REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) NO.1011 OF 2022

SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. … Petitioners

Versus

UNION OF INDIA …Respondents

with:
W.P.(C) No.1020/2022
W.P.(C) No.1105/2022
W.P.(C) No.1141/2022
W.P.(C) No.1142/2022
W.P.(C) No. 1150/2022
W.P.(C) No. 93/2023
W.P.(C) No. 159/2023
W.P.(C) No.129/2023
W.P.(C) No.260/2023
T.C.(C) No.5/2023
T.C.(C) No.6/2023
W.P.(C) No.319/2023
T.C.(C) No.7/2023
T.C.(C) No.8/2023
T.C.(C) No.10/2023
T.C.(C) No.9/2023
T.C.(C) No.11/2023
T.C.(C) No.12/2023
T.C.(C) No.13/2023
W.P.(C) No. 478/2023

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. This case presents a new path and a new journey in providing legal recognition to non-heterosexual relationships.

2. I have had the benefit of the exhaustive and erudite judgment of the Hon'ble Chief Justice Dr. D.Y. Chandrachud; which enumerates the prevalence of these relationships in history, the Constitutional recognition of the right to form unions (in other words 'civil unions'), and the necessity of laying down guidelines to protect non-heterosexual unions. In a way, this is a step forward from the decriminalisation of private consensual sexual activities by the LGBTQ+ community in ***Navtej Singh Johar & Ors. vs. Union of India, Through Secretary, Ministry of Law & Justice.***[1]

3. The judgment penned down by the Hon'ble Chief Justice considers all aspects of the challenge. However, the subject matter itself persuades me to pen down a few words while broadly agreeing with his judgment.

Historical prevalence of non-heterosexual unions

4. In their submissions, the Respondents raised doubts about the social acceptability of non-heterosexual relationships. Before we address the same, it

[1] 2018 (1) SCC 791.

is no longer *res integra* that the duty of a constitutional Court is to uphold the rights enshrined in the Constitution and to not be swayed by majoritarian tendencies or popular perceptions. This Court has always been guided by constitutional morality and not by social morality.[2]

5. A pluralistic social fabric has been an integral part of Indian culture and the cornerstone of our constitutional democracy.[3] Non-heterosexual unions are well-known to ancient Indian civilisation as attested by various texts, practices, and depictions of art. These markers of discourse reflect that such unions are an inevitable presence across human experience. Hindu deities were multi-dimensional and multi-faceted and could appear in different forms. One of the earliest illustrations is from the *Rig Veda* itself. *Agni*, one of the most important deities, has been repeatedly described as the "*child of two births*" (*dvijanman*), "*child of two mothers*" (*dvimatri*), and occasionally, "*child of three mothers*" (*the three worlds*).[4]

6. In Somdatta's *Kathasaritsagara*, same-sex love is justified in the context of rebirth. Somaprabha falls in love with Princess Kalingasena and claims that she loved her in her previous birth as well.[5] Hindu mythology is replete with several such examples. We need not be detained in an effort to capture each of

[2] *Navtej* (Supra).
[3] *Maqbool Fida Husain v. Rajkumar Pandey, 2008 Cri LJ 4107.*
[4] Ruth Vanita and Saleem Kidwai, *Same-sex love in India: Readings from Literature & History* (Palgrave, 2001), p. 15.

[5] *Ruth Vanita and Saleem Kidwai* (Supra), p. 68.

them. The significant aspect is that same-sex unions were recognised in antiquity, not simply as unions that facilitate sexual activity, but as relationships that foster love, emotional support, and mutual care.[6]

7. Even in the *Sufi* tradition, devotion is often constructed around the idea of love as expressed through music and poetry. In several instances, the human relationship with the divine was expressed by mystics through the metaphor of same-sex love.[7] Love across genders is also reflected in the *Rekhti* tradition of Lucknow. This tradition is centred around the practice of male poets writing in a female voice and is characterised by its homoeroticism. Significantly, the depictions of same-sex relationships are charged with affects such as love, friendship, and companionship.[8]

8. Marriage as an institution developed historically and served various social functions. It was only later in its long history that it came to be legally recognized and codified.[9] However, these laws regulated only one type of socio-historical union, i.e., the heterosexual union.

