-sex marriage became a weakness to such families on the issues of health, education, and other responsibilities. In another paper titled, "Academic achievement of children in same and different sex parented families: A population-level analysis of linked administrative data from the Netherlands",[273] it was concluded that the children raised by same-sex couples performed at least as well as children of heterosexual parents in socio-political environments characterised by high levels of legislative or public support, and that the children living in same-sex parented families experience no educational disadvantage relative to children living in heterosexual parented families. The learned counsel also relied on a study which was conducted based on the data derived from Netherlands where same-sex marriages were formalised in 2011.[274] The study found that the academic results of children indicated that children raised by non-heterosexual parents outperformed children raised by heterosexual parents by 0.139 standard deviations, and that they are 4.8 percentage points more likely to graduate. The studies which have been submitted by the counsel on either sides support their respective arguments. The studies submitted by Ms Bhati support the argument that even if Regulation 5(3) discriminates against the queer community, it is justified because the interest of the child would suffer if they are parented by

[272] Biasutti, CM; Nascimento CRR, Gato J, Bortolozzo ML, Same-sex parenting in Brazil and Portugal: An integrative review**.** Research, Society and Development**,** *[S. l.]*, v. 11, n. 16,

[273] Kabátek J, Perales F. Academic Achievement of Children in Same- and Different-Sex-Parented Families: A Population-Level Analysis of Linked Administrative Data From the Netherlands. Demography. 2021 Apr 1;58(2):393-418

[274] Deni Mazrekaj, Kristof De Witte, Sofie Cabus, School outcomes of children raised by same-sex parents: Evidence from administrative Panel Data, American Sociological Review Volume 85 Issue 5

queer partners. On the other hand, the studies submitted by Dr. Menaka Guruswamy support the argument that the interest of the child parented by persons belonging to the queer community does not suffer, and if it does it is not because persons with queer identity are 'bad' parents but because the State by not recognising queer relationships treats them as second-class citizens.

312. The burden which is required to be discharged by the State for an Article 14 violation and an Article 15 violation vary. While Article 14 prohibits unreasonable **classification**, Article 15 prohibits **discrimination** based on identity. The interpretation of Article 15 has evolved over the years to incorporate a more substantial effects-based approach towards the anti-discrimination principle.[275] The test is whether the law discriminates against persons in **effect,** based on the identities covered in Article 15. While the Court is undertaking an exercise to determine if Article 14 is violated, the State is required to submit cogent evidence to support its claim that the classification holds a nexus with the object sought to be achieved. On the other hand, there is no **justification** for discrimination based on identities which are protected under Article 15. State interests (even if established which in this case it has not been) cannot be used to justify discrimination once the Court holds that the provision in effect discriminates based on identity. Of course, while the Court is assessing if the provision under challenge discriminates in effect based on identity, it must also evaluate whether the provision in question is a protective provision meant to achieve the guarantee of substantive equality.

[275] See Navtej (supra)

313. For example, it cannot be argued that the Transgender Persons Act is violative of Article 15 because it provides special provisions to safeguard the interest of the transgender community in exclusion of cis-gender persons. A classification **based** on the identities protected by Article 15 does not automatically lead to discrimination. This Court in **State of Kerala** v. **NM Thomas**[276] held that protective provisions (such as for reservation) were not an exception to the anti-discrimination law but are in furtherance of the principle of equality (of which anti-discrimination is a facet). The Court examines if the law is discriminatory not based on whether there is a **classification** based on the identity but whether there is **discrimination** based on the identity. While doing so it determines if it is a protective provision. However, once it is established that the law discriminates based on protected identities, it cannot be justified based on state interest. Thus, once it is proved that the law discriminates based on sexual orientation as in this case (because it disproportionately affects queer persons), no amount of evidence or material submitted by the State that such discrimination is based on state's interest can be used as a justification.

314. We are of the opinion that if the children of persons from the queer community suffer it is because of the lack of recognition (at a legal and social plane) to same-sex unions. In fact, one of the studies submitted by Ms. Aishwarya Bhati highlights this aspect.[277] The stigmatization (if any) faced by the children parented by persons of the queer community is because of the inherent biases that the

[276] (1976) SCC 2 310
[277] Solirios Sarantakos, Children in three contexts: Family, education, and social development, Children Australia Volume 21, No. 3, 1996

society holds against the queer community, and in this context, biases about their fitness to be parents. Thus, it is in the interest of children that the State endeavours to take steps to sensitise the society about queer relationships.

