REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO(S). 1011 OF 2022

SUPRIYO @ SUPRIYA CHAKRABORTY & ANR. …APPELLANT(S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

WITH

WRIT PETITION (CIVIL) NO(S). 1020 OF 2022

WRIT PETITION (CIVIL) NO(S). 1105 OF 2022

WRIT PETITION (CIVIL) NO(S). 1141 OF 2022

WRIT PETITION (CIVIL) NO(S). 1142 OF 2022

WRIT PETITION (CIVIL) NO(S). 1150 OF 2022

WRIT PETITION (CIVIL) NO(S). 93 OF 2023

WRIT PETITION (CIVIL) NO(S). 159 OF 2023

WRIT PETITION (CIVIL) NO(S). 129 OF 2023

WRIT PETITION (CIVIL) NO(S). 260 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 05 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 06 OF 2023

WRIT PETITION (CIVIL) NO(S). 319 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 07 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 08 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 10 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 09 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 11 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 12 OF 2023

TRANSFERRED CASE (CIVIL) NO(S). 13 OF 2023

WRIT PETITION (CIVIL) NO(S). 478 OF 2023

J U D G M E N T

S. RAVINDRA BHAT, J.

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1. At the centre of the dispute, lies the definition and the content of two willing individuals' right to marry. On the one hand the petitioners assert that marriage is an evolving social institution, capable of embracing the union of two willing non-heterosexual, queer or LGBTQ+ (used interchangeably) individuals and necessitating state recognition; on the other, the respondents assert that the institution of marriage rests on certain constant and unchanging premises, the most prominent of which is that it is a heterosexual union. The task of this Court lies in determining how the Constitution speaks on the issue.

2. Having had the benefit of reading the draft and revised opinions circulated by the learned Chief Justice, Dr. Chandrachud, we find it necessary to pen our reasoning and conclusions in this separate judgment. The learned Chief Justice has recorded in detail the submissions made by counsel, and claims made; they consequently do not require reiteration. Similarly, the sections addressing the Union Government's preliminary objections – i.e., the discussion on the court's authority to hear the case [Section D(i)], and that queerness is a natural phenomenon that is neither urban or elite [Section D(ii)], are parts we have no hesitation in agreeing with. However, we do not agree with the conclusions

arrived at by the learned Chief Justice and the directions issued. We do agree with certain premises and conclusions that he has recorded – they are: (a) that there exists no fundamental right to marry under the Constitution; (b) that the Special Marriage Act, 1956 (hereafter "SMA"), is neither unconstitutional nor can it be interpreted in such a manner so as to enable marriage between queer persons; and that (c) transgender persons in heterosexual relationships, have the right to solemnize marriage under existing legal frameworks. We have briefly highlighted our main points of agreement, and reasoned in more detail those aspects with which, respectfully, we cannot persuade ourselves to concur. We had the benefit of perusing the concurring opinion of Narasimha, J. We endorse those observations and conclusions fully; the reasoning and conclusions shall be read as supplementing that of the present judgment.

3. The common ground on which the batch of petitions claim relief is that LGBTQ+ persons are entitled to solemnize and register their marriage – in other words, they claim a right to *legal* recognition of their unions within the marriage fold. The petitioners rely on fundamental rights to equality and non-discrimination, of dignity and autonomy and of expression and association, and specifically, most petitioners focus on Section 4(c) of the SMA as well as the first and second schedules thereof, to state that particular references to "husband" or "wife" in its provisions are to be read "down", and a neutral expression needs to substituted, instead. A few petitioners also claims that Section 4(c) and 17 of the Foreign Marriage Act, 1969 (hereafter "FMA") need to be similarly read down. Some of the prayers also relate to the right of such couples to adopt under existing laws in India. Some of the prayers specifically challenged Chapter II of the SMA– relating to notice and objections procedure prescribed. However, during the course of hearing, the court indicated that this was not a question of law that necessitated a 5 judge-bench ruling, and hence this issue was to be left for consideration by a numerically smaller bench.

I. Nature of marriage as a social institution

4. Marriage, as a social institution predates all rights, forms of political thought and laws. The institution of family has no known origin in the sense that, there has been no stage of human existence, in which family was absent leading to another time in which it emerged. Marriage, however, has been regarded - for the longest time, as a relationship of man to woman which is recognized by custom, and thereafter law; it involves certain rights and duties in the case of both persons entering the union. It is considered to be one of the most important relationships, as it is not solely the individuals' happiness and well-being but that of others too, that is affected by their conduct in it. It has long been regarded as the reason for society's continuance on the one hand, and its building block on the other. What is marriage and the conceptualisation of its role in society, has undergone change over the time; it has engaged the attention of philosophers, from Plato to Hegel, Kant and John Stuart Mill and of religious leaders, like St. Augustine.

5. Different traditions view marriage as sacraments, and indissoluble unions (Hindus and Catholic Christians); Islam regards marriage as both contractual and sacred; Parsis regard it as both a sacrament and contractual. Most – if not all, place importance on procreation, creation of family, co-habitation, shared values as the important markers; at the same time, these traditions also recognize - in varying degrees, importance of companionship, spiritual union, friendship and togetherness of the spouses, in every way.

6. The respondents are right, in one sense in underlining that all conceptions of what constitutes marriage, all traditions and societies, have by and large, historically understood marriage as between heterosexual couples. The contexts of culture, social understanding of what constitutes marriage, in every social order are undoubtedly very important. At the same time, for the purpose of determining the claims in these petitions, it is also necessary to mark the progression of what

were deemed constitutive and essential constituents, and essential boundaries within which marriages were accepted.

7. Marriages have not always been dictated by voluntary choice. In medieval European societies, when a girl was physically able to consummate marriage, she was eligible for matrimony. Among the nobility and landed gentry, the principal consideration for marriage was exchange of property- in the form of dowry. Thus, it was not uncommon that among the "upper classes" marriages were loveless and unhappy. The sole reason for marriage was touted to be procreation, which the church dictated; thus, consummation of marriage and physical sexual relations were considered the most important features of every marriage, since this meant the establishment of family. Among Hindus, barriers of other kinds, such as ban on *sagotra* and *sapinda* marriages, and impermissibility of non-endogamous marriages, was widely prevalent, for the longest time. Although amongst Muslims, marriage is both sacramental and contractual, and requires exercise of free will, nevertheless, it is premised on the agreement of *mehar*, or the amount the groom would offer, for the bride. Muslim are permitted to marry others of the same faith, or from the "People of the Book" (known as *Kitabiyas*), such as Jews, Sabians and Christians. No marriage with polytheists is permitted. Similarly, widow re-marriage amongst Hindus was prohibited. Likewise, injunctions against inter-caste marriages were widely prevalent. Child marriages were widely prevalent too. Inter-religious marriages were impossible. In the USA, various laws had, in the past, prohibited interracial marriages. Arranged marriages were very common throughout the world until the 18th century.

8. It is, therefore, evident that for long periods, in many societies, the choice of a matrimonial partner was not free; it was bounded by social constraints. Much of the time, marriage was seen as an institution meant for procreation, and sexual union of the spouses. In most societies marriage had cast "roles" for the spouses; they were fairly inflexible, with men controlling most decisions, and women placed in subordinate positions, with little or no voice, and, for the longest time,

no legal authority, autonomy or agency. For millennia, custom, tradition, and law subordinated wives to husbands. Notions of equality of partners or their roles, were uncommon, if not totally unheard of. All these underwent radical change.

9. The greater part of history shows that choice of a spouse, based on love or choice played almost no role at all. Enlightenment, and Western thinkers of the eighteenth century established that pursuit of happiness was important to life. They advocated marrying for love, instead of status, or wealth or other considerations. The Industrial Revolution gave impetus to this thought. Marriages were solemnized and celebrated with increasing frequency, in Western cultures, based on choice, voluntary consent, and without parental approval. This movement increased tremendously - as women's-rights movement expanded and gained impetus in the nineteenth and twentieth centuries, wives started being regarded as their husbands' equals, not their property. Couples were also enabled to choose whether to have, and if so, how many children to have. If they were unhappy with each other, they could divorce - a choice exercised by a large number of couples. Marriage became primarily a personal contract between two equals seeking love, stability, and happiness. Therefore, although social mores prevailed in relation to marriage, traditions and legal regimes were not static; the changes that society underwent or the forces that brought change, also carried winds that breathed new content, new contexts and new values, into the institution of marriage.

10. Law’s progress stresses upon individual’s rights for equality. The form of marriage, or the legally prescribed procedures assume a secondary role - they are matters of belief and practice. They cannot be regarded as the essential content of marriage. Tying *thali* is necessary in South India among many Hindu communities; and in some parts the exchange of rings, garlands and some rituals is necessary in North India. Many Hindu marriage customs and traditions insist on the *saptapadi*; amongst Muslims, the *nikah* ceremony, witnessed by invitees, and other customary rituals and practices, is generally followed; Christian

customs emphasize on solemnization by the couples taking marriage vows. The rich diversity of this country and its pluralism is reflected in customary practices surrounding marriage solemnization, all – if not most of which involve the couple, the members of their family, and the larger community. Ritualistic celebration of marriage is considered by some as essential, while many in other sections may deem that the factum of marriage sufficient. For relationships that did not have customary practice dating back in history, the State enacted law – much like the petitioners, seek.

11. Therefore, legislations governing inter-caste and inter faith marriages, and adoption, are two important social relations relating to the family, through which secularism finds its base for an egalitarian social order under the Constitution. The enactment of laws to facilitate this aspect is testimony of the right of individuals to personal choice and autonomy. For instance, enactment of the Hindu Marriage (Removal of Disabilities) Act, 1946 enabled persons from the same *gotra* or *pravara* to marry. Likewise, the bar to Hindu widows' remarriage, was removed by enacting the Hindu Widows Remarriage Act, 1856. Inter-caste and inter-faith marriages became a possibility under the SMA after 1954.

12. The 'legal' dimension of marriage, in the US – the jurisprudence of which the petitioners relied on, is markedly different from the nature of marriage in India, and its evolution. This contextual difference, is of great relevance, when considering a constitutional question of this kind. Marriage in countries like the US, was earlier a sacramental institution that flowed from the Church and its divine authority. However, in modern times, it flows from the State; which created a 'license regime' for marriage. The result is that marriages may be performed and celebrated with religious traditions or rituals, that have great meaning personally for the individuals – but the *legality* of the marriage, is solely dependent on a validly obtained license. This regime has since been extended to queer couples as well in the US. The *law* relating to marriage in India, however, has had a different trajectory. A deeply religious affair, it gained its *legitimacy* and

legal status from personal law and customs, that govern this aspect of life – for members belonging to all faiths. The matrimonial laws that have been enacted– were a result of the codification project (in the 19th and 20th century), which expressly recognise these social practices, while continuing to offer space to unwritten customary practices as well (barring aspects like marriageable age, etc. which are regulated by law). As mentioned, the SMA is the only avenue for a form of secular/non-religious 'civil marriage' – which too still ties into personal law for succession, and other aspects. The Indian context, is elaborated in the following Part II.

II. State interest in regulating social practices, through legislation

13. Before undertaking a study on whether there is a fundamental right to marry, and an obligation on the State to create such an avenue, it is necessary to traverse the brief history of state intervention in social practices *including in relation to marriage*. These laws were enacted in relation to different subject areas. However, a pattern certainly emerges, on the limited scope of interference.

14. The social practices resulting in stigma and exclusion of large sections of society, impelled the Constitution framers to frame specific provisions like Article 15(1) and (2), Articles 17, 23 and 24, which was left to the Parliament to flesh out through specific legislation. This resulted in statutes such as the Protection of Civil Rights Act, 1955, Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Bonded Labour System (Abolition) Act, 1976, Immoral Traffic (Prevention) Act, 1956, the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, and their respective amendments. The laws removing barriers which prevented large sections of society from entering into temples and places of public worship, is another example.

15. In a somewhat similar vein, legislative activity, as aimed at bringing about gender parity through prohibiting prevailing practices that further inequality and sometimes even criminalizing certain customs, resulted in legislations such as the

Equal Remuneration Act, 1976 (which guaranteed equal pay for equal work regardless of the sex of the worker), the Dowry Prohibition Act, 1961 as amended subsequently, introduction of provisions in criminal law which gave teeth to such provisions [Sections 498A and 304B of the Indian Penal Code, 1860 ("IPC"), and Section 113A and 113B of the Evidence Act, 1872 which enabled courts to raise presumptions in the trial of such offences].

16. Other practices aimed at realization of social goals and furthering the mandate of Article 15(3) in respect of children such as the right to free universal education under Article 21A of the Constitution, and the Right to Free Education Act, 2009; The Child Labour (Prohibition and Regulation) Act, 1986; Protection of Children from Sexual Offences Act, 2012, the Juvenile Justice (Care and Protection) Act 2016 (hereafter, "JJ Act"), etc. In all these, the Parliament or the concerned legislatures donned the role of reformers, and furthered the express provisions of the Constitution, enjoining State action, in furtherance of Articles 15(2), 15(3), 17, 23 and 24.

17. Marriage has historically been a union solemnized as per customs, or personal law tracing its origin to religious texts. Legislative activity, in the *personal law* field, so far has been *largely, though not wholly,* to codify prevailing customs and traditions, and *regulating* them, only where needed. The instances that stand out, are the enactment of the Indian Succession Act, 1925, Hindu Women's Right to Property Act, 1937, Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, the Indian Divorce Act, 1869 (as amended in 2001), the Muslim Personal Law (Shariat) Application Act, 1937; and the Anand Marriage Act, 1909 (as amended). These laws mostly *codified* traditions and customs, which existed, and to an extent, regulated marriages and succession laws. These laws also sought to introduce reforms: for the first time, monogamy was enacted as a norm applicable to all Hindus; likewise, the option of divorce was enacted, together with grounds on which or other remedies (like

judicial separation) could be sought. Further, the minimum age of marriage was also enacted, through provisions in various personal laws, and enforced through the Prohibition of Child Marriage Act, 2006 (which repealed the pre-existing Child Marriage Restraint Act, 1929) – this law applies to all sections of societies.