9. It would thus be misconceived to claim that non-heterosexual unions are only a facet of the modern social milieu. The objective of penning down this section is to provide perspective on the existence of non-heterosexual unions, despite continued efforts towards their erasure by the heteronormative majority.

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[6] Devdutt Pattnaik, *The Man who was a Woman & Other Queer Tales* (Routledge, 2002).
[7] Ruth Vanita and Saleem Kidwai (supra), p. 115.
[8] Manjari Shrivastava, *Lesbianism in Nineteenth Century Erotic Urdu Poetry "Rekhti",* Proceedings of the Indian History Congress, 68, 965.
[9] Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (Penguin, 2005), p. 3-5.

10. Non-heterosexual unions are entitled to protection under our Constitutional schema. In *Maqbool Fida Husain*, I had observed: "*Our Constitution by way of Article 19(1) which provides for freedom of thought and expression underpins a free and harmonious society. It helps to cultivate the virtue of tolerance. It is said that the freedom of speech is the matrix, the indispensable condition of nearly every other form of freedom. It is the wellspring of civilization and without it liberty of thought would shrivel*."[10]

<u>The necessity of recognizing civil unions</u>

11. The judgment of the Hon'ble Chief Justice notes that the right to form unions is a feature of Articles 19 and 21 of the Constitution. Therefore, the principle of equality enumerated under Articles 14 and 15 demands that this right be available to all, regardless of sexual orientation and gender. Having recognized this right, this Court has taken on board the statement of the Learned Solicitor General to constitute a Committee to set out the scope of benefits available to such unions. I agree with the Hon'ble Chief Justice.

12. The Petitioners' submissions demand that the Special Marriage Act, 1872[11] be tested on the touchstone of Part III of the Constitution, i.e., whether they are discriminatory on the basis of *sex* and thus violative of Articles 14 and 15 of the Constitution. It is now settled law that Article 14 contemplates a two-pronged test: (i) whether the classification made by the SMA is based on

[10] Maqbool Fida Husain (supra).
[11] Hereinafter referred to as "the SMA".

intelligible differentia; and (ii) whether the classification has a reasonable nexus to the objective sought to be achieved by the State.[12] The first prong, i.e., intelligible differentia implies that the differentia should be clear and not vague. Section 4 of the SMA is clear in so far as it contemplates a marriage between a **male** who has completed the age of twenty-one years **and** a **female** at the age of eighteen years. In defining the degrees of prohibited relationships, Section 2(b) of the SMA exclusively applies to a relationship between a man and a woman. Thus, by explicitly referring to marriage in heterosexual relationships, the SMA by implication creates two distinct and intelligible classes – i.e., heterosexual partners who are eligible to marry and non-heterosexual partners who are ineligible.

13. Under the second prong, the Court examines whether the classification is in pursuit of a State objective. The SMA's Statement of Objects and Reasons assists us in determining the objective. It is reproduced hereunder:

> "**Statement of Objects and Reasons**. —*This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnisation of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers. For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnising and registering marriages between citizens, of India in a foreign country.*

[12] *D.S. Nakara v. Union of India, 1983 (2) SCR 165.*

2. Provision is also sought to be made for permitting persons who are already married under other forms of marriage to register their marriages under this Act and thereby avail themselves of these provisions.

3. The bill is drafted generally on the lines of the existing Special Marriage Act of 1872 and the notes on clauses attached hereto explain some of the changes made in the Bill in greater detail." (Emphasis supplied).