315. In fact, the Indian Psychiatric Society which consists of 7000 mental health professionals in India released a statement stating that children brought up by non-heterosexual parents may face stigmatization and that it is important that the civic society is adequately sensitized:

> "The Indian Psychiatric Society is very cognizant that a child adopted into a same gendered family may face challenges, stigma and/or discrimination along the way. It is imperative that, once legalized, such parents of the LGBTQA spectrum bring up the children in a gender neutral, unbiased environment. It is also of utmost importance, that the family, community, school and society in general are sensitized to protect and promote the development of such a child, and prevent stigma and discrimination at any cost."

316. The law cannot make an assumption about good and bad parenting based on the sexuality of individuals. Such an assumption perpetuates a stereotype based on sexuality (that only heterosexuals are good parents and all other parents are bad parents) which is prohibited by Article 15 of the Constitution. This assumption is not different from the assumption that individuals of a certain class or caste or religion are 'better' parents. In view of the above observations, the Adoption Regulation is violative of Article 15 for discriminating against the queer community.

317. In view of the observations above, Regulation 5(3) is *ultra vires* the parent Act for exceeding the scope of delegation and for violating Articles 14 and 15 of

the Constitution. It is settled that courts have the power to read down a provision to save it from being declared *ultra vires.*[278] Regulation 5(3) is read down to exclude the word "marital". It is clarified that the reference to a 'couple' in Regulation 5 includes both married and unmarried couples including queer couples. In bringing the regulations in conformity with this judgment, CARA is at liberty to ensure that the conditions which it prescribes for a valid adoption subserve the best interest and welfare of the child. The welfare of the child is of paramount importance. Hence, the authorities would be at liberty to ensure that the familial circumstances provide a safe, stable, and conducive environment to protect the material well-being and emotional sustenance of the child. Moreover, CARA may insist on conditions which would ensure that the interest of the child would be protected even if the relationship of the adoptive parents were to come to an end in the future. Those indicators must not discriminate against any couple based on sexual orientation. The criteria prescribed must be in tune with constitutional values. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried or queer couples who seek to jointly adopt a child.

318. The forms in Schedules II (child study report), III (medical examination report and classification of special needs of a child), VI (online registration form) and VII (home study report) use the phrases "male applicant" and "female applicant". We have already concluded above that both married and unmarried couples can adopt under Regulation 5 of the Adoption Regulations. After the judgments of this Court

[278] Gita Hariharan v. Reserve Bank of India, (1999) 2 SCC 228; State Bank of Travancore v. Mohammed Khan (1981) 4 SCC 82; Indra Das v. State of Assam, (2011) 3 SCC 380

**Navtej** (supra) and **NALSA** (supra) recognising non-binary identity and their freedom to choose a partner irrespective of the sexual identity, reference to a 'couple' cannot be restricted to heterosexual relationships. It will include all forms of queer relationships. The phrases "male applicant" and "female applicant (in case of applicant couples)" in Schedules II, III, VI and VII of the Adoption Regulations limit reference to only heterosexual couples and have the effect of precluding persons in queer relationships from adopting, violating the anti-discrimination principle in Article 15(1). Thus, the phrases "male applicant" and "female applicant (in case of applicant couples)" in Schedules II, III, VI and VII of the Adoption Regulations are substituted with the phrases "prospective adoptive parent 1" and "prospective adoptive parent 2 (in case of applicant couples)."

*b. Challenge to the CARA Circular*

319. In 2022, CARA issued an Office Memorandum stipulating that a single prospective adoptive parent in a live-in relationship will be ineligible to adopt a child. The Office Memorandum further provides that this decision is taken in line with Regulation 5(3) of the Adoption Regulations which stipulates that a child can only be placed with a stable family and that a single applicant in a live-in relationship cannot be considered to be a part of a stable family. The relevant portion of the Office Memorandum is extracted below:

> "It has been noticed from Home study Reports (HSRs) that some single PAPs registered with CARA for the adoption process are in relationship with their live-in partner.
>
> 2. The cases of single PAPs engaged in live-in relationship have been discussed in the Steering Committee of Central Adoption Resource Authority (CARA) during its 31st Meeting held on 18th April, 2022. It has been decided to go with the