18. Existing conditions of women, especially in respect of issues such as maintenance, were considered inadequate even before the Constitution was brought into force. The earliest reform introduced was through the Bengal Sati Regulation, 1829[1] (by the colonial rulers). This was later followed by the Hindu Widow Remarriage Act, 1856 which *enabled* re-marriage of Hindu widows. These enactments pre-date the Constitution, and can be seen as *reforms,* meant to outlaw abhorrent practices viewed as evil, and needing prohibition, to protect women's lives; in the case of widow remarriage, it was to enable child and young widows an opportunity to lead lives. Given the diversity of Hindu traditions and the differing approaches in various schools of law, which prevailed in different parts of the country, it was considered necessary to enact the Hindu Women's Right to Property Act, 1937[2] (later with the enactment of the Hindu Succession Act, 1956, some rights were expanded through its provisions[3]). For a long time, daughters were treated unequally in regard to succession to the estate of their deceased father; this changed with the enactment of the Hindu Succession Amendment Act, 2005, and the substitution of Section 6, daughters (who were hitherto excluded from succession to any coparcenary properties) became entitled

[1] Regulation XVII, A. D. 1829 of the Bengal Code

[2] With the introduction of the Hindu Women's Right to Property Act, 1937, the widow of the deceased husband now had a right to her husband's property after his death. Unlike previously, where the property was divided among the surviving coparceners by the doctrine of survivorship, now it was the widow who had the sole right to such property. However, she only had limited rights (popularly called "limited estate") over such property, which remained with her till her death.

[3] After the coming of the Hindu Succession Act, 1956, any property held by a Hindu female, whether before or after the commencement of that Act and which does not fall under the exception of 14(2), is held by her in an unrestricted and absolute manner. The word "possessed" as incorporated in section 14 was further held by various judgements of this court to include any kind of remote possession, be it constructive, physical, or even a right to possess. The result of the incorporation of this section led to a situation whereby all the limited rights given to a female Hindu under the 1937 Act became absolute by virtue of section 14(1) of the Hindu Succession Act.

to claim the share that a son was entitled to, in the case of death of a coparcener in relation to ancestral property.

19. The right to maintenance (*pendente lite*, as well as alimony) was given statutory force under the Hindu Marriage Act 1955 as well as the Hindu Maintenance and Guardianship Act 1956, for Hindus. All married women and children of their marriage, regardless of their religious or social backgrounds, were enabled to claim maintenance, by virtue of Section 488 of the Criminal Procedure Code, 1898. This provision was re-enacted, and progressively amended through section 125 of the Code of Criminal Procedure, 1973. This court, in its five-judge decision in *Mohd. Ahmad Khan v. Shah Bano Begum (hereafter, "Shah Bano")*[4] upheld the right of Muslim women, including divorced Muslim women to claim maintenance. However, soon after that decision, Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986, which diluted the ruling in *Shah Bano* (supra) and restricted the right of Muslim divorcées to alimony from their former husbands for only 90 days after the divorce (the period of *iddat* in Islamic law). The restriction imposed was however interpreted narrowly, and this court through a Constitution Bench, in *Danial Latifi v. Union of India*[5] held that *"nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time"*.

20. The Age of Consent Act in 1891, raised the age of marriage from 10 to 12 years. The Child Marriage Restraint Act of 1929 addressed this by prescribing the minimum age of marriage for females to 14 years and for boys to 18 years. The Child Marriage Restraint Act of 1929 (also known as the Sarda Act), was enacted as a result of prolonged pressure from social reform organisations and concerned people who fought against the negative repercussions of child marriage. The age

[4] 1985 (3) SCR 844
[5] 2001 Suppl. (3) SCR 419

limitations were later raised to 18 and 21 years old, under the Prohibition of Child Marriage Act, 2006. The practise of marrying off children young, which prevailed before these enactments, was thus, interdicted by legislation.

21. Similarly, even while exercising personal choice in marriage, these choices are regulated by law – prohibition of marriage of persons related by blood (consanguineous marriages)[6]. Other restrictions such as the requirement to be of "sound mind" to give valid consent or not to be *"unfit for marriage and the procreation of children"*.[7] If a spouse is *"incurably of unsound mind"* or on the ground of unsoundness, the other spouse can secure divorce[8]. Bigamy among Hindus was abolished by enactment of the HMA, in 1955. Reform has been the underlying theme, impelling the state to intervene. The legislative trajectory, and indeed some of the debates that preceded enactment of measures like monogamy and divorce, showed a division of opinion. The first President, Rajendra Prasad, expressed strong sentiments against adopting such "foreign" concepts which were opposed to Hindu society. There were other voices, most prominently, women in public life, who *supported* the need to empower women.

22. It can thus, be seen that two kinds of legislations have regulated marriage: the first, like SMA, HMA, the Hindu Disabilities Removal Act, and the Hindu Widows Remarriage Act, removed barriers, and enabled exercise of meaningful choice, specifically *to women*. The second kind of legislation are those which enacted restrictive regulations, essentially to further an orderly society and/or protect women: prohibit bigamy; define minimum age for marriage; child

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[6] Defined as "prohibited degrees" under Section 3 (g) of the Hindu Marriage Act, 1955 - which is not confined to a bar against marriages related by blood, but also through non-biological ties, such as widow of brother, son's widow; mother in law, etc; Section 3 (1) (a) of the Parsi Marriage and Divorce Act, 1936; Section 19, Indian Divorce Act, 1869; Section 88, Indian Christian Marriages Act, 1872. Among Muslims, the concept of consanguinity is known as *qurabat*, i.e. blood relationships such as marrying one's relatives like mother, grandmother, sister, aunt, niece, etc. Other grounds (affinity or *mushaarat*) are also prohibited relationships, i.e. marriage with mother in law, daughter in law, step grandmother; step granddaughter, fosterage when a child under the age of two years has been fed by a woman other than his mother, or when the woman becomes his foster mother, a man cannot marry his foster mother or her daughter, i.e. foster sister.

[7] Section 5 (i) (ii) (iii), HMA [Hindu Marriage Act, 1955]

[8] Section 13 HMA; Section 32 (b) and (bb) Parsi Marriage Act, 1936; Section 10 (1) (iii) Indian Divorce Act, 1869; under Section 2 (v) of the Dissolution of Muslim Marriages Act, 1939

marriage restraint; marriage of individuals within prohibited degrees of relationships, etc. Whereas some restrictions, in a sense codified and recognized existing *customs* – such as by enacting prohibited degrees of relationships, rule against insanity, rules enabling declaration of nullity or divorce on ground of impotence, etc., - others were meant to further interests of women and children and also enable exercise of choice.

23. Such *reforming* and codification, however, did not cover the entire field. For instance, in the field of succession and inheritance, the Hindu Succession Act, 1956 only enacts certain broad features, leaving untouched the rights of various communities and sections of Hindus, to work out their rights in succession to joint family, Hindu Undivided Family and coparcenary property- and this unwritten, uncodified law, (in many cases based on customs and local traditions) is enforced not only in regard to inheritance, but also in the field of taxation. Likewise, the law accommodates and accords primacy to custom [e.g., Section 2 (d) which states that persons other than Hindus- including Jews, Muslims and Christians who may be following Hindu customs, would continue to do so[9]; Section 7 which spells out the ceremonies of Hindu marriage, also states that they shall be based on *"customary rites and ceremonies of either party thereto"*; and similarly, customary divorce amongst Hindus is accorded primacy, by Section 29 (2)[10]]. Neither the Hindu Marriage Act, nor the Hindu Succession Act, apply to members of the Scheduled Tribe communities; the Hindu Adoptions and Maintenance Act, applies to them in a nuanced manner.[11] The Hindu Minority and Guardianship

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[9] Section 2 which says that the Act does not apply to "(c) *to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed."*

[10] *"29… (2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act."*

[11] Section 2 (2), Hindu Marriage Act, and Hindu Succession Act, are identically worded, and state that:
"(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."

The Hindu Adoptions and Maintenance Act, 1956 is worded differently, and covers, *inter alia,*

Act, 1956, on the other hand, has a provision similar to the one under the Hindu Minority and Maintenance Act as well as one which excludes members of the scheduled tribe communities[12]. In the latest three judge bench decision of this court, in *Revanasiddappa v. Mallikarjuna*[13]*,* this court clarified that with the enactment of Section 16 of the HMA, the legitimacy conferred upon children born of void or voidable marriages would be that they are *"entitled only to a share in their parent's property but cannot claim it of their own right as a consequence of which they cannot seek partition during the life-time of their parents".* The court also held that they cannot claim any rights other than what was expressly provided for. Thus, uncodified law and custom was upheld.

24. Legislative action initiated at different points in time thus were reformatory or meant to effectuate certain fundamental rights. Practices and customs which had resulted in the degradation or diminution of individuals, seen as inconsistent and abhorrent to democratic society, were sought to be eliminated by these laws. When codification attempts resulted in residual discrimination, the courts stepped in to eliminate and enforce the fundamental rights [*Independent Thought v. Union of India & Anr., (hereafter, "Independent Thought")*[14]*; Shayara Bano v. Union of India & Anr.*[15], etc.].

25. The only legislations which come to one's mind which in fact created social status or facilitated the *status* of individuals in private fields are the Special Marriage Act, 1954, the Protection of Women from Domestic Violence Act, 2005 ("DV Act"), and Section 41 of the *Juvenile Justice (Care and Protection of Children)* Act (which enables adoption amongst members of all faiths and

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"(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;"

[12] Section 3 (2) states that *"(2) Notwithstanding anything contained in sub-section (1) nothing contained in this Act shall apply to the members of any scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs."*

[13] 2023 INSC 783; ; 2023 SCC OnLine SC 1087

[14] 2017 (13) SCR 821

[15] 2017 (9) SCR 797

communities). The latter, i.e., the provision enabling adoption was preceded by certain guidelines which facilitated inter-country adoptions. These guidelines, initially pioneered in the judgment of this court in *Laxmi Kant Pandey v. UOI*[16] - were accepted. Executive instructions filled in the vacuum to some extent assimilating the guidelines of the court but at the same time the limitation in law that prevented adoption of children from different faiths and backgrounds, persisted. These limitations were finally overridden through the enactment of the Juvenile Justice Act, 2016. The Protection of Women from Domestic Violence Act, 2005 which was for the purpose of *more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family.* For the first time, a legal status was given to unmarried couples, which enabled women, subjected to domestic violence, to the right to residence (quite apart from remedies through its provisions). The culture of the Constitution, thus, has impelled the removal of barriers which hitherto existed. *Traditional barriers* – such as those based on social practice, and stereotypes such as gender roles, have, through express constitutional provisions like Articles 14, 15 and 16 which shaped legislation (and where this fell short, through judicial intervention), been overcome and in some cases eliminated.

26. The role of the legislature has been to act as codifier, and in many instances, not enact or codify existing customs or practices, and, wherever necessary, intervene, and in furtherance of Article 14 and 15(3) enact laws. Parliament, has intervened and facilitated creation of social status (marriage) through SMA, and enabled the creation of the institution of adoption, which was available amongst only certain communities. These, and other legislative interventions, are a result of state interest in *reforms* or furthering the interests of given communities or persons. For these reasons, we do not particularly subscribe to the characterisation of 'democratizing intimate zones' as discussed in the learned chief justice's draft

[16] [1985] Supp. (3) SCR 71

opinion. These outcomes were driven by enacted law; furthermore, there was state interest, which impelled regulation of such relationships, as for instance, in ensuring that the minimum age for marriage of girls. Likewise, there is state interest in regulating *what kind of relationships, i.e. prohibited degrees of relationship,* should be enacted as *disqualifications to marriage*. Marital "offences" such as desertion, or "cruelty" [not confined to physical violence or cruelty] are also grounds afforded to spouses, to seek matrimonial remedies. The absence of such legislation would have meant that children of any age, would continue to have been married off, much to the peril of the girl child's health and life; likewise, the codification and enactment of prohibited degrees of relationships, were meant to further certain public health interests.

III. Tracing the rights enjoyed by queer persons

A. The trinity - autonomous choice, dignity and non-discrimination

i. Importance of personal choice under the Constitution

27. The journey of our constitutional progression, and our understanding of the personal liberties, especially right to life (Article 21) and equality (Article 14) has peeled and laid bare, so to say, multiple layers of prejudice, insensitivity and indifference of the social order or other collectives, in regard to a person's freedom to exercise her volition, and free will, in several matters. For instance, a woman's choice and bodily autonomy in regard to exercise of her reproductive rights has been acknowledged as a fundamental right–- integral to the right to life, in *Suchita Srivastava & Ors. v. Chandigarh Administration*[17] reiterated in *Devika Biswas v. Union of India*[18]*; X v. Principal Secretary, Health and Family Welfare Department (hereafter, "X v. Principal Secretary")*[19]*; Independent Thought (supra)* and other decisions.

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[17] 2009 (13) SCR 989. This court held that "*a woman's right to make reproductive choices*" is "*a dimension of 'personal liberty' as understood under Article 21*".
[18] 2016 (5) SCR 773
[19] 2022 (7) SCR 686

28. A person's autonomy to choose a spouse or life partner, has been declared as integral to one's fundamental right to live: in *Asha Ranjan v. State of Bihar*[20], this choice of a *"partner in life"* was held to be *"a legitimate constitutional right"* that is "*founded on individual choice"* and the court decried the concept of *"class honour"* or *"group thinking"* which acted as barriers from the exercise of free choice. Similarly, *In re [Gang-Rape Ordered by Village Kangaroo Court in W.B.,*[21] echoed the same idea and said that the state is *"duty-bound"* to protect the fundamental rights *"and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage." Shafin Jahan v. Asokan K.M & Ors., (*hereafter, *"Shafin Jahan")*[22], brought home that expressing choice is in *"accord with the law"* and is *"acceptance of individual identity."*[23]

29. The nine-judge decision in *K.S. Puttaswamy v. Union of India (hereafter, "K.S. Puttaswamy")*[24] through Dr. Chandrachud J writing for himself and five other judges, in several places, explored the various nuances of the right to privacy, and observed that *"personal choices governing a way of life are intrinsic to privacy"*.

30. The choice of a woman to seek employment, was upheld in *Anuj Garg v. Hotel Association of India*[25] where gender and age barriers were held unconstitutional; the choice of an individual patient has been held to exercising his (or her) legal right to euthanasia (or to his relations in certain circumstances, particularly when the patient is unconscious or incapacitated to take a decision), in *Common Cause (A Regd. Society) v. Union of India (UOI) & Ors (hereafter, "Common Cause")*[26]. Traditional barriers to temple entry based on gender was

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[20] 2017 (1) SCR 945
[21] (2014) 4 SCC 786
[22] 2018 (4) SCR 955
[23] Choice was also the central theme, in *Gian Devi v. Superintendent, Nari Niketan* (1976) 3 SCC 234, *Soni Gerry v. Gerry Douglas* (2018) 2 SCC 197 and *Nanda Kumar v. State of Kerala* (2018) 16 SCC 602
[24] 2017 (10) SCR 569
[25] 2007 (12) SCR 991
[26] 2018 (6) SCR 1

the subject matter of this court's ruling in *Indian Young Lawyers Association & Ors. v. the State of Kerala & Ors.*[27]*)*.

ii. Dignity as a dimension of equality and all our liberties

31. The promise of the Preamble to the Constitution is of 'fraternity' *"assuring* power, conflicts, and oppression, denial of participation. Quite naturally, these occupied centre-stage in our struggle for *Swaraj.* We did not strive merely for freedom from the shackles of a foreign power; our founders realized that millennia old practices of marginalization, oppression and exclusion produced humiliation, resulting in dehumanization of the human "*self*". The relation of self to other self, the dominant or powerful self to the oppressed self, ventures on the concept of equality. It thus tries to eliminate untouchability, sex and caste-based discrimination, and ensure dignity.