14. From the above, we see that the SMA postulates a 'special form of marriage' available to **any** person in India **irrespective of faith**. Therefore, the SMA provides a secular framework for solemnization and registration of marriage. Here, I respectfully disagree with my brother Justice Ravindra Bhat, that the sole intention of the SMA was to enable marriage of heterosexual couples exclusively. To my mind, the stated objective of the SMA was not to regulate marriages on the basis of sexual orientation. This cannot be so as it would amount to conflating the differentia with the object of the statute. Although substantive provisions of the SMA confer benefits only on heterosexual relationships, this does not automatically reflect the object of the statute. For as we are all aware, we often act in ways that do not necessarily correspond to our intent. Therefore, we cannot look at singular provisions to determine substantive intent of the statute. Doing so would be missing the wood for the trees.

15. If the intent of the SMA is to facilitate inter-faith marriages, then there would be no rational nexus with the classification it makes, i.e., excluding non-heterosexual relationships.

16. In any event, regulating *only* heterosexual marriages would not be a legitimate State objective. It is settled law that the Court can also examine the normative legitimacy and importance of the State objective,[13] more so in a case such as this where sex (and thereby sexual orientation) is an *ex-facie* protected category under Article 15(1) of the Constitution. An objective to exclude non-heterosexual relationships would be unconstitutional, especially after this Court in *Navtej* has elaborately proscribed discrimination on the basis of sexual orientation.[14] Therefore, the SMA is violative of Article 14.

17. However, I recognize that there are multifarious interpretive difficulties in reading down the SMA to include marriages between non-heterosexual relationships. These have been enumerated in significant detail in the opinions of both the Hon'ble Chief Justice and Hon'ble Justice Bhat. I also agree that the entitlements devolving from marriage are spread out across a proverbial 'spider's web' of legislations and regulations. As rightly pointed out by the Learned Solicitor General, tinkering with the scope of marriage under the SMA can have a cascading effect across these disparate laws.

[13] Deepak Sibal v. Punjab University, (1989) 2 SCC 145.
[14] (supra).

18. In fact, the presence of this web of statutes shows that discrimination under the SMA is but one example of a larger, more deeper form of social discrimination against non-heterosexual people that is pervasive and *structural* in nature. Ordinarily, such an intensive form of discrimination should require keener and more intensive judicial scrutiny. However, due to limited institutional capacity, this Court does not possess an adequate form of remedy to address such a violation. As pointed out in the judgment of Hon'ble the Chief Justice, substantially reading into the statute is beyond the powers of judicial review and would be under the legislative domain. It would also not be prudent to suspend or strike down the SMA, given that it is a beneficial legislation and is regularly and routinely used by heterosexual partners desirous of getting married. For this reason, this particular methodology of recognizing the right of non-heterosexual partners to enter into a civil union, as opposed to striking down provisions of the SMA, ought to be considered as necessarily *exceptional* in nature. It should not restrict the Courts while assessing such deep-seated forms of discrimination in the future.

19. Non-heterosexual unions and heterosexual unions/marriages ought to be considered as two sides of the same coin, both in terms of recognition and consequential benefits. The only deficiency at present is the absence of a suitable regulatory framework for such unions. This Court in *Navtej* noted that: "*history owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."* I believe that this moment presents an

opportunity of reckoning with this historical injustice and casts a collective duty upon all constitutional institutions to take affirmative steps to remedy the discrimination.

20. Thus, the next step in due course, would be to create an edifice of governance that would give meaningful realization to the right to enter into a union, whether termed as marriage or a union.

Charting a course: Interpreting statutes using Constitutional principles

21. As noted above, the benefits pertaining to marriage are spread out across several incidental legislations and regulations. These statutes presently do not explicitly extend to civil unions. However, now that we have recognized the right to enter into civil unions; such statutes must be read in a manner to give effect to this right, together with the principle of equality and non-discrimination under Articles 14 and 15. In other words, statutory interpretation must be in consonance with constitutional principles that are enumerated by this Court. Needless to say, this should not detract from the Committee's task of ironing out the nitty-gritties of the entitlements of civil unions.