> earlier decision of 14th Steering Committee Meeting held on 10th May, 2018 **that the cases of single PAP in a live-in relationship with a partner will not be considered eligible to adopt a child and their registration from concerned agencies/authorities will not be considered for approval.**
>
> 3. The decision has been taken in line with Regulation 5(3) of the Adoption regulations 2017. The authority would like the children to be placed only with the stable family and **single applicant in a live-in relationship cannot be considered as stable family**."
>
> (emphasis supplied)

320. CARA in its 31st meeting held on 18 April 2022 in terms of the decision taken in the Steering Committee Meeting held on 10 May 2018 resolved that an application received by a prospective adoptive parent who is in a live-in relationship may not be considered on the basis of Regulation 5(3) of the Adoption Regulations. The resolution is extracted below:

> "14. Reference is drawn to Steering Committee Meeting, held on 10th May 2019 wherein the Steering Committee had not approved adoption to prospective adoptive parents staying in Live-in relationship. However, NOC section has received three cases of children reserved from Special Need portal and on examination of the HSR it has been observed that the parents have been in live-in relationship.
>
> 15. In this regard the NOC committee had not approved inter-country cases of the children on the basis of Reg. 5(3) which states that no child shall be given in adoption to a couple unless they have atleast two years of stable marital relationship. Since the matter involves cases of special needs children, the issue may be kindly be discussed in the Steering Committee.
>
> Decision: It was decided to go with the earlier decision of the Steering committee and the same rule should be applicable as that of the domestic PAPs. Any application received from live in PAPs may not be considered on the basis of Reg. 5(3) of the Adoption Regulations."

321. The CARA Circular prescribes a condition in addition to the conditions prescribed in the Adoption Regulations. While the Adoption Regulations exclude unmarried couples from jointly adopting a child, the CARA Circular restricts the ability of a person who is in a live-in relationship to adopt in their **individual** capacity. The CARA Circular stipulates that the decision is in pursuance of Regulation 5(3) of the Adoption Regulations which requires couples to be in a 'stable' relationship.

322. Regulation 5(1) of the Adoption Regulations prescribes a general criteria (in the form of a guiding principle) for prospective adoptive parents which is that they must be physically, mentally, and emotionally fit, they must not be convicted of a criminal act, and they must not have a life-threatening disease. These criteria are equally applicable to couples and persons who wish to adopt in their individual capacity. All the other subsequent provisions in Regulation 5 are specific to couples (that is, the requirement of a stable relationship and the consent of both parties) and individuals (that is, that a male cannot adopt a girl child). Hence, the additional criterion prescribed by the CARA circular for a person to adopt in an individual capacity must be traceable to the principles in Regulations 5(1) and 5(2)(c). The condition imposed by CARA circular is neither traceable to the principles in Regulations 5(1) and 5(2)(c) nor is it traceable to any of the provisions of the JJ Act. The CARA Circular has exceeded the scope of the Adoption Guidelines and the JJ Act.

323. According to the Adoption Regulations, unmarried couples cannot jointly adopt a child. Though the additional criteria prescribed by the CARA Circular would

also affect a heterosexual person's eligibility to adopt a child, it would disproportionately affect[279] non-heterosexual couples since the State has not conferred legal recognition in the form of marriage to the union between non-heterosexual persons. When the CARA Circular is read in light of this legal position, a person of the queer community would be forced to choose between their wish to be an adoptive parent and their desire to enter into a partnership with a person they feel love and affinity with. This exclusion has the effect of reinforcing the disadvantage already faced by the queer community. For these reasons **and the reasons recorded in Section D (xiii)(a)(III),** the CARA Circular is violative of Article 15 of the Constitution.

## E. Response to the opinion of Justice Ravindra Bhat

324. In the opinion authored by him, my learned brother, Justice Ravindra Bhat states that unenumerated rights are recognised by Courts in response to State action "that *threaten* the freedom or right directly or indirectly." With due respect, such a narrow understanding of fundamental rights turns back the clock on the rich jurisprudence that the Indian courts have developed on Part III of the Constitution. This Court has held in numerous cases held that the rights of persons are infringed not merely by *overt actions* but also by inaction on the part of the State. Some of these precedents are referred to below.