32. Dignity is understood to mean the intrinsic worth of a person or the inherent value of a human being which entitles one to respect. The crucial aspect of substantive dignity lies in the state's role in providing basic conditions of life which enable individuals to fully realise the potential of intrinsic dignity by living, what is called, a 'dignified life'.

33. In the Indian context the idea of equality and dignity is to reach its constitutional commitment to be a republic, based on democracy. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*[28]*,* this court said that the *"right to life includes the right to live with human dignity". Prem Shankar Shukla v. Delhi Admn*[29] voiced the same idea, i.e. that the Preamble set the *"humane tone and temper of the Founding Document and highlights justice, equality and the dignity of the individual."* The court went on to hold that Article

[27] 2018 (9) SCR 561
[28] 1981 (2) SCR 516
[29] 1980 (3) SCR 855

21 *"is the sanctuary of human values, prescribes fair procedure and forbids barbarities, punitive or procedural".*

34. This court, in *Jeeja Ghosh v. Union of India*[30], spoke about human dignity as a "core value" and that the "*right to life is given a purposeful meaning by this Court to include right to live with dignity".* The court quoted from Aharon Barak[31] that human dignity has a *"central normative role"* and that as a constitutional value it is *"the factor that unites the human rights into one whole. It ensures the normative unity of human rights"* expressed in different ways i.e., normatively as a basis for constitutional rights; an interpretive principle for determining the scope of constitutional rights and that dignity has *"an important role in determining the proportionality of a statute limiting a constitutional right."* In *Kesavananda Bharati v. State of Kerala (hereafter, "Kesavananda Bharti")*[32] too the value of dignity was underlined: "*the basic dignity of man does not depend upon the codification of the fundamental rights nor is such codification a prerequisite for a dignified way of living*". This view has been adopted in several other decisions. It would be to borrow the words of Justice K.K. Mathew *"an idle parade of familiar learning to review the multitudinous cases"*[33] underpinning this aspect.

35. This court in *K.S. Puttaswamy* (supra) too, recognized the value of dignity[34]. The judgment of this court in *National Legal Services Authority v. Union of India & Ors., (hereafter, "NALSA")*[35] is significant; it underlines how dignity can be said to form the basis of enjoyment of fundamental freedoms.

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[30] 2016 (4) SCR 638

[31] Aharon Barak "Human Dignity - The Constitutional Value and the Constitutional Right" Cambridge University Press (2015)

[32] 1973 Supp SCR 1

[33] *State Of Gujarat And Another v. Shri Ambica Mills Ltd* 1974 (3) SCR 760

[34] This formulation was followed in *X v. The Principal Secretary (supra).* In *Navtej Johar (supra),* Dipak Misra, J, said that *"[t]his is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary prerequisite that consent is the real fulcrum of any sexual relationship.".*

[35] (2014) 5 SCR 119

36. The constitutional emphasis on dignity is not without a reason. Ambedkar, and several of our constitution framers, meticulously sought to carve out of the remnants of a socially repressive, hierarchical, and unequal society a modern constitution, reflecting the aspirations of a confident people, in a vibrant democracy. The society which our constitution created was to emerge out of darkness of caste and other forms of social prejudice and oppression, into the light of the rule of law, social justice, and egalitarianism. To Ambedkar and other constitution makers, political freedom *(swaraj)* meant precisely the freedom to make the self, to make choices with dignity, to break from historical suffering and humiliation. The drafting history of the equality code (Articles 14, 15, 16, 17 and 18) bear poignant testimony to this aspect.

37. Dignity has both an internal and external aspect. In its internal context, dignity and privacy are intrinsically twined. In its external context, dignity is multidimensional: it is a right to be treated as a fellow human, with all attributes of a human personality, which is, the right and expectation to be accorded due respect, treated with dignity and equal worth. Denial of these, has a disproportionate impact on the individual: they are diminished in their own eyes, and the rest of the world, resulting in a loss of one's self worth and moral worth. This is the vision of equality, social justice, welfare and dignity which our Constitution articulates.

iii. Equality, non-discrimination and non-exclusion

38. The equality code - Articles 14, 15, 16, and 17 (and Articles 23 and 24), so referred to in various previous decisions of this Court - for instance as the constitution's "identity" in *M. Nagaraj v. Union of India (hereafter, "M. Nagaraj")*[36] is not a "wooden" equality before law and equal protection of law. It contains specific injunctions prohibiting the state from discriminating on

[36] 2006 Supp (7) SCR 336

specifically forbidden grounds [such as caste, race, sex, place of birth, religion, or any of them, in Article 15; and caste, sex, religion, place of residence, descent, place of birth, or any of them, in Article 16]. The rooting of such explicit issues - commanding the state against discriminating on such specific heads, is therefore, as much a part of the equality code, as the principle of equality indorsed in Article 14. The inclusion of Article 17 enjoins the state to forbear caste discrimination, overtly, or through classification, and looms large as a part of the equality code and indeed the entire framework of the Constitution. The protected attribute of 'sex' has been held to include 'sexual orientation' and 'gender expression' by this court in *NALSA (supra)* and *Navtej Johar & Ors. v. Union of India (hereafter, "Navtej Johar")*[37].

39. The *rationale* for enacting proscribed grounds under Article 15 or 16 (or both) is the awareness of Constitution makers that courts could use these markers- or pointers of distinction, to determine if reasonable classification were permissible. Hence, absent the prohibited ground of sex, gender could have been a *plausible* basis for an intelligible differentia. To prevent such classifications specific proscribed grounds were enacted as injunctions against State action. The provisions, and the equality code, are consequently not only about the declaratory sweep of equality: but also about the total prohibition against exclusion from participation in specified, enumerated activities, through entrenched provisions. A closer look at Article 15, especially Article 15(2), would further show that likewise most of the proscribed grounds in Article 15(1) were engrafted to ensure that access to public resources - in some cases not even maintained by the state, but available to the public generally, could not be barred. This provision was made to right a historical wrong, i.e., denial of *access* to the most deprived sections of society of the most basic resources, such as water, food, etc. The aim of the Constitution was to act as the ultimate leveller, ensuring that equality in

[37] (2018) 7 SCR 379

practice, and substance, became the constitutional culture of this great nation. Together with the affirmative action provisions - Articles 15(3) & (4), 16(4) & 16(5) was intended to guarantee that not mere facial discrimination was forbidden but that existing inequalities were ultimately eradicated. Flowing from these, this court has, time and again, emphasized that non-discrimination is essential for enjoyment of all rights and freedoms of citizens of our country, to realize their worth and potential.[38]

40. In the context of the present debate, in *NALSA (supra),* this court took note of the Yogyakarta Principles and principle on right to equality and non-discrimination enshrined therein which reads as:

> *"**2. The rights to equality and non-discrimination** - Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination."*

In this backdrop, the declaration of law, in *Navtej Johar* (supra) has provided impetus, so far as LGBTQ+ persons are concerned. Consensual queer relationships are not criminalized; their right to live their lives, and exercise choice of sexual partners has been recognised. They are no longer to be treated as "sub-par humans" by law. Yet, that ipso facto, the petitioners allege, is not sufficient, because the fact that they are allowed to be by themselves, "let alone" in the privacy of where they live, is not adequate. Discrimination and prejudice faced by the queer community has been acknowledged, and discussed at length by this court in *NALSA* (supra) and *Navtej Johar* (supra). The draft opinion of the Chief Justice, also highlights these aspects, so is only briefly touched upon in the following section, for the sake of completeness.

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[38] The principle of non-discrimination was explained in *Rajive Raturi v. Union of India & Ors* 2017 [12] SCR 827 as existing to *"ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation".*

B. Rights flowing from previous decisions of this court relating to the queer community

41. The Constitution assures dignity; also, various fundamental rights guarantee a panoply of rights (to equality, non-discrimination on enumerated grounds, to freedom of speech, expression, of association, of right to travel freely, of right to reside, of the right to trade, commerce and business, to personal liberty, freedom to profess one's religion, all being important ones). Various rights not expressly stated or enumerated, have been declared as facets of the right to life - of livelihood, access to healthcare, right to shelter, right to a clean environment, etc.

42. Sexual relation between persons of the same sex was outlawed, by virtue of Section 377 of the IPC. It characterized such acts as "unnatural sex", enacted an offence, and prescribed sentence. This provision was read down by a Division Bench ruling of the Delhi High Court in *Naz Foundation v. State (NCT of Delhi)* (hereafter, *"Naz Foundation")*[39], which de-criminalized consensual sex between persons of the same sex. However, *Naz Foundation* (supra) was over turned, and its holding disapproved by this Court in *Suresh Kumar Kushal v. Naz Foundation*[40] that became the final word for a time so to say, resulting in the criminalization of physical intimacy between same sex consenting adults. Implicit in this was the chilling effect on the exercise of other freedoms by such couples particularly in exhibiting even bare, decent expressions of affection – which was a position that prevailed till the later five-judge bench decision in *Navtej Johar (supra)*.

43. *NALSA (supra)* was a significant ruling regarding the rights of transgender persons. It was held that *"discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law*

[39] (2009) 111 DRJ 1 (DB)
[40] (2014) 1 SCC 1: (2013) 17 SCR 1019

and violates Article 14 of the Constitution of India".[41] This court, for the first time, recognized what now is obvious but was not perceived to be till then, i.e., that the transgender persons have the same rights and have to be treated as full citizens, entitled to their self-expression of gender identity. In other words, every human being's right to assert what their gender is, not limited by what has been ascribed to them based on their sex at the time of birth. The court unequivocally declared that the right of transgender persons to non-discrimination is equally contained and resonates in the same manner as it does with other citizens. The court also acknowledged *the right to self-determination of one's gender* as intrinsic to Article 21 of the Constitution. The court further declared that necessarily, to realize such persons' fundamental right to live with dignity under Article 21, extends to the *right of equal access to all facilities to achieve full potential as human beings*, such as education, social assimilation, access to public spaces and employment opportunities. The court also expressly alluded to their rights under Articles 15 and 16 of the Constitution of India. The court was cognizant of the acutest form of discrimination of such persons, resulting in their degradation. This declaration of the entitlement of the transgender persons sensitized the society to take measures for addressing their concerns, eventually paving the way for the enactment of the Transgender Persons (Protection of Rights) Act, 2019 which aims to entrench the principle of non-discrimination and entitles transgender persons to a range of statutory rights, which they can enforce.

44. The court's intervention in the oft cited decisions on behalf of the petitioners has been to protect the citizens or those approaching the courts against threats of violence or creation of barriers in the exercise of free choice [*Shakti Vahini v. Union of India (hereafter, "Shakti Vahini")*[42]*, Lata Singh v. State of U.P (hereafter, "Lata Singh"), Shafin Jahan* (supra)*, Laxmibai Chandaragi. v. State*

[41] *Ibid.*
[42] 2018 (3) SCR 770

of Karnataka[43] respectively]. These decisions were based on the state's duty to protect citizens and enable the exercise of their individual choice, in the face of external threats. Other decisions, such as *Joseph Shine v. Union of India*[44]*, Navtej Johar (supra)* and *Independent Thought (supra)* were instances where specific provisions that criminalized or made exceptions to criminal behaviour, were struck down or read down in the enforcement of the fundamental rights, i.e. Articles 14, 15(3) and 21. Along the way, *K.S. Puttuswamy (supra)* articulated the broadest right to privacy which embraces within its fold the right to exercise ones choice of a life partner and to lead their life free from external barriers.

C. *Is there a fundamental right to marry?*

45. This court has recognized that marriage is a *social institution.*[45] As elaborated in **Part I**, marriage existed and exists, historically and chronologically in all of the senses - because people married before the rise of the state as a concept. Therefore, marriage as an institution is prior to the state, i.e., it precedes it. The *status* is still, not one that is conferred by the state (unlike the license regime in the US). This implies that the marriage structure exists, regardless of the state, which the latter *can* utilise or accommodate, but cannot be abolished as a concept. Under this view terms of marriage are set, to a large extent, independently of the state. Its source is *external* to the state. That source defines the boundaries of marriage. This implies that state power to regulate marriage does not sit easy with the idea of marriage as a fundamental right. In attempting to analyse the claim to a fundamental right to marry, there are primarily two

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[43] 2021 (3) SCC 360

[44] 2018 (11) SCR 765

[45] *Sivasankaran v. Santhimeenal* [2021] 6 SCR 169: *"The norms of a marriage and the varying degrees of legitimacy it may acquire are dictated by factors such as marriage and divorce laws, prevailing social norms, and religious dictates. Functionally, marriages are seen as a site for the propagation of social and cultural capital as they help in identifying kinship ties, regulating sexual behaviour, and consolidating property and social prestige."* Likewise, in *Indra Sarma v. V.K.V. Sarma* [(2013) 14 SCR 1019] this court said that *"The institutions of marriage and the family are important social institutions."* The same decision also recognized the centrality of tradition, and custom, while emphasizing that *"Marriages in India take place either following the personal Law of the Religion to which a party is belonged or following the provisions of the Special Marriage Act."*

competing claims about the nature of marriage: one being that the state should exercise more control over marriage to support and protect *"traditional purposes and perceptions"* and the other, that each individual should have the right to define marriage for themselves and state involvement in marriage should be minimal.

46. If indeed there is a right to marry unless it is elevated to a right akin to Articles 17, 23, and 24, [which apply to both state and nonstate agencies and actors], it cannot be operationalized. These provisions, most emphatically create positive obligations; likewise Articles 15 (3), 15 (4) – and 15 (6), as well as Articles 16 (4), 16 (6) highlight state interest in creating conditions to further the goal of non-discrimination. Yet, the previous decisions of this court have carefully held such provisions to enable the state, and in a sense oblige it to take measures; but ruled out court mandated policies and laws.[46] In our considered opinion, this is not however, one such case where the court can make a departure from such rule, and require the state to create social or legal status.

47. What is being asked for by the petitioners is state intervention in enabling marriage between queer or non-heterosexual couples. Civil marriage or recognition of any such relationship, with such *status*, cannot exist in the absence of statute. The demand, hence, is that of a *right of access to a publicly created and administered institution*. There is a paradox here or a contradiction, which runs to the root of the issue and weighs on this court's mind, heavily - in that *the creation of the institution, here depends on state action, which is sought to be compelled through the agency of this court*.