22. This exercise is necessary to foster greater coherence within the legal system as a whole, both *inter se* statutes and between statutes and the Constitution. Reading statutes in this manner will facilitate 'inter-connectedness' by allowing constitutional values to link statutes within the larger legal system. Constitutional values emanate from a *living* document and thus are constantly evolving. Applying constitutional values to interpret statutes

helps update statutes over time to reflect changes since the statute's enactment. Ordinarily, constitutional principles come in contact with statutes when the validity of such statutes is being tested. However, constitutional values should play a more consistent role, which can be through the everyday task of statutory interpretation.[15]

23. This interpretive technique has gained currency across jurisdictions. In the famous *Lüth* case, the Federal Constitutional Court of Germany recognized that the constitutional right of freedom of expression as enumerated under the German Basic Law also 'radiates' into the statutory law of defamation. The Court noted that:

> "*But far from being a value-free system the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision*."[16]

24. We may note that the Constitution of South Africa has an explicit provision which directs that the interpretation of statutory law shall be in 'due regard to the spirit, purport and objects' of the chapter on fundamental rights.[17]

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[15] William N. Eskridge, *Public Values in Statutory Interpretation*, 137(4) UPenn Law Rev. 1007, 1009.

[16] BVerfGE 7, 198 (*Lüth*-decision).

[17] Section 35(3) of the Constitution of the Republic of South Africa.

The Constitutional Court of South Africa in *Du Plessis v. De Klerk* succinctly observed the objective and scope of this provision:

> "*The common law is not to be trapped within the limitations of its past. It needs not to be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalized with the spirit of the constitutional values defined in Chapter 3 of the Constitution and with full regard to the purport and objects of that Chapter*."[18]

25. Although no such provision exists in the Indian Constitution, our Courts are no stranger to interpreting statutory laws through fundamental rights. In *Central Inland Water Transport Corpn. v Brojo Nath Ganguly*, the Supreme Court was concerned with the interpretation of 'public policy' under Section 23 of the Indian Contract Act, 1872.[19] In this context, this Court observed:

> "*It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution*."

[18] 1996 (3) SA 850.
[19] (1986) 3 SCC 156.

26. This technique of reading in Constitutional values should be used harmoniously with other canons of statutory interpretation. In this context, legislations that confer benefits on the basis of marriage should be construed to include civil unions as well, where applicable.

The need for an anti-discrimination law

27. I am wholeheartedly in agreement with the opinion of the Hon'ble Chief Justice that there is a need for a separate anti-discrimination law which *inter alia* prohibits discrimination on the basis of sexual orientation. Presently, there are several laws that have an anti-discrimination aspect to them. However, they are fragmented and may fail to capture the multitudinous forms of discrimination. Another compelling reason for a law that places a *horizontal* duty of anti-discrimination is provided by the spirit of Article 15, which prohibits discrimination by both the State and private actors. Presently, although the Court assumes its role as the 'sentinel on the *qui vive*', the only method to enforce this Constitutional right under Article 15 would be through its writ jurisdiction. There are significant challenges for marginalized communities to access this remedy. Therefore, the proliferation of remedies through an anti-discrimination statute can be a fitting solution. Such legislation would also be in furtherance of the positive duty of the State to secure social order and to promote justice and social welfare under Article 38 of the Constitution.

28. My suggestions for an anti-discrimination law are as follows. First, such a law should recognize discrimination in an *intersectional* manner. That is to say, in assessing any instance of discrimination, the Court cannot confine itself to a singular form of discrimination. Instead, discrimination must be looked at as a confluence of factors – as identities and individual instances of oppression that 'intersect' and create a distinct form of disadvantage.[20] Discrimination laws can only be effective if they address the types of inequality that have developed in the given society. This principle has already been recognized by this Court in *Navtej*.[21] Second, the duties under an anti-discrimination law can be proportionately distributed between different actors depending on factors such as the nature of functions discharged, their control over access to basic resources, and the impact on their negative liberty.[22] Third, an anti-discrimination statute must also enumerate methods to redress existing discrimination and bridge the advantage gap. This could be through policies that distribute benefits to disadvantaged groups.[23]

Equal rights to equal love

29. The principle of equality mandates that non-heterosexual unions are not excluded from the mainstream socio-political framework. However, the next step would be to examine the framework itself, which cannot be said to be

[20] Shreya Atrey, *Intersectional discrimination* (Oxford University Press, 2019), p. 41.
[21] (supra).
[22] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015), p. 212-213.
[23] Khaitan (supra), p. 39.

neutral. On the contrary, it is inherently value-laden. One particularly pernicious value is patriarchy, which manifests in various oppressive ways. Gendered stereotypes and sex-based violence are lived realities of many. This is something both society and law recognize.