[279] See Lt. Col. Nitisha v. Union of India, 2021 SCC OnLine SC 261

325. In **NALSA** (supra), this Court held that the State by rendering the transgender community invisible and failing to recognize their gender identity deprived them of social and cultural rights. This Court recognised the duty of the State to enable the exercise of rights by the transgender community and issued a slew of directions to enforce this duty. Justice AK Sikri in his opinion issued the following declarations and directions:

> "129. We, therefore, declare:
>
> 1. Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
>
> 2. Transgender persons' right to decide their selfidentified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.
>
> 3. We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
>
> 4. Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/ Transgenders face several sexual health issues.
>
> 5. Centre and State Governments should seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.
>
> 6. Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
>
> 7. Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

> 8. Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.
>
> 9. Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life."

326. In **Union of India** v. **Association of Democratic Reforms**[280], proceedings under Article 136 were initiated against the judgment of the High Court of Delhi which recognised the rights of citizens to receive information regarding criminal activities of a candidate to the legislative assembly. The High Court directed the Election Commission to *inter alia* secure information on whether the candidate is accused of any offence and the assets possessed by a candidate. A three-Judge Bench of this Court dismissed the appeal and held that it is imperative that the electorate possesses sufficient information to enable them to exercise their right to vote. The observations are extracted below:

> "34**.** From the afore quoted paragraph, it can be deduced that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.
>
> 45. Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution

[280] (2002) 5 SCC 294

> till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets — immovable, movable and valuable articles — it would have its own effect."

327. While the precedents on the subject are not multiplied in the text of the judgment, some of the judgments on this point are footnoted.[281] In view of the discussion above, the observation of Justice Bhat that an overt action of the State is necessary for the court to direct the State to create enabling conditions has no jurisprudential basis. Neither the provisions of the Constitution nor the earlier decisions of this Court create such a distinction. In fact, as I have discussed in detail, Article 32 of the Constitution states that the Supreme Court shall have the power to issue directions for the *enforcement* of rights conferred by Part III without making any distinction between action and inaction by the State.

328. I also disagree with the observations of Bhat J that in the **absence of a legal regime**, the power of this Court to issue directions to enable the facilitation of rights is limited. In **Sheela Barse** v. **Union of India**[282], the petitioner, a social activist brought to the attention of this court that the State of West Bengal jailed persons with mental disabilities who are not suspected, accused, charged of, or convicted for, committing any offence but only for the reason that they are mentally ill. The decision to jail them was made based on an instant assessment of their mental health. This Court held that the admission of such mentally ill persons to jails was

[281] In the context of the right to speedy trial, see SC Advocates-on-Record Association v. Union of India, (1993) 4 SCC 441 (paragraph 505-507) and State of Punjab v. Ajaib Singh, (1995) 2 SCC 486 (paragraph 6); in the context of the right to environment, see MC Mehta v. Union of India, (2004) 6 SCC 588 (paragraphs 40 and 42); in the context of the right to freedom from noise pollution, see Noise Pollution (I), in re (2005) 5 SCC 727; in the context of the right to legal aid, see State of Maharashtra v. Manubhai Pragji Vashi, (1995) 5 SCC 730

[282] (1993) 4 SCC 204

illegal and unconstitutional. This Court also directed that hospitals shall be immediately upgraded, psychiatric services shall be set up in all teaching and district hospitals, including filling posts for psychiatrists, and integrating mental health care with the primary health care system. In **PUCL** v. **Union of India**[283], the petitioner submitted that the right to livelihood implies that the State has a duty to provide food to people. In a series of orders, this Court identified government schemes which constituted legal entitlements of the right to food and outlined the manner of implementing these schemes.

329. My learned brother relies on the example of Article 19(1)(d) to buttress his point. He states that in the absence of a law which casts a duty on the State to provide transportation through roads, a citizen cannot approach the court and seek the construction of a road to enforce the right to move freely. The opinion of my learned brother fails to have noted the judgment of a three-Judge Bench of this Court in **State of Himachal Pradesh** v. **Umed Ram Sharma**[284]. In this case, a letter petition was written to the High Court claiming that the construction of a road which would benefit the residents of the village and in particular, the members of the Dalit community was stopped by the State. The High Court directed the Superintending Engineer of the Public Works Department to complete the construction of the road. This Court dismissed the appeal against the judgment of the High Court observing that the Constitution places a duty on the State to provide roads for residents of hilly areas because access to roads is encompassed in their right to secure a quality life. This Court recognised that the right under Article 21 of

[283] WP (Civil) No. 196/2001
[284] (1986) 2 SCC 68

the Constitution is violated if the State *does not* build roads for effective communication and transportation. Thus, even in the *absence* of a law which requires the State to build roads, such a duty was imposed on the State on an interpretation of Part III of the Constitution. Moreover, in the precent case, the petitioners are demanding **equal access** to something which does exist (i.e., the entitlements which flow from the right to form an abiding cohabitational union). In fact, my learned brother himself recognizes this when he holds that the actions of the state have the effect of discriminating against queer couples. The example under Article 19(1)(a) is unconvincing for similar reasons.