48. Most of the precedents cited contain discussions on how the institution of marriage involves issues of basic importance. Many decisions, including *Obergefell v. Hodges (hereafter, "Obergefell")*[47], recall tradition, to underline that marriage is of utmost significance, and that it underlines the importance of

[46] *Andhra Pradesh Public Service Commission v. Baloji Badhvanath* 2009 (5) SCR 668
[47] 576 US 644 (2015)

commitment of two individuals towards each other *and that it is a foundational relationship of society*. Traditions of marriage *per se* may not support the basis of recognition of marital relationship between non-heterosexual couples. Many decisions by the US courts, have underlined the *rationale* for declaring the right to marry a fundamental right as being essential to the *orderly pursuit of Happiness* (as it appears in their Declaration of Independence) by free persons. This strand of reasoning is apparent from *Loving*[48] to *Obergefell (supra).*

49. This with respect is not sound - at least as applied to state licensing of marriage (as in the US), which is what civil marriage is. The fundamental importance of marriage remains that it is based on *personal preference* and confers social status. Importance of something to an individual does not *per se* justify considering it a fundamental right, even if that preference enjoys popular acceptance or support. Some may consider education to be fundamentally important in that they consider nothing less than a postgraduate degree is fundamental; there may be a large section of the people, who consider that access to internet is a fundamental right, and yet others, who may wish that access to essential medication is a fundamental right. All these cannot be *enforceable rights*, *which the courts can compel the state or governance institutions to provide.* These cannot result in demand for creation of a social institution, and in turn creation of status, through a statute. This result - i.e. recognition, can be achieved only by enacted law.

50. All decisions relied on by the petitioners – K.S. *Puttaswamy (supra), Navtej Johar (supra), Shakti Vahini (supra) and Deepika Singh v. Central Administrative Tribunal*[49], contain broad observations with respect to individuals' choice of their partner as also a reference as to non-conventional relationships. Some broad observations are undoubtedly to be found in these judgments they cannot be referenced to hold that a right to marry automatically flows in the

[48] *Loving v. Virginia*, 388 US 1 (1967)
[49] 2022 (7) SCR 557

manner from the provisions of Part III which the petitioner asserts. There cannot, for the above reasons, be a *per se* assertion that there exists an unqualified right to marry which requires treatment as a fundamental freedom; we agree on this conclusion arrived at by the learned Chief Justice, and his analysis of *Shakti Vahini (supra)*, *Shafin Jahan (supra), Navtej Johar (supra), K.S. Puttaswamy (supra),* and *NALSA (supra)* that *the constitution does not expressly recognize a right to marry.*

D. Right to 'union', or abiding relationship

51. The conclusion arrived at by the learned Chief Justice is that while there is no express *fundamental* right to marry, there is a right or freedom to enter into a union [spelt out in *Navtej Johar (supra), K.S. Puttaswamy (supra), NALSA (supra), Shakti Vahini (supra), Shafin Jahan (supra),* etc.] and that having regard to our constitutional values, which entail respect to the choice of a person whether or when to enter into marriage and the right to choose a marital partner. The learned Chief Justice also traces this right to enter into an abiding cohabitational relationship to express provisions of Article 19(1)(a), (c), and (e), Article 21, and Article 25.

52. While we agree, that there is a right - which we will characterise as a *'right to relationship'* to avoid confusion – we squarely recognise it to fall within Article 21[50], as already recognised in the afore-cited cases. The right to relationship here, includes the right to choose a partner, cohabit and enjoy physical intimacy with them, to live the way they wish to, and other rights that flow from the right to

[50] See *Navtej Johar (supra).* Some of the opinions, notably of Chief Justice Dipak Misra (with whom Justice Khanwilkar concurred) highlighted the need to protect choice of one's partner, in case of non-heterosexual persons. Citing previous decisions of this court, including *Shakti Vahini* (supra)and *Shafin Jahan (supra)*, Justice Dipak Mishra (Chief Justice, as he then was), concluded that:

> *"167. The above authorities capture the essence of the right to privacy.* ***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." (emphasis supplied)*

privacy, autonomy and dignity. They are, like all citizens, entitled to live freely, and express this choice, undisturbed in society. Whenever their right to enjoyment of such relationship is under threat of violence, the state is bound to extend necessary protection. This is a natural consequence of this court's judgments in *Navtej Johar (supra), K.S. Puttuswamy (supra), Shafin Jahan (supra)* and *Shakti Vahini (supra)*.

53. The learned Chief Justice in a detailed discussion of the 'goal of self-development', rights under Article 19 (including the right to freedom of speech and expression, and to form 'intimate' associations, to *settle* in any part of India), Article 21, and Article 25, arrives at the conclusion that the right to union (or right to enter into an abiding cohabitational relationship) can be traced to these express provisions, which in turn enrich this right. Thereafter, having traced this right to union, it is propounded that the 'positive' postulate of fundamental rights (as explained in an earlier section of the draft opinion), necessitates or places a positive obligation on the State to accord recognition to such relationships/unions. This, in our considered opinion, is not necessary. Further, our point of disagreement is deepened by the discussion in Part D(v) and (vi) in the learned Chief Justice's draft opinion, prior to the section on 'the right to enter into a union'- which lays down a theory on the 'positive postulates' of fundamental rights and the consequential obligation on the State. For the reasoning elaborated in Part IV of our opinion, we cannot agree to this characterisation of the entitlement, or any corresponding state obligation to create a status through statute.

54. If it is agreed that marriage is a ***social*** institution with which the State is unconcerned except the limited state interest in regulating some aspects of it, does it follow that any section of the society (leaving aside the issue of rights of non-heterosexual couples) – which wishes for creation of a *like* social institution, or even an entry into a zone which is not popular or otherwise does not fall within the institution of marriage – can seek relief of its creation by court intervention?

IV. Positive obligations in furtherance of fundamental rights

55. The conception of fundamental rights – in terms of their negative, and positive content – is a formulation that requires no citation. However, the *extent* to which this positive obligation may reach to, is where our reasoning arrives at the metaphorical fork in the road. Every fundamental right, is not enjoyed by an individual, to the same degree of absoluteness – for instance: Article 19 has a clear stipulation of reasonable restrictions for each freedom; Article 15 and 16 have a clear negative injunction on the State against discrimination, within which substantive equality is baked in and requiring the State to step in or facilitate; Article 25, is subject to other fundamental rights and freedoms under Part III, etc. There are restrictions, to the content of these rights. A discussion of Article 21 elucidates this point. However, even while tracing these numerous 'unenumerated' rights – the right to a clean environment, right to shelter, etc. – the courts have been (necessarily so) circumspect in *how* these can be enforced. Often, these rights have come to be *enumerated* in response to State action that *threatened* the freedom, or right directly or indirectly, thus compelling the litigant to invoke the jurisdiction of this court, to remind the State of the negative injunction that impedes its interference, and must guides its actions. Does this, however, mean that a litigant could knock on the doors of this court, seeking to enforce each of these unenumerated rights? A simple example would offer some clarity – consider a poet who wishes to share their work, with the public at large. Now provided that there is no direct restriction, or those in the nature of having a chilling effect, the State's role in *enabling* or *facilitating* this freedom enjoyed by the poet, is limited. This court cannot direct that the State must create a platform for this purpose; this would be a stretch, in the absence of any overt or inert threat.

56. In the draft circulated by the Chief Justice, the reasoning that there is no fundamental right to marry and thereafter, nevertheless, to proceed to delineate the facets or features which unions other than marriage, are deprived of; merits a

closer look. The summation of various rights which such a couple is said to be deprived of, is used to delineate the contours of the right to enter into a union, and justify a positive obligation. There cannot be any doubt that the individuals have the choice of their life partners and the right to live the lives they wish to, undisturbed. This is the essence of what the jurisprudence of this Court has been so far, i.e., an explanation of the right to life and the other rights enumerated or discovered by interpretive process – privacy, choice, dignity etc.

57. Repeatedly, decisions of this court have emphasized on the non-discriminatory and *positive* content of certain fundamental rights (Articles 14, 15, 16, 17, 23 and 24). In fact, the court has underlined the *obligations* of the state to create conditions conducive to the exercise of the right to equality (i.e., substantive equality), and to realize fraternity [Refer: decisions in *N.M. Thomas*[51] and *Indra Sawhney*[52] which expanded the understanding of substantive equality, though without making enabling provisions enforceable by court]. This court has also in some decisions, accepted the argument that given the nature of fundamental rights, and its evolving content, in many circumstances, it might be necessary for the state to intervene *and protect the fundamental right concerned* thus creating an atmosphere conducive for the enjoyment of such right. *Lata Singh* (supra) dealt with honour killings of couples involved in inter-caste, inter-religious marriages; in *Arumugam Servai v. State of Tamil Nadu*[53], where the issue was virulent caste slurs and violence, which were crimes, the court required administrative and police officials *"to take strong measures to prevent such atrocious acts". In Shakti Vahini (supra),* which dealt with threats by *khap panchayats,* this court held that the *state "is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage".* The court issued

[51] *State of Kerela v. N.M Thomas*, (1976) 2 SCC 310
[52] *Indra Sawhney v. Union of India*, (1992) Supp (3) SCC 217
[53] 2011 (5) SCR 488

directions requiring the state to take punitive and remedial measures, and that the state has a positive obligation to *protect the life and liberty of persons.*

58. In several decisions it has been recognised that the reason for entrenching Part III Rights - as for instance, in *M. Nagaraj (supra)* was to *"withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts….. Fundamental right is a limitation on the power of the State*". *Rustom Cavasjee Cooper v. Union of India* (hereafter, "*R.C. Cooper")*[54] is salient, for the observations it made about the common thread that runs through Part III rights, which again, sets out distinct *enforceable* rights:

> "*it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right: Articles 29(1), 30(1), 26, 25 & 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action--legislative or executive--Articles 14, 15, 16, 20, 21, 22(1), 27 and 28; in some others, it takes the form of a positive declaration and simultaneously enunciates the restriction thereon: Articles 19(1) and 19(2) to (6); in some cases, it arises as an implication from the delimitation of the authority of the State, e.g., Articles 31(1) and 31(2); in still others, it takes the form of a general prohibition against the State as well as others: Articles 17, 23 & 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them: they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights.*"

59. The right to freedom of speech, is distinct, because it - unlike others in Article 19, is preceded by the word "freedom" *of speech and expression* whereas the others are *rights*. Whilst this judgment does not call for elaboration on this distinction, yet the common element, in respect of all the rights spelt out in Article 19 is the assertion of the right, which is a curb or restraint, on state action, whose limits can only be through laws, *made by the state*, to promote some state concern, such as sovereignty and integrity of the state, etc. reasonably restricting speech

[54] 1970 (3) SCR 530

in the interests of *inter alia,* "public order, decency or morality". The same pattern is followed in relation to freedom to associate by Article 19(4). In relation to the right under Article 19(1)(g) a broader state interest, *inter alia,* i.e., *"in the interests of the general public".* These expressions are common grounds on which reasonable restrictions can be enacted, validly *by law. Kharak Singh v. State of UP*[55]*, Bijoe Emmanuel v. State of Kerala*[56]*,* and *Union of India (UOI) v. Naveen Jindal & Ors.*[57] are all authorities for the proposition that *regulating the exercise of rights guaranteed under Article 19(1)(a) to (e) and (g) - through reasonable restrictions, can be only through a law.*

60. The judgment of the learned Chief Justice, propounded a theory of a unified thread of rights, entitlements flowing from it, and how lack of recognition, results in deprivation of specified rights under Articles 19 and 25 (in addition to Article 21). To the extent, that *assertion of sexual or gender identity,* in exercise of free speech, association, through express manifestations in whatever form (whether through speech, art, participation in *processions*, *etc.*), are concerned, one cannot join issue. Equally, if one has by some state process, measure or conduct been barred from expressing one's choice, publicly, the reasonableness of that prohibition or order, can be tested on grounds enumerated in Article 19(2), if such barriers are through a valid law, or orders, traceable to law.

61. However, when the law is silent, and leaves the parties to express choice, Article 19(1)(a) does not oblige the state to enact a law, or frame a regulation, which enables the facilitation of that expression. All judgments, from *Sakal Papers*[58]*, to Bennet Coleman*[59] and *Express Newspapers*[60]*,* etc. were based on the effect of laws or policies, based on statutory provisions. Equally, in the absence of a legal framework enabling citizens to form a particular kind of association (as

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[55] 1964 (1) SCR 332
[56] 1986 (3) SCR 518
[57] 2004 (1) SCR 1038
[58] Sakal Papers *(P) Ltd v. Union of India* 1962 (3) SCR 842
[59] *Bennet Coleman v. Union of India* 1973 (2) SCR 757
[60] Express Newspapers (P) Ltd. V. Union of India, (1959) 1 SCR 12

for instance recognition of a limited liability partnership, which was not recognized any legal status till recently)[61] the court could not have validly created a regime *enabling recognition or regulating* such associations. Similarly, in the absence of any enacted law which obliges meaningful facilitation of transport such as roads, it is hard to visualize that a citizen can approach the Court and seek the construction of a road to enforce the right to travel [Article 19(1)(d)], or seek court's intervention to create a network of roads or other modes of transportation. Likewise in the absence of a basic housing scheme again the court if approached for enforcement of Article 19(1)(e), would not call upon the State to create one either by framing a general legislative policy or through law. Furthermore, this Court has also recognized that, there can even be reasonable restrictions, in the acquisition and enjoyment of certain types of properties in many States. Given the nature of rights under Articles 19 and 21 the enjoyment of which are limited to the extent reasonable laws within the bounds of the specified provisions, enact in the legitimate jurisdiction of this court, it would be difficult to translate the positive obligations (or postulates) as articulated in the learned chief justice's opinion.

62. History or traditions may not be the only methods to trace constitutional values which can arguably be the result of an evolving society. Yet the court cannot stray too far from the express provisions and the manner in which they are cast. In the case of free speech and expression, right to association and the other rights spelt out in Article 19 and the rights spelt out in Article 25, the core content of these are hard fought freedoms and rights primarily directed *against state action and its tendency to curb them.* To the question whether it is possible to locate an entitlement to lead to positive obligation and to facilitate the exercise of free speech, generally by mandating a horizontally applicable parliamentary law or legal regime, the answer would be a self-evident negative.

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[61] The Limited Liability Partnership Act, 2008

63. There is no difficulty about the right of two consenting persons to decide to live together, to co-habit with each other, and create their unique idea of a home, unconstrained by what others may say. That is the natural sequitur to K.S. *Puttaswamy (supra)* and Navtej *Johar (supra)*. Conduct hitherto criminalised, is now permissible. The liberative effect of Section 377 being read down is that two individuals, regardless of their sexual orientation are enabled to live together, with dignity, and *also protected from any kind of violence, for living and existing together*. Therefore, the right to be left alone, the right to exercise choice, the right to dignity, and to live one's life, with the person of one's choice, is an intrinsic and essential feature of Article 21 of the Constitution.