30. I believe that the legal recognition of non-heterosexual unions can challenge culturally ordained gender roles even in heterosexual relationships. For a long period of time, marriage has been viewed in *gendered* terms. That is to say, one's status as husband or wife determines their duties and obligations towards each other, their family, and society. Marriage enforces and reinforces the linkage of gender with power by husband/wife categories, which are synonymous with social power imbalances between men and women.[24] This is notwithstanding the fact that there has been progressive awareness of these issues. Non-heterosexual unions can make an important contribution towards dismantling this imbalance while emphasizing alternative norms. As Eskridge puts it: "*In a man-man marriage where tasks are divided up along traditional lines, a man will be doing the accustomed female role of keeping house. It is this symbolism that represents the deeper challenge to traditional gender roles. The symbolism can be expressed in the argot of normalization. Once female-female and male-male couples can marry, the wife-housekeeper/husband-breadwinner model for the family would immediately become less normal, and perhaps even abnormal over time. The wife as someone who derives*

[24] Nan. D. Hunter, '*Marriage, Law and Gender: A Feminist Inquir*y' in Sex Wars: Sexual Dissent and Political Culture (Lisa Duggan and Nan. D. Hunter eds, Routledge, 2006) p. 109 – 110.

independent satisfaction from her job outside the home would immediately become a little bit more normal."[25]

31. In a non-heterosexual union, duties and obligations are not primarily dictated by culturally ordained gender norms. In other words, both partners are not limited by extant gender norms to shape their relationship, including the division of labour. For instance, studies have found that partners in non-heterosexual relationships share unpaid labour more equally than those in heterosexual relationships.[26] This is not to suggest that other imbalances of power do not exist within non-heterosexual unions. Nevertheless, non-heterosexual unions are not limited by the legally and socially sanctioned gendered power dynamic that can be present in heterosexual unions.[27]

32. Legal recognition aids social acceptance, which in turn increases queer participation in public spaces. Through the medium of legal recognition, queer persons will have a greater opportunity to be 'seen' and 'heard' in ways not previously possible. Queer expression will help facilitate an expansive social dialogue, cutting across communities and generations. This dialogue will help us reimagine all our relationships in a manner that emphasizes values such as mutual respect, companionship, and empathy.

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[25] William Eskridge, *Equality Practice: Civil Unions and the Future of Gay Rights,* (Routledge, 2002) p. 322.
[26] Abbie E. Goldberg et al, *The Division of Labor in Lesbian, Gay, and Heterosexual New Adoptive Parents,* 74(4) Journal of Marriage and Family, p. 812; Charlotte J. Patterson et al, *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns,* 11 Journal of Adult Development, p. 179.
[27] Rosemary Auchmuty, *When Equality is not Equity: Homosexual Inclusion in Undue Influence Law,* 11 Feminist Legal Studies, 163, 183.

Conclusion

33. Is this the end where we have arrived? The answer must be an emphatic 'no'. Legal recognition of non-heterosexual unions represents a step forward towards marriage equality. At the same time, marriage is not an end in itself. Our Constitution contemplates a holistic understanding of equality, which applies to all spheres of life. The practice of equality necessitates acceptance and protection of individual choices. The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others. After all, "it's my life."[28]

....……J.
[Sanjay Kishan Kaul]

New Delhi.
October 17, 2023.

[28] 'Its my life', a song by Bon Jovi.
"It's my life
It's now or never
But I ain't gonna live forever
I just want to live while I'm alive".