330. Bhat, J. holds that: (i) the legal dimension of marriage in USA is different from the legal dimension of marriage in India; (ii) the legality of a marriage in USA is solely dependent on a validly obtained license; (iii) in India, the legal status of a marriage stems from personal law and customs; and (iv) the terms of marriage are set, to a large extent, independently of the state. While there is no doubt that marriage predates the state and the existence of what we now consider 'law', I am unable to agree with the conclusion of my learned brother that the status of a marriage in India stems only from personal law and customs and that the terms of marriage are largely set independently of the state, for two reasons: First, the legal status of a married couple stems from statute. Once the state began regulating marriage, the validity (and consequently, the 'status') of marriage is traceable to law. While law may provide that a marriage is valid if it was performed in accordance with custom, it is beyond cavil that the only reason that a custom is relevant (for the purposes of law) is because of law itself. Therefore, it is law (through statutes) that accords significance to personal law and customs and it is

statutes that may (and often do) deviate from personal law and customs. Second, the number of legislations which govern marriage as well as the detailed framework which they set out makes it immediately evident that the terms of marriage are not set independently of the state, but by the state itself. From divorce to custody to maintenance to domestic violence and offences, almost every aspect of marriage is regulated by the state. I have discussed the manner in which marriage has evolved (**through state regulation**) in detail in Section D(iii)(b) of my judgment. Thus, marriage as an institution cannot anymore be viewed as solely traceable to customs and traditions after the State's interference to regulate the institution. The State's reformation of the institution has slowly but evidently changed the nature of the institution itself. Under the Constitution, the state is empowered to reform social institutions including marriage in line with constitutional values.

331. Contrary to what is stated in the judgment of Bhat, J., the directions in my judgment do not require the state to create social or legal status, or a social institution. The directions are with a view to recognizing the choice that a person makes for themselves when they choose another to be their partner for life. The directions seek to make that choice a meaningful one. Nowhere do they create an institution of any kind. Rather, they give effect to the fundamental rights in Part III of the Constitution. This is the mandate of this Court under Article 32 – "The Supreme Court shall have power to issue directions or orders or writs … for the enforcement of any of the rights conferred by this Part." No response is forthcoming to my detailed exposition of the scope of the powers of this Court under Article 32 in Section D(i) of my judgment. In fact, Bhat, J. himself recognizes that courts often enable and oblige the state to take measures. My learned brother also arrives at

the conclusion that the state is indirectly discriminating against the queer community but fails to exercise the power vested in this Court by Article 32 to alleviate this discrimination in any way. This Court is not through judicial *diktat* creating a legal regime exclusively for persons of the queer community but merely recognising the duty of the State to recognise the entitlements flowing from exercising the right to choose a life partner.

332. Bhat, J. states that no one has contended that two queer persons have the right of a sustained partnership which is traceable to Articles 19(1)(a), (c), (d) and the right to conscience under Article 25. This is not true, as demonstrated by the segment of this judgment on the submissions made by the petitioners.[285]

333. Bhat, J. has held that:

a. The classification in a legislation is to be discerned by gathering the object sought to be achieved by the enactment. The object of the SMA was to enable inter-faith heterosexual marriage. The classification is therefore between same-faith heterosexual couples and inter-faith heterosexual couples. It does not discriminate against queer persons; and

b. The test for discrimination is not the object of the statute but its effect and impact. The effect of the state regulating marriage only for heterosexual couples is that it "adversely impacts" them, "results in their

[285] Illustratively, see the submissions of (i) Dr Abhishek Manu Singhvi (at paragraph 21(d) of this judgment); (ii) Mr. Raju Ramachandran (at paragraph 22(a) of this judgment); (iii) Mr KV Vishwanathan (at paragraph 23(f) of this judgment); (iv) Mr. Anand Grover (at paragraph 25(e) of this judgment); (v) Dr. Menaka Guruswamy (at paragraph 27(d) of this judgment); (vi) Ms. Anitha Shenoy (at paragraph 31(a) of this judgment).