64. The idea that one right can lead to other rights, emanating from it, has been conclusively rejected by this court by seven judges, in *All India Bank Employees Association v. National Industrial Tribunal*[62]. That decision was quoted with approval in *Maneka Gandhi v. Union of India (UOI) & Ors.* , (hereafter, "*Maneka Gandhi*")[63]:

> "*This theory has been firmly rejected in the All India Bank Employees Association's case and we cannot countenance any attempt to revive it, as that would completely upset the scheme of Article 19(1) and to quote the words of Rajagopala Ayyanger, J., speaking on behalf of the Court in All India Bank Employees Association's case "by a series of ever expending concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grostesque result". So also, for the same reasons, the right to go abroad cannot be treated as part of the right to carry on trade, business, profession or calling guaranteed under Article 19(1)(g). The right to go abroad is clearly not a guaranteed right under any clause of Article 19(1)"*

65. As the two 7-judge bench decisions have affirmed whilst there is no dispute that there is an interconnectedness of various fundamental rights, their manifestations in different forms especially under Article 19 and the distinct grounds on which they can be circumscribed, sets each freedom and right apart. While the right to free speech and expression may be exercised in conjunction

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[62] 1962 (3) SCR 269
[63] 1978 (2) SCR 621

with the right to association and even the right to assemble and move, nevertheless the extent of the assertion of these rights, collectively, would depend on the circumstances of the case and the nature of the curbs imposed (by law). Thus, for instance, the right to protest in the form of a procession is subjected to the laws reasonably restricting movement in the larger interests of the public. It is questionable whether the imposition of valid restrictions and curbs in such circumstances can be successfully impugned only on the ground that their right to free speech and assembly are violated. In the case of both, if the restriction is valid for one fundamental right, it is equally valid for the others on an application of the test laid down in *Maneka Gandhi (supra)*. Rather it is the test of reasonableness and the proximity to the disturbance of public order, when such restriction is imposed, that becomes the focal point of debate. Therefore, in the abstract every right enumerated in Article 19, and other Article 25, can be exercised freely without hindrance by all. However, it is the assertion of the right, in the face of some threat by state action or despite state protection, which becomes the subject of court scrutiny. The extent of right to free speech is subject to reasonable restrictions, to further *inter alia, "public order"* or *"decency"* and *"morality".* The right to association is hedged by reasonable restrictions *inter alia,* in furtherance of *"public order or morality".* The right to travel and settle in any part of the country, is subject to reasonable restrictions in the *"interests of the general public"* or *"for the interests of any scheduled tribe"*. Likewise, the freedom of conscience is both internal, and external. As long as an individual exercises it, from within, and in privacy, there can be ordinarily no inroads into it; its external manifestation, may call for scrutiny, at given points in time.

66. The right to freedom of conscience is also subject to *other provisions of Part III, and any measure, in the interests of public order or morality.* It is thus, open to all to exhibit and propagate their beliefs and ideas through overt "for the edification of others", regardless if *the propagation is made by a person in his individual capacity or on behalf of any church or institution*….exhibition of such

"*belief, is, as stated above, subject to State regulation imposed to secure order, public health and morals…"*[64] This broad understanding and enunciation of the freedom of conscience has remained unchanged. The state on occasions has intervened to promote social welfare and reforms; this court has intervened when state action was based on a practise found inconsistent with the right to equality and dignity.

67. We do not therefore, agree with the learned Chief Justice who has underlined that the positive *postulate* of various rights, leads to the conclusion that all persons (including two consenting adult queer persons) have an entitlement to enter into a union, or an abiding cohabitational relationship which the state is under an obligation to recognize, "to give real meaning" to the right. There is no recorded instance nor was one pointed out where the court was asked to facilitate the creation of a social institution like in the present case.

68. There are observations from the judgment of the (then Justice Chandrachud and) now Chief Justice) Justice D.Y. Chandrachud, in *Navtej Johar (supra),* of how social institutions must be arranged:

> *"Social institutions must be arranged in such a manner that individuals have the freedom to enter into relationships untrammelled by binary of sex and gender and receive the requisite institutional recognition to perfect their relationships. The law provides the legitimacy for social institutions. In a democratic framework governed by the Rule of law, the law must be consistent with the constitutional values of liberty, dignity and autonomy."*

These observations underscored the need to respect and give worth to the choice of queer couples. The observations were in the context of criminalization of consensual sexual conduct between queer couples. The observations, however, have tended to point to the direction that there should be some social ordering of institutions, which not merely accommodate such choice, but *facilitate* its meaningful exercise beyond the confines of their right to privacy and to live together. While the decision's decriminalising impact is undoubted, and not

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[64] *Ratilal Panachand Gandhi v. State of Bombay* 1954 (1) SCR 1055

contested, yet the broader observations obliging social institutions to accommodate and *facilitate* exercise of choice fully were not necessary. In one sense, they travelled beyond the scope of the court's remit and have to be viewed as *obiter dicta*. That the State should or ought to order such social institutions, is different from a direction issued by this court, which they *must* carry out; the latter is what we take exception to, and place our reservations against.

69. Therefore, even if we were to, for argument sake, recognise an entitlement under the Constitution to enter into *an abiding cohabitational relationship* or union– in our opinion, it cannot follow to a claim for an institution. There are almost intractable difficulties in *creating, through judicial diktat,* a civil right to marry or a civil union, no less, of the kind that is sought by the petitioners in these proceedings. *"Ordering a social institution"* or re-arranging existing social structures, by creating an entirely new kind of parallel framework for non-heterosexual couples, would require conception of an entirely different code, and a new universe of rights and obligations. This would entail fashioning a regime of state registration, of marriage between non-heterosexual couples; the conditions for a valid matrimonial relationship amongst them, spelling out eligibility conditions, such as minimum age, relationships which fall within "prohibited degrees"; grounds for divorce, right to maintenance, alimony, etc.

70. As a result, with due respect, we are unable to agree with the conclusions of the learned Chief Justice, with respect to tracing the right to enter into or form unions from the right to freedom of speech and expression [Article 19(1)(a)], the right to form associations [Article 19 (1)(c)], along with Article 21 and any corresponding positive obligation. It is reiterated that all queer persons have the right to relationship and choice of partner, co-habit and live together, as an *integral part of* choice, which is linked to their privacy and dignity. Any further discussion on the rights which consenting partners may exercise, is unnecessary. No one has contested that two queer partners have the rights enumerated under Article 19 (1)(a); (c), and (d), or even the right to conscience under Article 25.

The elaboration of these rights, to say that exercise of choice to such relationships renders these rights meaningful, *and that the state is obliged to "recognise a bouquet of entitlements which flow from such an abiding relationship of this kind"* is not called for. We therefore, respectfully disagree with that part of the learned Chief Justice's reasoning, which forms the basis for some of the final conclusions and directions recorded in his draft judgment.

V. Inapplicability of the Special Marriage Act

A. Challenge to the SMA on the ground of impermissible classification

71. The petitioners complained that provisions of the SMA, *inasmuch as they excluded, or do not provide for marriage of non-heterosexual couples, is discriminatory,* because the classification made in its various provisions are *heteronormative,* thus discriminating against non-heterosexual couples. This exclusion, is the basis of their challenge.

72. Hostile classification, which results in exclusion from benefits of a statute or policy, is based on the understanding that where *"equals are treated differently, without any reasonable basis"* as held in *D.S. Nakara v. Union of India*[65]:

> *"The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question. There ought to be causal connection between the basis of classification and the object of the statute. An executive action could be sustained only if the twin tests of reasonable classification and the rational principle co-related to the object sought to be achieved are satisfied."*

73. What is an "intelligible differentia" on which the classification is to be drawn distinguishing objects or persons, or conditions, for the purpose of legislative or executive policy? The premise of classification is to *discriminate.* The theory of permissible classification rests, therefore, on the basis for

[65] 1983 (2) SCR 165

differentiation, and its *relation to the object of the measure or the law.* Permissible classification, therefore, should result in valid differentiation; but it crosses the line when it has a *discriminatory effect,* of excluding persons, objects or things which otherwise form part of the included group. *Kedar Nath Bajoria* v. *State of West Bengal*[66] explained that Article 14 cannot mean that

> *"all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain."*

74. After a fairly detailed examination of previous precedents, recently, in *Chandan Banerjee v. Krishna Prasad Ghosh*[67]*,* this court explained the principles applicable to determine whether classification by any law or policy can be upheld:

> *"**27.** The principles which emerge from the above line of precedents can be summarised as follows:*
>
> *(i) Classification between persons must not produce artificial inequalities. The classification must be founded on a reasonable basis and must bear nexus to the object and purpose sought to be achieved to pass the muster of Articles 14 and 16;*
>
> *(ii) Judicial review in matters of classification is limited to a determination of whether the classification is reasonable and bears a nexus to the object sought to be achieved. Courts cannot indulge in a mathematical evaluation of the basis of classification or replace the wisdom of the legislature or its delegate with their own; [..]"*

This court, in *Transport & Dock Workers Union v. Mumbai Port Trust*[68] explained how differential treatment may not always result in discrimination and *"it violates Article 14 only when there is no conceivable reasonable basis for the differentiation."*

75. The differentiation or classification has to be based on the *object* or end sought to be achieved: a facet highlighted in *Union of India* v. *M.V. Valliappan*[69]*,*

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[66] [1954] 1 SCR 30
[67] [2021] 11 SCR 720
[68] (2010) 14 SCR 873
[69] 1999 (3) SCR 1146

where the court held that if there is a differentiation, having rational nexus with the *"object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution"*. In fact, earlier, this court in *State of J&K v. Triloki Nath Khosa*[70] ruled that *"the object to be achieved"* ought not to be "*a mere pretence for an indiscriminate imposition of inequalities and the classification*" should not be "*characterized as arbitrary or absurd"*.

76. The discussion on equality and the limits of permissive classification were conveniently summarized by the seven-judge bench in *In Re the Special Courts Bill, 1978 (hereafter, "Re Special Court's Bill")*[71]. Some of the propositions were stated as follows:

> *"[..] (2).The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.*
>
> *(3). The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.*
>
> *(4). The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.*
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> * * *
>
> *(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.*

[70] 1974 (1) SCR 771
[71] (1979) 2 SCR 476

> *(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.*
>
> *(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon person arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.*
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> * * *
>
> *(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality."*

The differentiation, therefore, is to be discerned from *gathering of the object sought to be achieved by the enactment.*

77. For a moment, if it is assumed (as the petitioners argue) that the classification is suspect, because non-heterosexual couples are not provided the facility of marriage, yet such "under classification" is not *per se* discriminatory. This aspect was highlighted by this court in *Ambica Mills*[72]*:*

> *"Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate — difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape — and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration"*

78. In an earlier decision, this court upheld the tax imposed upon joint families, in Kerala, based on *Marumakkattayam* law. The law imposed expenditure tax

[72] *State Of Gujarat And Another v. Shri Ambica Mills Ltd* 1974 (3) SCR 760

upon those professing the *Marumakkattayam* unit and defined it in such a manner that it omitted to include Mapillas (non-Hindus) who also followed that system. This court held that such *under inclusion* did not attract the vice of discrimination, in *N. Venugopala Ravi Varma Rajah v. Union of India*[73] and observed*:*

> *"the mere fact that the law could have been extended to another class of persons who have certain characteristics similar to a section of the Hindus but have not been so included is not a ground for striking down the law."*

79. The question of some categories being left out, when a new legislation is introduced, was the subject matter of the decision in *Ajoy Kumar Banerjee & Ors. v. Union of India & Ors.*[74] where it was held that:

> *"[…] Article 14 does not prevent legislature from introducing a reform i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons. A law can be sustained if it deals equally with the people of well-defined class- employees of insurance companies as such and such a law is not open to the charge of denial of equal protection on the ground that it had no application to other persons."*

These judgments have underlined that exclusion or under inclusion, *per se,* cannot be characterised as discriminatory, unless the excluded category of persons, things or matters, which are the subject matter of the law (or policy) belong to the same class (the included class).

80. The statement of objects and reasons of the SMA read as follows:

> *"**Statement of Objects and Reasons**:*
> *1. 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 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.*

[73] 1969 (3) SCR 827
[74] 1984 (3) SCR 252

> *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. The Bill is drafted generally on the lines of the existing Special Marriage Act of 1872 and the notes on clauses attached thereto explain some of the changes made in the Bill in greater detail."*

81. The Statement of Objects and Reasons of SMA clearly suggests that the sole reason for the enactment of the Act was to replace the earlier colonial era law and provide for certain new provisions; it does not refer to any specific object sought to be achieved or the reasons that necessitated the enactment of the new Act other than that it was meant to facilitate marriage between persons professing different faiths.

82. If one looks at the *enacted provisions,* especially Sections 19-21 and 21A, Sections 24, 25, 27, 31, 37 and 38, of SMA, there can be no doubt that the sole intention was to enable marriage (as it was understood then, i.e., for heterosexual couples) of persons professing or belonging to *different faiths,* an option hitherto available, subject to various limitations. There was no idea to exclude non-heterosexual couples, because at that time, even *consensual physical intimacy* of such persons, was outlawed by Section 377 IPC. So, while the Act sought to provide an avenue for those marriages that did not enjoy support in society, or did not have the benefit of custom to solemnise, it would be quite a stretch to say that this included same sex marriages. Therefore, the challenge to the constitutionality of the statute, must fail. It is settled by decisions of the court that as long as an objective is clearly discernible, it cannot be attacked merely because it does not make a better classification. The need for a law or a legal regime that provides or facilitates matrimony of queer couples is similar, to the need to facilitate inter-faith marriages which is what drove the Parliament to enact the SMA.

83. The next question urged is that the passage of time, has rendered the exclusion of queer couples, the benefit of SMA, discriminatory. This line of argument, is based on this court's reasoning that with passage of time, a classification which was once valid, could become irrelevant, and insupportable,

thus discriminatory. The first of such decisions was *Motor and General Traders v. State of AP*[75] wherein a provision of the state rent control legislation (which exempted premises constructed after 26.08.1957[76]) was under challenge. The idea was to provide impetus to construction of houses; however, the long passage of time resulted in two classes of tenants, i.e., those residing in older premises, who were covered by the law, and those who lived in premises constructed later. This court held that the continued operation of such exemption, rendered it unconstitutional:

> *"There being no justification for the continuance of the benefit to a class of persons without any rational basis whatsoever, the evil effects flowing from the impugned exemption have caused more harm to the society than one could anticipate. What was justifiable during a short period has turned out to be a case of hostile discrimination by lapse of nearly a quarter of century. The second answer to the above contention is that mere lapse of time does not lend constitutionality to a provision which is otherwise bad."*

84. Almost identically, in *Rattan Arya v. State of T.N.*[77] the validity of Section 30(ii) of the Tamil Nadu Buildings (Lease and Rent) Control Act, 1960 was under challenge, this court held that the provision which exempted tenants of "residential buildings" paying monthly rent of more than Rs 400 from the protection of the said Rent Control Act, whereas no such restriction was imposed in respect of tenants of "non-residential buildings" under the said Act. This court upheld the challenge, and held that

> *"a provision which was perfectly valid at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14."*

The judgment cited by the petitioners, that is *Satyawati Sharma v. Union of India*[78] too dealt with rent legislation which differentiated between non-

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[75] 1984 (1) SCR 594.
[76] Section 32, clause (b) of Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1954
[77] 1986 (2) SCR 596
[78] 2008 (6) SCR 566

residential and residential buildings, in respect of the remedy of eviction, on ground of *bona fide* requirement.

85. In all the judgments cited by petitioners, the court was able to discern or find that a classification, made at an earlier point in time, had lost its relevance, and operated in a discriminatory manner. In some circumstances, rather than declaring the entire law void, this court "read down" the relevant provision to the extent the statute could be so read. In the present case, the petitioner's arguments with respect to "reading down" provisions of the SMA are insubstantial. The original rationale for SMA was to facilitate inter-faith marriages. That reason is as valid today as it was at the time of birthing that law. It *cannot be condemned on the ground of irrelevance, due to passage of time.* It would be useful to recall principle (9)[79] of the opinion in *Re Special Court's Bill (*supra). The classification was primarily not between heterosexual and non-heterosexual couples, but heterosexual couples *of differing faiths.* All its provisions are geared to and provide for a framework to govern the solemnisation, or registration, of the marital relationship, which replicates the status that different personal laws bestow. Since there was no one law, which could apply for couples professing differing religions, the SMA created the governing norms- such as procedure, minimum age, prohibited degree of relationship and forbidden relationships for the male and female spouses respectively (through different schedules); the grounds of divorce, etc. The relevance of SMA has gained more ground, because of increasing awareness and increasing exercise of choice by intending spouses belonging to different faiths. It cannot be said, by any stretch of the imagination that the exclusion of non-heterosexual couples from the fold of SMA has resulted in its ceasing to have any rationale, and thus becoming discriminatory in

[79] "(9) If the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation."

operation. Without a finding of that kind, it would not be open to the court to invoke the doctrine of "reading down".

86. We, therefore, agree with the reasoning elaborated by the Chief Justice, Dr. Chandrachud, J that the challenge to the SMA fails.

B. Interpretation of provisions of SMA

87. The provisions of SMA are incapable of being "reading down", or interpreted by "reading up" in the manner suggested by the petitioners. We have supplemented the Chief Justice's conclusions, with further reasoning briefly below.

88. The petitioners' efforts have been aimed at persuading this court to interpret the provisions of SMA in a manner, that accommodates non-heterosexual couples and facilitates this marriage. Their arguments were centred around reading its specific provisions – [Section 2 (b) read with Part I (for a male) and Part II (for a female) (degrees of prohibited relationships), Section 4 (c), Section 12, 15, 22, 23, 27(1); 27(1A) (special ground of divorce for wife), 31(1)(iiia) and (2) (special provision for jurisdiction in case of proceeding for the wife), 36 and 37 (alimony for the wife), 44 (bigamy)] – which present a dominant underlying heteronormative content. They argue that this court should adopt a purposive construction of the provisions of SMA, and interpret it in light of this court's previous decisions in *Dharani Sugars and Chemicals Ltd v. Union of India (hereafter, "Dharani Sugars")*[80] and *X v. Principal Secretary* (supra).

89. In *Dharani Sugars*, the challenge was against a new policy introduced by the Reserve Bank of India (RBI). The petitioners contented that there was no authorization under the RBI Act to frame the impugned policy. Although the court acknowledged that new facts can influence the interpretation of existing law, it ultimately upheld the policy based on existing provisions that empowered the RBI

[80] [2019] 6 SCR 307

to issue such policies. A careful examination of this judgment would reveal that even though discussion on the interpretation that *"unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them"* indeed occurred[81]; but, the court also noticed that *"this doctrine does not however mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended"*[82].

90. This court, in *X v. Principal Secretary* (supra) while reading down the exclusion of unmarried women from the benefit of the Medial Termination of Pregnancy Act, 1971 (MTP Act), also relied on *Dharani Sugars* (supra) to invoke the principle that a statute "always speaks". Noting that the Act, and more so its amendment, was to enable women to terminate unwanted pregnancies, the reasons for which could be manifold, the court held that such exclusion was arbitrary and discriminatory. Further, the court relied on *Badshah v. Sou. Urmila Badshah Godse*[83] which held that *"change in law precedes societal change and is even intended to stimulate it"* and that *"just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law"*. Similarly, in *All Kerala Online Lottery Dealers Association v. State of Kerala & Ors.,*[84] this court referred to decision of court in *State v. SJ Choudhary*[85] wherein it was observed that *"in its application on any date, the language of the Act,*

[81] This court indeed cited a number of decisions of the House of Lords, or the UK Court of Appeals: *Royal College of Nursing of the United Kingdom v. Department of Health and Social Security,* 1981 (1) All ER 545 [HL]*; Comdel Commodities Ltd. v. Siporex Trade S.A.,* 1990 (2) All ER 552 [HL]; *McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd., [2000] 4 All ER 913; R v Ireland, R v Burstow* 1997 (4) All ER 225; *Birmingham City Council v. Oakley* [2001] 1 All ER 385 [HL].

[82] In this context, the court took note of *Goodes v East Sussex County Council* (2000 [3] All ER 603) and *Southwark London Borough Council v. Mills* (1999 [4] All ER 449).

[83] [2013] 10 SCR 259

[84] [2015] 10 SCR 880

[85] 1996 (2) SCC 428

though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law."[86]

91. Furthermore, the petitioners relied on the interpretation of this court, in *Githa Hariharan v. Union of India*[87], wherein the court construed the word 'after' in Section 6(a) of the Hindu Minority and Guardianship Act, 1956 as meaning *"in the absence of - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise"* - thus, saving it from the vice of discrimination. Reliance was also placed on *Association of Old Settlers of Sikkim & Ors. v. Union of India*[88] where an exemption provision[89] discriminated against Sikkimese women who may have had their names registered in the Register of Sikkim subjects, married non-Sikkimese on or after 1st April, 2008, and excluded them from the benefit. This court held such discrimination to be violative of equality under Article 14 of the Constitution of India. In *Independent Thought* (supra), this court invalidated as discriminatory a provision[90] which *permitted* sex between a man, and a young woman married to him, *above the age of 15 years.* The resultant classification was that sex with any woman below 18 years, irrespective of consent was defined as rape.[91]

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[86] The court had cited *State (Through CBI/New Delhi) v. S.J. Choudhary* (1996) 2 SCC 428; *SIL Import, USA v. Exim Aides Silk Exporter* [1999] 2 SCR 958 and *BR Enterprises v. State of U.P.* [1999] 2 SCR 1111

[87] [1999] 1 SCR 669

[88] (2023) 10 SCR 289

[89] [Section 10(26AAA) of the I.T. Act, 1961]

[90] [Exception 2 to Section 375, IPC, 1860]

[91] The reasoning of the court was that *"a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz., maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 in so far as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.*

92. The principle of *purposive interpretation* was relied upon by the petitioners to urge that a gender neutral interpretation or use of words which include non-heterosexual couples should be resorted to. This court, in *S.R. Chaudhuri v. State of Punjab & Ors*[92] remarked that

> *"The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve."*

93. Ahron Barrack[93] in his treatise[94] stated as follows:

> "*Purposive interpretation is based on three components: language, purpose, and discretion. Language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the (express or implied) semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its (public or private) language."*

94. This court has also held that there can be occasions when words may be read in a particular manner, if it is sure that the draftsman would have wished it to be so, given the nature of the expressions, and, at the same time, indicated the limits for that principle, while quoting from the treatise *Principles of Statutory Interpretation by* G.P. Singh[95], in *Ebix Singapore Private Limited and Ors. v. Committee of Creditors of Educomp Solutions Ltd & Ors.*[96]*:*

> "*A departure from the Rule of literal construction may be legitimate so as to avoid any part of the statute becoming meaningless. Words may also be read to give effect to the intention of the Legislature which is apparent from the Act read as a whole. Application of the mischief Rule or purposive construction may also enable reading of words by implication when there is no doubt about the purpose which the Parliament intended to achieve. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these or similar words would have been*

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[92] (2001) 7 SCC 126,
[93] the former President of the Israeli Supreme Court
[94] *Aharan Barak-Purposive Interpretation in Law* (quoted in *Shailesh Dhairyawan v. Mohan Balkrishna Lulla* ([2015] 12 SCR 70)
[95] Lexis Nexis, First Edition (2015)
[96] [2021] 14 SCR 321

> *inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."*

Other decisions too have endorsed this line of reasoning.[97]

95. The objects of a statute, acquire primacy while interpreting its provisions, if the need so arises. Therefore, in interpretation of any statute or provision, this court, long ago, in *Workmen of Dimakuchi Estate v. Management of Dimakuchi Tea Estate*[98] underlined that where there are doubts about the meaning of a provision, they *"are to be understood in the sense in which they best harmonise with the subject of the enactment"* and that popular meanings, or strict grammatical import, may yield to *"the subject or the occasion on which they are used, and the object to be attained".* This object-based interpretation was adopted in several decisions.[99]

96. This court emphasised in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors.*[100] that:

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

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[97] In *M. Nizamuden v. Chemplast Sanmar Ltd & Ors* ((2010) 4 SCC 240)*, it was observed: "Purposive construction has often been employed to avoid a lacuna and to suppress the mischief and advance the remedy. It is again a settled rule that if the language used is capable of bearing more than one construction and if construction is employed that results in absurdity or anomaly, such construction has to be rejected and preference should be given to such a construction that brings it into harmony with its purpose and avoids absurdity or anomaly as it may always be presumed that while employing a particular language in the provision absurdity or anomaly was never intended." Girodhar G. Yadalam v. Commissioner of Wealth Tax & Ors* [2015] 15 SCR 543; *K.H. Nazar v. Mathew K. Jacob*, (2020) 14 SCC 126, which states that in interpreting a statute *"the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted."* Again, in *New India Assurance Co. Ltd.* v. *Nusli Neville Wadia* [2007] 13 SCR 598, this court explained purposive interpretation to mean one which enables *"a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act is fulfilled".*

[98] 1958 SCR 1156

[99] To name some, in *Bipinchandra Parshottamdas Patel v. State of Gujarat* [2003 (4) SCC 642]*,* a provision enabling the suspension of an elected official of a municipality, *under detention during trial,* was held to include detention during investigation, *having regard to the object, or the mischief sought to be addressed by the law."*

[100] 1987 (2) SCR 1

97. In *Bank of India v. Vijay Transport & Ors.*[101], the court dealt with the plea that a literal interpretation is not always the only interpretation of a provision in a statute and that the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something *implicit* behind the words used which control the literal meaning of such words.[102]

98. The five-judge decision of this court in *Central Bank of India v. Ravindra*[103] held:

> *" [...] Ordinarily, a word or expression used at several places in one enactment should be assigned the same meaning so as to avoid "a head-on clash" between two meanings assigned to the same word or expression occurring at two places in the same enactment. It should not be lightly assumed that "Parliament had given with one hand what it took away with the other" (see Principles of Statutory Interpretation, Justice G.P. Singh, 7th Edn. 1999, p. 113). That construction is to be rejected which will introduce uncertainty, friction or confusion into the working of the system (ibid, p. 119). While embarking upon interpretation of words and expressions used in a statute it is possible to find a situation when the same word or expression may have somewhat different meaning at different places depending on the subject or context. This is however an exception which can be resorted to only in the event of repugnancy in the subject or context being spelled out. It has been the consistent view of the Supreme Court that when the legislature used same word or expression in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout (ibid, p. 263). More correct statement of the rule is, as held by the House of Lords in Farrell v. Alexander All ER at p. 736b, "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning". The court having accepted invitation to embark upon interpretative expedition shall identify on its radar the contextual use of the word or expression and then determine its direction avoiding collision with icebergs of inconsistency and repugnancy."*

99. The objects that a statute seeks to achieve, are to thus be gleaned not merely from a few expressions, in the statement of objects and reasons (for the statute)

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[101] [1988] 1 SCR 961

[102] Relied on *R.L. Arora v. State of Uttar Pradesh {*(1964) 6 SCR 784} *"It may be that in interpreting the words of the provision of a statute, the setting in which such words are placed may be taken into consideration, but that does not mean that even though the words which are to be interpreted convey a clear meaning, still a different interpretation or meaning should be given to them because of the setting. In other words, while the setting of the words may sometimes be necessary for the interpretation of the words of the statute, but that has not been ruled by this Court to be the only and the surest method of interpretation."*

[103] (2001) Supp (4) SCR 323

but also from the enacted provisions. The provisions and the objects of the SMA (as discussed in the earlier section on discrimination) clearly point to the circumstance that Parliament intended only one *kind of couples,* i.e., heterosexual couples belonging to different faiths, to be given the facility of a civil marriage.

100. The petitioners' argued that the purpose of the SMA was to provide a framework for civil marriages not based on personal law includes same-sex marriages. Yet, structurally, Section 4 (conditions relating to solemnization of special marriages), contemplates marriages between a *man and a woman*. To read SMA in any other manner would be contrary to established principles of statutory interpretation as discussed in preceding paragraphs. It is also not permissible for the court to 'read up' and substitute the words *"any two persons"* to refer to a marriage between non-heterosexual couples.

101. Gender neutral interpretation, much like many seemingly progressive aspirations, may not really be equitable at times and can result in women being exposed to unintended vulnerability, especially when genuine attempts are made to achieve a balance, in a social order that traditionally was tipped in favour of cis-heterosexual men. The purpose of terms like *'wife', 'husband,' 'man,'* and *'woman'* in marriage laws (and other laws on sexual violence and harassment as well) is to protect a socially marginalised demographic of individuals. For instance, women facing violence by their partner have a right to seek recourse under the Domestic Violence Act, which assures- and is meant to assure that they (the victims) are safeguarded and provided relief against such injustice. In fact, provisions in SMA, for alimony, and maintenance (Section 36 and 37) confer rights to women; likewise certain grounds of divorce (conviction of husband for bigamy, rape) entitle the wife additional grounds (Section 27) to seek divorce. Other provisions such as: Section 2 (b) read with Part I (for a male) and Part II (for a female) enact *separate* degrees of prohibited relationships; Section 4 (c), uses the terms "husband" and "wife"; Section 12, 15, 22, 23, 27(1), Section 31(1) (iiia) and (2) (special provision for jurisdiction in case of

proceeding for the wife), Sections 36 and 37 provide for maintenance and alimony for the wife), Section 44 (Punishment of bigamy). The general pattern of these provisions – including the specific provisions, enabling or entitling women, certain benefits and the *effect* of Sections 19, 20, 21 and 21A of SMA is that even if for arguments' sake, it were accepted that Section 4 of SMA could be read in gender neutral terms, the interplay of other provisions- which could apply to such non-heterosexual couples in such cases, would lead to anomalous results, rendering the SMA unworkable.