> exclusion," "results in denial of entitlements / benefits," and that "this injustice and inequity results in discrimination." The state must address "this deprivation" and take "remedial action."

My learned brother contradicts himself when he holds that the SMA is not discriminatory by relying on its **object**, on the one hand, and that the state has indirectly discriminated against the queer community because it is **the effect and not the object which is relevant**, on the other. My learned brother discusses in detail the deprivation, exclusion, and discrimination faced by the queer community. In effect, he: (i) recognizes that they have a right not to be discriminated against; and (ii) holds that the actions of the state have the effect of discriminating against them. However, he does not take the step which logically follows from such a ruling which is to pass directions to obviate such discrimination and ensure the realization of the rights of the queer community. I cannot bring myself to agree with this approach. The realization of a right is effectuated when there is a remedy available to enforce it. The principle of *ubi jus ibi remedium* (that is, an infringement of a right has a remedy) which has been applied in the context of civil law for centuries cannot be ignored in the constitutional context. Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude.

334. Bhat, J highlights that the central question which arises for the consideration of this Court is whether the absence of law or a regulatory framework, or the failure of the State to enact law, amounts to discrimination that is protected under Article 15. He states that "*there is no known jurisprudence or case law (yet) pointing to the absence of law being considered as discrimination as understood under Article*

*15*." Here, I would like to sound a note of caution (which, though obvious, bears repetition) – the manner in an issue is framed impacts the analysis of the issue. In fact, Bhat, J's reasoning deviates from the jurisprudence that this Court has developed on the interpretation of Article 15. Bhat, J's reasoning assesses the 'objective' of a law instead of its 'effect. This is best understood with the help of an example. Suppose the state were to enact a law which enabled only citizens of a particular caste to avail the services of a particular government hospital but which did not expressly prohibit members of other castes from availing its services. This law contains various conditions which must be satisfied before services of the hospital can be availed (such as a list of diseases which it treats or how advanced a particular disease is). This law can be understood as being an "enabling law" or a law which "regulates" or it can be understood (in its true sense) as a law which has the effect of excluding certain groups on the basis of prohibited markers of identity. This remains true not only of a hospital but of any service or scheme or institution that one can imagine. Hence, what is framed as the "absence of a law" or an "enabling law" can have the same restrictive effect as a law which expressly bars or prohibits certain actions or excludes certain groups.

335. I disagree with the observations of my learned brother that the State has a positive obligation under Article 21 but such an obligation cannot be read into other fundamental rights other than Article 21. I reiterate the observations made in Section D(ix)(a).

336. Bhat, J. distinguishes the judgments in **Vishaka** (supra), **Common Cause** (supra) and **NALSA** (supra) from the present case by holding that in each of these

cases, directions were passed because the “inadequacies … were acute and intolerable” and faced by “entire groups.” However, he does not explain why the inadequacies faced by the queer community in this case are mild or tolerable. There is neither a test nor standard known to law by which discrimination, or the violation of a fundamental right, must reach a level of intolerability for this Court to exercise its jurisdiction. Regardless of the severity of the violation, it is the duty of this Court to protect the exercise of the right in question. Further, in this case too, the rights of an “entire group” (being the queer community) are at issue.

337. The opinion of Bhat, J. highlights that the reading of the Adoption Regulations to permit unmarried couples to adopt would have ‘disastrous outcomes’ because the law, as it stands today, does not guarantee the protection of the child of unmarried parents adopting jointly. A reading of the numerous laws relating to the rights of children qua parents indicates that the law does not create any distinction between children of married and unmarried couples so long as they are validly adopted. Section 12 of the Hindu Adoptions and Maintenance Act 1956 states that an adopted child shall be **deemed** to be the child of their adopted parents for all purposes from the date of adoption. Similarly, Section 63 of the JJ Act also creates a deeming fiction. The provision states that a child in respect of whom an adoption order is issued shall become the child of the adoptive parents and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, including for the purposes of intestacy.