102. Furthermore, if provisions of SMA are to be construed as gender neutral (such as *persons* or *spouses*, in substitution of *wife and husband*) as the petitioners propose, it would be possible for a cis-woman's husband to file a case or create a narrative to manipulate the situation. Gender neutral interpretation of existing laws, therefore, would complicate an already exhausting path to justice for women and leave room for the perpetrator to victimise them. A law is not merely meant to look good on paper; but is an effective tool to remedy a perceived injustice, addressed after due evaluation about its necessity. A law which was consciously created and fought for, by women cannot, therefore, by an interpretive sleight be diluted.

103. In fact, it would do well to remind ourselves what this court had stated, in *Delhi Transport Corporation v. DTC Mazdoor Congress (hereafter, "Delhi Transport Corporation")*[104]*:*

> *"when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it."*

Similarly, in *Cellular Operators Association of India v. Telecom Regulatory Authority of India*[105]*,* the court applied the rule of *Delhi Transport Corporation*

[104] (1990) Supp. 1 SCR 142
[105] 2016 (9) SCR 1

(supra) and held that the construction suggested would lead the court *"to add something to the provision which does not exist, which would be nothing short of the court itself legislating"* and therefore, impermissible.[106]

104. Lastly, there is no known rule by which a word or group of words, in one provision, can have two different meanings. The effect of the petitioner's argument would be to say that *generally,* provisions of SMA should be read in a gender neutral manner (spouse for wife and husband; persons instead of the male and female, etc). Whilst it could in theory be possible to read such provisions in the manner suggested, their impact on specific provisions such as the separate lists for wives and husbands for purposes of age, determining prohibited degrees of relationships, and remedies such as divorce and maintenance, leads to unworkable results. Most importantly, the court, in its anxiety to grant relief, would be ignoring provisions that deal with and refer to *personal laws of succession* that are, Sections 19, 20, 21 and 21A. This court cannot look at a text containing *words with* two optional meanings in the same provision.

105. Likewise, with regard to the FMA, the petitioners' sought that certain conditions and provisions be read in gender neutral terms, to enable same-sex marriage. FMA too, is a secular legislation wherein Section 4[107] states that a marriage between "parties" may be solemnized under this Act, provided that at least one of the two parties is a citizen of India. However, "bride" and "bridegroom" are used in Section 4 (relating to the age of the parties at time of solemnization), the Third and Fourth Schedule (which prescribe the declarations by both parties and certification of marriage). In our view, the conditions for such

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[106] Likewise, *B.R. Kapur v. State of Tamil Nadu* 2001 (3) Suppl. SCR 191 - a Constitution Bench ruling of this court, also held that interpretations which read in words, were impermissible.

[107] 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;
(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.

marriages, under Section 4(1)(c) of FMA specifically require the parties to be a 'bride' and a 'bridegroom', i.e., it is gendered in nature. Furthermore, the terms "husband" and "wife" are used in Section 13 and 18 in relation to the solemnisation of marriage and provisions where matrimonial reliefs (as under the SMA) are available under the FMA. The Petitioners' prayer therefore, that this Court read the references to "husband" or "wife" or "spouse" with "or spouse" in the same manner as discussed in relation to the SMA above, is unsustainable.

106. As far as the petitioners' reliance on *Ghaidan*[108]; *Fourie*[109]*;* and precedents from other foreign jurisdictions are concerned, we agree with the reasoning given by Chief Justice that our courts should exercise caution when relying on the law in other jurisdictions. We should be mindful of distinct contextual framework within which those decisions have been given.

107. As discussed earlier, the words of the statutes have to be read, taking into account the fabric of concepts, rights, obligations and remedies which it creates. Removing or decontextualizing provisions, from their setting and "purposively" construing some of them cannot be resorted to, even in the case of SMA as well as FMA.

VI. Discriminatory impact on queer couples

108. I do not wish to revisit the history of how this court evolved the test of considering the effect or impact of laws on Fundamental Rights; it would be appropriate to say that the object-based test favored and applied in *A.K. Gopalan*[110] was discarded decisively by the 11 judge Bench in *R.C. Cooper* (supra). The true test was spelt out in the following manner:

> *"it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon*

[108] Ghaidan v Godin – Mendoza, (2004) UKHL 30.
[109] Minister of Home Affairs v. Fourie & Anr, [(CCT 60/04) [2005] ZACC 19; 2006 (1) SA 524 (CC)]
[110] AK Gopalan v. State of Madras, (1950) 1 SCR 88

> *constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights."*

This line of reasoning was applied and commended in *Maneka Gandhi (*supra); it is now an intrinsic part of the constitutional lore.

109. In recent times, this court has applied, in relation to claims of discrimination, the test of *indirect discrimination.* This dimension was explained in *Lt. Col Nitisha v. Union of India*[111]*:*

> *"First, the doctrine of indirect discrimination is founded on the compelling insight that discrimination can often be a function, not of conscious design or malicious intent, but unconscious/implicit biases or an inability to recognize how existing structures/institutions, and ways of doing things, have the consequence of freezing an unjust status quo. In order to achieve substantive equality prescribed under the Constitution, indirect discrimination, even sans discriminatory intent, must be prohibited.*

In *Navtej Johar (*supra) too, earlier, the concurring judgment of the present Chief Justice, had relied on the directive of European Parliament which defines *indirect* discriminatory impact as:

> *"where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."*

Interestingly, an earlier decision of this court, had relied on the concept and application of indirect discrimination test in *Om Kumar and Ors v. Union of India*[112] - in the context of discussing the principle of proportionality:

> *"If indirect discrimination were established, the Government would have to show 'very weighty reasons' by way of objective justification, bearing in mind that derogations from fundamental rights must be construed strictly and in accordance with the principle of proportionality"*

[111] 2021 (4) SCR 633
[112] 2000 Supp (4) SCR693

Later judgments (*S.K. Nausad Rahaman & Ors. v. Union of India (UOI) & Ors*[113]and *Ravinder Kumar Dhariwal v. Union of India*[114]) also applied the indirect discrimination test to judge the validity of the measure in question.

110. The common feature of the *"effect of the law and of the action upon the right"* in *R.C. Cooper (supra)* and the decisions which applied the indirect discrimination lens, is that the objects (of the legislation or the policy involved) are irrelevant. It is their impact, or the effect, on the individual, which is the focus of the court's inquiry. In one sense, the development of the indirect discrimination test, is a culmination, or fruition of the methods which this court adopted, in judging the *discriminatory* impact of any law or measure, on an individual.

111. This court in the previous sections of this judgment, has discussed and concluded how the claim for reading a fundamental right to marry, into the Constitution, cannot be granted. However, the court cannot be oblivious of the various intersections which the existing law and regulations impact to queer couples.

112. The constitution exists, and speaks for *all,* not the many or some. The felt indignities of persons belonging to the LGBTQIA+ community need no proof, of the forensic kind; it does have to meet a quantifiable threshold, this court has outlined them in *Navtej Johar (supra)*. The refusal to acknowledge choice, by society, is because it is statedly based on long tradition (dating back to the times when the constitution did not exist). In such cases, the issue is does the state's silence come in the way of this court recognizing whether the petitioners have been denied the right to choose their partner?

113. It is important to recognize, that while the state *ipso facto* may have no role in the choice of two free willed individuals to marry, its characterizing marriage for *various collateral and intersectional purposes,* as a permanent and binding

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[113] 2022 (12) SCC 1
[114] 2021 (13) SCR 823

legal relationship, recognized as such between heterosexual couples only (and no others) impacts queer couples adversely. The intention of the state, in framing the regulations or laws, is to confer on benefits to families, or individuals, who are married. This has the result of *adversely* impacting to exclude queer couples. By recognizing heterosexual couples' unions and cohabitation as marriages in various laws and regulations such as: in employment (nominations in pension, provident fund, gratuity, life and personal accident insurance policies); for credit (particularly joint loans to both spouses, based on their total earning capacity); for purposes of receiving compensation in the event of fatal accidents, to name some such instances, and not providing for non-heterosexual couples such recognition, results in their exclusion.

114. The individual earned benefits (by each partner or both collectively), which would be available to family members (such as employee state insurance benefits, in the event of injury of the earning partner, provident fund, compensation, medical benefits, insurance benefits, in the event of death of such earning partner) are examples of what the injured or deceased partner by dint of her or his work, becomes entitled to, or the members of her family become entitled to. The denial of these benefits and inability of the earning partner in a queer relationship, therefore has an adverse discriminatory impact. The state may not intend the discrimination, or exclusion in the conferment of such benefits or social welfare measures. Yet, the framework of such policies or regulations, expressed in favour of those in matrimonial relationships, results in denial of entitlements/benefits, despite the professional abilities and contributions which such individuals might to society.

115. The objective of many of these laws or schemes is to confer or provide entitlements based on individual earning and contribution. For example, provident fund is payable due to the employee's personal contribution and their status as an employee, directly flowing from the functions discharged. Similarly, the objective of entitlement of benefits under the Employee State Insurance Act,

and other such insurance related schemes or welfare measures (such as the Workman's Compensation Act), flow from the individual status, work, and effort of the concerned employee. Major part of these benefits, or all of them, flow in the event of certain eventualities such as fatal accident, or death. The design of these statutes and schemes, is to enable both the concerned subscriber or employee (in the event of infirmity or termination of employment) to receive them, or in an unforeseen event such as death, for his dependents to receive them. The restrictive way in which 'dependent' or 'nominee(s)' are defined ('spouse', or members of the family in a heteronormative manner) exclude their enjoyment to the intended beneficiary.

116. This deprivation has to be addressed. That these can be magnified, can be illustrated by a few examples. For instance, a queer couple might live together as spouses (without legal recognition)- even for two decades. If one of them passes away in a motor vehicle accident, the surviving partner would not only be unable to get any share of the deceased partner's estate, but also any portion of the compensation. In case the union was not with approval of their respective families, who might have ostracised or broken relationship with them, the result would be injustice, because the surviving spouse, who shared life and cared for the deceased partner, especially during hard times, would be completely excluded from enjoying any benefits - all of which would go to the family members of the deceased (who may have even boycotted them). The same result would occur, in the event of death of one partner; family pension and death benefits would be denied to the queer partner. This injustice and inequity results in discrimination, unless remedial action is taken by the state and central governments.

117. It is relevant to record a note of caution at this juncture. While the right to marry or have a legally recognised marriage is only statutory, the right to cohabit and live in a relationship in the privacy of one's home is fundamental, and enjoyed by all. This is not to say that the latter, is unqualified or without restriction. Rather, that the latter, is a right afforded to all, irrespective of the State's recognition of

the relationship or status, as in the case of 'married' couples. The discriminatory impact recognised in the above paragraphs, however, is to highlight the effect of a legislative vacuum – specifically on long term queer couples, who do not have the avenue of marriage, to entitle them to earned benefits. Could this same logic then be extended to heterosexual couples that *choose* to not get married, despite having the avenue? With respect, this would require further consideration by the State, and was an aspect that was neither argued, nor were we called upon to decide, in the present petitions. Therefore, it is pointed out that State must remain cognizant of such an unwitting consequence of creating two parallel frameworks, for live-in or domestic partnerships, and marriages, and the confusion or anomalies this may cause to *gendered* legal frameworks (as they stand today) – while trying to remedy or mitigate the discrimination faced by queer couples.

118. Addressing all these aspects and concerns means considering a range of policy choices, involving multiplicity of legislative architecture governing the regulations, guided by diverse interests and concerns - many of them possibly coalescing. On 03.05.2023, during the course of hearing, the learned Solicitor General, upon instructions, had expressed the Union's position that a High-powered committee headed by the Union Cabinet Secretary would be formed to undertake a comprehensive examination to consider such impacts, and make necessary recommendations in that regard.

VII. Transgender persons in heterosexual persons can marry under existing law

119. We are in agreement with the Part (xi) of the learned Chief Justice's opinion which contains the discussion on the right of transgender persons to marry. We are also in agreement with the discussion relating to gender identity [i.e., sex and gender are not the same, and that there are different people whose gender does not match with that assigned at birth, including transgender men and women, intersex persons, other queer gendered persons, and persons with socio-cultural identities

such as hijras] as well as the right against discrimination under the Transgender Persons Act 2019. Similarly, discussion on the provisions of the Transgender Persons Act, 2019 and enumeration of various provisions, remedies it provides, and harmonious construction of its provisions with other enactments, do not need any separate comment. Consequently, we agree with the conclusion [(G(m)] that transgender persons in heterosexual relations have the right to marry under existing laws, including in personal laws regulating marriage. The court's affirmation, of the HC judgment in *Arun Kumar v. Inspector General of Registration*[115] is based upon a correct analysis.

VIII. Issue of joint adoption by queer couples

120. Some of the petitioners have challenged Regulation 5(3) of the 2020 CARA Regulations. By Section 57(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter 'JJ Act'), consent of both the spouses for adoption is necessary ("shall be required"). By Section 57(5), the authority[116] is enabled to frame any other criteria. CARA notified regulations in furtherance of Section 57(3) which *inter alia* mandates as a prerequisite that the prospective adopting couple should have been in a stable marital relationship for at least 2 years[117]. The petitioners argued that these regulations relating to adoption were ultra vires the parent enactment – the JJ Act, and arbitrary for classifying couples on the basis of marital status, for the purpose of joint adoption. We have perused the reasoning and conclusion by the learned Chief Justice on this aspect, and are unable to concur.

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[115] (2019) Online SCC Madras 8779

[116] CARA (Central Adoption Resource Agency) formed under Section 68

[117] 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:— (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.

121. The interpretation placed on Section 57(2) of the JJ Act by the learned Chief Justice, is that it contemplates (joint) adoption by both married and unmarried couples, but the condition requiring both spouses to consent applies only to married couples. Therefore, while the JJ Act is wider in its scope, the CARA Regulation 5(3) [in furtherance of Section 57(5) which delegates power to prescribe any other criteria] stipulating a 'stable marital relationship' exceeds the power granted by the parent Act, and is *ultra vires* the express provisions and legislative policy of the JJ Act. Our disagreement with this characterization is laid out in Part A below. Thereafter, the learned Chief Justice has read down offending part 'marital' from Regulation 5(3), and held that the requirement of 'consent' embodied in Regulation 5(2)(a) would be equally applicable on both married and unmarried couples. We are of the firm opinion that the exercise of reading down itself, is unsustainable [See part B below] and hence, this consequence though favourable, cannot apply. Our reasoning in relation to the aspect of adoption by queer couples, and the indirect discrimination faced, is elaborated in Part C.