338. In view of the deeming fiction created by Section 12 of the Hindu Adoptions and Maintenance Act 1956 and Section 63 of the JJ Act, an adopted child is a legitimate child of the adopting couple. The manner of determination of legitimacy prescribed by Section 112 of the Indian Evidence Act 1872[286] shall not apply in view of the deeming fiction created by Section 12 of the Hindu Adoptions and Maintenance Act 1956 and Section 63 of the JJ Act. Thus, all the benefits which are available under the law to a legitimate child (who has been validly adopted) of a married couple will equally be available to the legitimate child of an unmarried couple. For example, Section 20 of the Hindu Adoptions and Maintenance Act 1956 which provides that a Hindu is to maintain their children does not make any distinction between a legitimate child of a married and an unmarried couple. Similarly, succession law in India does not differentiate between the child of a married and an unmarried couple if the child has been adopted by following the due process of law. Further, the breakdown of the relationship of an unmarried couple will not lead to a change in applicable law because the child will continue to be a legitimate child even after the breakdown of the relationship. It is therefore unclear what the 'disastrous outcomes' referred to, are. My learned brother has also failed to address whether Regulation 5(3) is discriminatory for distinguishing between married and unmarried couples for the purpose of adoption and for the disproportionate impact that it has on the members of the queer community while simultaneously holding that "the State cannot, on any account, make regulations that are facially or indirectly discriminatory on the ground of sexual orientation."

[286] The provision confers legitimacy on a child born during the continuance of a valid marriage or within two eighty days since the dissolution of marriage.

## F. Directions to obviate discrimination

339. Counsel for the petitioners and some counsel for the respondents advanced extensive submissions on the various forms of violence and discrimination that society and the state machinery inflict upon the queer community, and especially queer couples. This has been discussed in detail in the prefatory part of the judgment. Counsel sought directions to obviate such violence and discrimination.

a. The Union Government, State Governments, and Governments of Union Territories are directed to:

   i. Ensure that the queer community is not discriminated against because of their gender identity or sexual orientation;

   ii. Ensure that there is no discrimination in access to goods and services to the queer community, which are available to the public;

   iii. Take steps to sensitise the public about queer identity, including that it is natural and not a mental disorder;

   iv. Establish hotline numbers that the queer community can contact when they face harassment and violence in any form;

   v. Establish and publicise the availability of ‘safe houses’ or Garima Grehs in all districts to provide shelter to members of the queer community who are facing violence or discrimination;

vi. Ensure that “treatments” offered by doctors or other persons, which aim to change gender identity or sexual orientation are ceased with immediate effect;

vii. Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;

viii. Recognize the self-identified gender of all persons including transgender persons, hijras, and others with sociocultural identities in India, as male, female, or third gender. No person shall be forced to undergo hormonal therapy or sterilisation or any other medical procedure either as a condition or prerequisite to grant legal recognition to their gender identity or otherwise;

b. The appropriate Government under the Mental Healthcare Act must formulate modules covering the mental health of queer persons in their programmes under Section 29(1). Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity;

c. The following directions are issued to the police machinery:

i. There shall be no harassment of queer couples by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;

ii. They shall not force queer persons to return to their natal families if they do not wish to return to them;

iii. When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, they shall on verifying the genuineness of the complaint ensure that their freedom is not curtailed;

iv. When a police complaint is filed apprehending violence from the family for the reason that the complainant is queer or is in a queer relationship, they shall on verifying the genuineness of the complaint ensure due protection; and

v. Before registering an FIR against a queer couple or one of the parties in a queer relationship (where the FIR is sought to be registered in relation to their relationship), they shall conduct a preliminary investigation in terms of **Lalita Kumari** v. **Government of U.P**[287], to ensure that the complaint discloses a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police shall close the complaint after recording a statement to that effect.

[287] (2014) 2 SCC 1

## G. Conclusions and orders of enforcement

340. In view of the discussion above, the following are our conclusions:

a. This Court is vested with the authority to hear this case. Under Article 32, this Court has the power to issue directions, orders, or writs for the enforcement of the rights in Part III;

b. Queerness is a natural phenomenon known to India since ancient times. It is not urban or elite;

c. There is no universal conception of the institution of marriage, nor is it static. Under Articles 245 and 246 of the Constitution read with Entry 5 of List III to the Seventh Schedule, it lies within the domain of Parliament and the state legislatures to enact laws recognizing and regulating queer marriage;

d. Marriage has attained significance as a legal institution largely because of regulation by the state. By recognizing a relationship in the form of marriage, the state grants material benefits exclusive to marriage;

e. The State has an interest in regulating the 'intimate zone' to democratize personal relationships;

f. The issue of whether the Constitution recognizes the right to marry did not arise before this Court in **Justice KS Puttaswamy (9J)** (supra), **Shafin Jahan** (supra), and **Shakti Vahini** (supra);

g. The Constitution does not expressly recognize a fundamental right to marry. An institution cannot be elevated to the realm of a fundamental right based on the content accorded to it by law. However, several facets of the marital relationship are reflections of constitutional values including the right to human dignity and the right to life and personal liberty;

h. This Court cannot either strike down the constitutional validity of SMA or read words into the SMA because of its institutional limitations. This Court cannot read words into the provisions of the SMA and provisions of other allied laws such as the ISA and the HSA because that would amount to judicial legislation. The Court in the exercise of the power of judicial review must steer clear of matters, particularly those impinging on policy, which fall in the legislative domain;

i. The freedom of all persons including queer couples to enter into a union is protected by Part III of the Constitution. The failure of the state to recognise the bouquet of entitlements which flow from a union would result in a disparate impact on queer couples who cannot marry under the current legal regime. The state has an obligation to recognize such unions and grant them benefit under law;

j. In Article 15(1), the word ‘sex’ must be read to include ‘sexual orientation’ not only because of the causal relationship between homophobia and sexism but also because the word ‘sex’ is used as a

marker of identity which cannot be read independent of the social and historical context;

k. The right to enter into a union cannot be restricted based on sexual orientation. Such a restriction will be violative of Article 15. Thus, this freedom is available to all persons regardless of gender identity or sexual orientation;

l. The decisions in **Navtej** (supra) and **Justice KS Puttaswamy (9J)** (supra) recognize the right of queer couples to exercise the choice to enter into a union. This relationship is protected from external threat. Discrimination on the basis of sexual orientation will violate Article 15;

m. Transgender persons in heterosexual relationships have the right to marry under existing law including personal laws which regulate marriage;

n. Intersex persons who identify as either male or female have the right to marry under existing law including personal laws which regulate marriage;

o. The state must enable the LGBTQ community to exercise its rights under the Constitution. Queer persons have the right to freedom from coercion from their natal families, agencies of the state including the police, and other persons;

p. Unmarried couples (including queer couples) can jointly adopt a child. Regulation 5(3) of the Adoption Regulations is ultra vires the JJ Act,

Articles 14, and 15. Regulation 5(3) is read down to exclude the word "marital". The reference to a 'couple' in Regulation 5 includes both married and unmarried couples as well as queer couples. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried couples who seek to jointly adopt a child. However, while framing regulations, the state may impose conditions which will subserve the best interest and welfare of the child in terms of the exposition in the judgment;

q. The CARA Circular disproportionately impacts the queer community and is violative of Article 15;

r. The Union Government, State Governments, and Governments of Union Territories shall not discriminate against the freedom of queer persons to enter into union with benefits under law; and

s. We record the assurance of the Solicitor General that the Union Government will constitute a Committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in unions. The Committee shall include experts with domain knowledge and experience in dealing with the social, psychological, and emotional needs of persons belonging to the queer community as well as members of the queer community. The Committee shall before finalizing its decisions conduct wide stakeholder consultation amongst persons belonging to the queer community,

including persons belonging to marginalized groups and with the governments of the States and Union Territories.

The Committee shall in terms of the exposition in this judgment consider the following:

i. Enabling partners in a queer relationship (i) to be treated as a part of the same family for the purposes of a ration card; and (ii) to have the facility of a joint bank account with the option to name the partner as a nominee, in case of death;

ii. In terms of the decision in **Common Cause** v. **Union of India**[288], as modified by **Common Cause** v. **Union of India**[289], medical practitioners have a duty to consult family or next of kin or next friend, in the event patients who are terminally ill have not executed an Advance Directive. Parties in a union may be considered 'family' for this purpose;

iii. Jail visitation rights and the right to access the body of the deceased partner and arrange the last rites; and

[288] (2018) 5 SCC 1
[289] 2023 SCC OnLine SC 99

iv. Legal consequences such as succession rights, maintenance, financial benefits such as under the Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance.

The report of the Committee chaired by the Cabinet Secretary shall be implemented at the administrative level by the Union Government and the governments of the States and Union Territories.

341. The petitions in these proceedings are disposed of in terms of this judgment.

342. Pending applications (if any) are disposed of.

**……CJI**
**[Dr Dhananjaya Y Chandrachud]**

**New Delhi;**
**October 17, 2023**