A. <u>Not a case of delegated legislation being ultra vires the parent Act</u>

122. With respect, we disagree with the interpretation of Section 57(2) of the JJ Act *itself*. A reading of the provision as a whole, makes it amply clear that it intends joint adoption only to married couples. While the word "couple" is not preceded by 'married', the use of "spouse" later in the sentence, rules out any other interpretation. The principle of *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) is squarely applicable; a provision is to be seen as a whole, wherein words are to be read in the context of accompanying or associating words. In *K. Bhagirathi G. Shenoy and Ors. v. K.P. Ballakuraya & Anr.*[118]*, it was observed*:

> *"It is not a sound principle in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a*

[118] [1999] 2 SCR 438

> *statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim noscitur a sociis (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision."*

Furthermore, such an interpretation – of construing a part of one provision as operating to one set of people, and not others, is simply not known to law.

123. To read Section 57(2) as enabling both married and unmarried couples to adopt, but that the statutory provision contemplates a restriction or requirement of 'consent' only on the former kind of couple is not based on any known principle of interpretation. There is a strong legislative purpose in the requirement of obtaining consent of the spouse, which is rooted in the best interest of the child; for their welfare, and security. The parent Act, and delegated legislation, both are clear that a prospective adoptive parent can be a single person (whether unmarried, widower, etc.) and on them, there exists no restriction other than on a single male being barred from adopting a girl child. The restriction of 'consent' of partner, applies only in the case of a couple. This is because the child will enter into a family unit – consisting of two parents, as a result of the adoption and will in reality, enjoy the home that is made of both partners. Acceptance, therefore, of the other partner, is imperative; it would not be in the best interest of the child if one of the partners was unwilling to take on the responsibility. The only other legislative model is Section 7 and 8 of the Hindu Adoption and Maintenance Act, 1956 which mandates consent of both spouses (which much like other personal laws, uses the gendered language of "wife" and "husband").

124. Therefore, given that we differ on the starting point itself – that section 57(2) of the JJ Act permits joint adoption by both married and unmarried couples (as held by the learned Chief Justice) – we are of the considered opinion that is not a case of delegated legislation being ultra vires the parent Act.

125. The legislative choice, of limiting joint adoption only to married couples needs to be understood in the broader context of the JJ Act, and its purpose – which is the best interest of the child are paramount. Legal benefits and

entitlements, flow either from/in relation to the individual adopting (when a single person adopts), or the married couple adopting as a unit. In the case of bereavement, of such single parent, custody of the child may be taken by a relative in the former, whereas continued by the surviving spouse, in the latter. But consider, that in the case of a married couple – there is a breakdown of marriage, or simply abandonment/neglect of one partner and the child, by the other. There are protections in the law, as they stand today, that enable such deserted, or neglected spouse, to receive as a matter of statutory right – maintenance, and access to other protections. Undoubtedly, the DV Act offers this protection even to those in an unmarried live-in relationship, but consider a situation that does not involve domestic violence, and is plain and simple a case of neglect, or worse, desertion. It is arguable that both partners, are equally responsible for the child after the factum of adoption; however – it begs the question, how can one *enforce* the protection that is due to this child?

126. The JJ Act merely enables adoption, but for all other consequences (i.e., relating to the rights of a child *qua* their parents, and in turn obligations of a parent towards the said child) reference has to be made to prevailing law (law relating to marriage and divorce, maintenance, succession, guardianship, custody, etc.). When a single person adopts as an individual, their capabilities are assessed as per Section 57(1) [and Regulation 5(1)], and the responsibility of that child – falls squarely on this individual. If that person enters into a relationship, whether it later succeeds, or fails, is immaterial – the responsibility of the child remains squarely on the individual (until they are married, and the partner legally adopts the child). When a couple adopts, they are *jointly* assessed, and in law, the responsibility falls on both parents. If one parent was to abandon the relationship, and the other parent is unable to maintain themselves or the child by themselves– recourse lies in other statutory provisions which enable remedy to be sought. To read the law in the manner adopted by the learned Chief Justice, with all due respect, would have disastrous outcomes, because the ecosystem of law as it

exists, would be unable to guarantee protection to the said child in the case of breakdown of an unmarried couple, adopting jointly. This, therefore, would not be in the best interest of the child.

B. Not a case for reading down or other interpretive construction

127. Counsel relied on the case of *X v. Principal Secretary (supra)* where this court read down 'married woman' to just 'woman' for the purpose of interpretating the MTPA Act, to argue that a similar interpretation be adopted for the law relating to adoption. In our considered opinion, that case was on a different footing altogether – it related to an individual woman's right to choice and privacy, affecting her bodily autonomy. Given the fundamental right that each childbearing individual has, and the objective of the Act, the classification on the basis of marital status, was wholly arbitrary. The JJ Act and its regulations are on a different footing. Here, the object of the Act and guiding principle, is the best interest of the child (and not to enable adoption for all).

128. It is agreeable that all marriages may not provide a stable home, and that a couple tied together in marriage are not a 'morally superior choice', or *per se* make better parents. Undoubtedly, what children require is a safe space, love, care, and commitment – which is also possible by an individual by themselves, or a couple– married or unmarried. There is no formula for a guaranteed stable household. Principally, these are all conclusions we do not differ with. As a society, and in the law, we have come a long way from the limited conception of a nuclear family with gendered roles, and privileging this conception of family over other 'atypical' families. However, the fact that Parliament has made the legislative choice of including only 'married' couples for *joint* adoption (i.e., where two parents are legally responsible), arises from the reality of all other laws wherein protections and entitlements, flow from the institution of marriage. To read down 'marital' status as proposed, may have deleterious impacts, that only

the legislature and executive, could remedy – making this, much like the discussion on interpretation of SMA, an outcome that cannot be achieved by the judicial pen. Having said this, however, there is a discriminatory impact on queer couples, perhaps most visible through this example of adoption and its regulation, that requires urgent state intervention (elaborated in Part C).

129. Furthermore, the previous analysis of SMA has led this Court to conclude that its provisions cannot be modified through any process of interpretation and that the expression "spouse" means husband and wife or a male and female as the case may be, on an overall reading of its various provisions. By Section 2(64) of the JJ Act, expressions not defined in that Act have the same meanings as defined in other enactments. The SMA is one example. Likewise, the other enacted laws with respect to adoption is the Hindu Adoption and Maintenance Act. That contains the expression "wife and husband". In these circumstances, we are of the opinion that the manner in which Section 57(2) is cast, necessitating the existence of both spouse and their consent for adoption of a child. In such a relationship, Regulation 5(3) cannot be read down in the manner suggested by the learned Chief Justice.

130. Therefore, in our opinion, whilst the argument of the petitioners is merited on some counts, at the same time, the reading down of the provision as sought for would result in the anomalous outcome that heterosexual couples who live together, but *choose not to marry*, may adopt a child together and would now be indirect beneficiaries, *without* the legal protection that other statutes offer – making it unworkable (much like the discussion on SMA in Part V).

C. Discriminatory impact of adoption regulations on queer persons

131. Section 57(2) of that Act spells out the eligibility conditions of prospective adoptive parents. The petitioner's argument was that the expression "marital" results in discrimination inasmuch as single parent can adopt – the only

prohibition being that a single man cannot adopt a girl child. Further, if a single man and/or a single woman choose to adopt separately as an individual, and live together, the resultant *de facto* parents would still have a choice of marrying each other – for the child in question to be legally the child of both parents. Or put differently, if a heterosexual couple wants to adopt a child jointly, they have the *option* of entering into a marriage, thereby making them eligible for joint adoption. However, in the absence of legal recognition of a queer couple union, they are left to adopt as individuals and the resultant *de facto* family would have no avenue for legal recognition. This iniquitous result too is an aspect which needs to be addressed as the impact here is not only on the queer couple (who have no avenue to seek legal recognition of their union) but also upon the children adopted by them (who have no say in the matter).

132. Furthermore, given the social reality that queer couples are having to adopt in *law* as individuals, but are residing together and for all purposes raising these children together – means that the State arguably has an even more urgent need to *enable* the full gamut of rights to such children, qua both parents. For instance, in an unforeseen circumstance of death of the partner who adopted the child as an individual, the child in question may well become the ward of such deceased's relatives, who might (or might not) even be known to the child, whereas the surviving partner who has been a parent to the child for all purposes, is left a stranger *in the law*. Therefore, this is yet another consequence of the non-recognition of queer unions, that the State has to address and eliminate, by appropriate mitigating measures.

133. This is not to say that unmarried couples – whether queer or heterosexual– are not capable or suitable, to be adoptive parents. However, once the law permits, as it has done – adoption by both single individuals, the likelihood of their joining and co-habiting cannot be ruled out. In such event, *de facto* family unit can and do come about. The underlying assumption in the law as it exists, that such unmarried heterosexual or queer couples should not adopt needs to be closely

examined. Similarly, the need of such couples to have and raise a family in every sense of the term, has to be accommodated within the framework of the law, subject to the best interests of the child. The existing state of affairs which permits single individuals to adopt, and later to live as a couple in due exercise of their choice, in effect deprives the children of such relationships various legal and social benefits, which are otherwise available to children of a married couple. In other words, given the objective of Section 57 and other allied provisions of the JJ Act, which is beneficial for children, the State as *parens patriae* needs to explore every possibility and not rule out any policy or legislative choice to ensure that the maximum welfare and benefits reach the largest number of children in need of safe and secure homes with a promise for their fullest development. This aspect is extremely important given that a large number of children remain neglected, or orphaned.

134. It goes without saying that the welfare and the benefit of the children is paramount in every case, and the State has the duty to act as *parens patriae*. That our country has countless children who are orphaned or neglected, and in need of loving homes, is not lost on us – and is certainly a concern that the State is most acutely aware of. In these circumstances, it would be in the general interest of all children that such impact is removed at the earliest instance, after undertaking in-depth study and analysis of the various permutations and combinations that would arise in opening adoption more widely, without hampering the child's rights. In its exercise of reframing the regulations or laws, it is reiterated that the State cannot, on any account, make regulations that are facially or indirectly discriminatory on the ground of sexual orientation. It would be entirely wrong, if the observations herein, are construed as saying that the State should hamper or interfere in queer persons who have in the past, or are seeking to adopt as individuals. These observations are to be construed to *enable* the state to consider all options, and implications, with the object of promoting the best welfare of children, especially whether joint adoption can be facilitated to such willing

couples, even while ensuring that the legal web of statutory protections and entitlements guaranteed to children, are operationalised for these children as well.

135. These observations are not meant to impede all possibilities and make all necessary policy and legislative changes, enabling children's welfare. In other words, the possibility of queer couples adopting children, should be given equal concern and consideration having regard to the larger interest of the largest number of children and their development.

IX. Moulding relief

136. The breadth and amplitude of this court's jurisdiction is incontestable. The constitution framers created this as a fundamental right in most emphatic terms. This jurisdiction enables the court to create and fashion remedies suited for the occasion, oftentimes unconstrained by previous decisions. Yet the breadth of this power is restrained by the awareness that it is in essence *judicial*. The court may feel the wisdom of a measure or norm that is lacking; nevertheless, its role is not to venture into functions which the constitution has authorised other departments and organs to discharge.

137. Social acceptance is an important aspect of the matrimonial relationship, but that is not the only reality; even in the exercise of choice by the parties to a marriage, there may be no acceptance at all, by members of their respective families; others too may shun them. Yet, their relationship has the benefit of the cover of the law, since the law would recognize their relationship, and afford protection, and extend benefits available to married persons. This however eludes those living in non-heterosexual unions, who have no such recognition in all those intersections with laws and regulations that protect individual and personal entitlements that are earned, welfare based, or compensatory. The *impact*, therefore, is discriminatory.

138. Does the existence of such discriminatory impacts, in these intersections with the state, and arising out of a variety of regulations and laws, impel this court

to fashion a remedy, such as a declaration, which *enjoin legislative activity, or instruct the executive to act in a specified manner, i.e., achieving non-heterosexual couple marriage*? This aspect cannot be viewed in isolation, but in the context of our constitution's entrenchment of separation of powers, which according to *Kesavananda Bharati (supra), Indira Gandhi*[119] and other judgments constitutes an essential feature of the Constitution. It is one thing for this court, to commend to the state, to eliminate the discriminatory impact of the intersections with laws and publicly administered policies and institutions, upon non-heterosexual couples, and entirely another, to indirectly *hold that through a conflation of positive obligations cast on the State, that such individuals' right to choice to cohabit and form abiding relationships, extends to the right (or some entitlement) to a legally recognised union that must be actualized by State policy/legislation.*

139. The petitioners relied on three judgments specifically, to argue that this court could issue directions, to fill the legal lacunae: *Common Cause (supra), Vishaka & Ors v. State of Rajasthan (hereafter, "Vishaka")*[120] and *NALSA* (supra). We have briefly summarized why these were in a context different from the case before us.

140. In *Common Cause* (supra), the court elaborated on the theme of liberty under Article 21 of the Constitution and the façade of dignity inherent in it. The Court relied on *Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*[121], *Maneka Gandhi* (supra), and *State of A.P. v. Challa Ramkrishna Reddy*[122]. The court also relied on *K.S. Puttaswamy* (supra), *NALSA* (supra) and *Shabnam v. Union of India*[123] to underline the intrinsic value of dignity and further stated that life is not confined to the integrity of physical body. Having said that, the Court

[119] *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp. SCC 1
[120] 1997 Supp 3 SCR 404
[121] (1983) 1 SCR 828
[122] (2000) 3 SCR 644
[123] (2015) 8 SCC 289

formulated the right under Article 21 to include the right to die with dignity, of a dying or terminally ill person and approved the application of only passive euthanasia. The Court further went on to approve the idea of individual autonomy and self-determination, underlining the context expanded and built upon the directions which had been granted in the earlier judgment in *Aruna Ramchandra Shanbaug v. Union of India (hereafter, "Aruna Shanbaug")*[124]. The Court was also influenced by the recommendations of the 241st Law Commission Report which had suggested incorporation of additional guidelines in addition to an elaboration of what had been spelt out in *Aruna Shanbaug (supra)*. The Court rejected the argument that the previous ruling in *Gian Kaur v. State of Punjab*[125] did not rule that passive euthanasia can only be given effect to through legislation and further that the Court could only issue guidelines.

141. The approach of *Common Cause (supra)* as can be seen from the varied opinions of the Judges forming the Bench was one of seeing the workability and the need to elaborate guidelines formulated in *Aruna Shanbaug (supra)*. The Court had no occasion, really speaking, but to consider whether the directions given could not have been given. Furthermore, there were reports in the form of Law Commission recommendations which formed additional basis for the Court's discretion and the final guidelines. An important aspect is that all judgments in *Common Cause (supra)* located the right to passive euthanasia premising upon the right to human dignity, autonomy and liberty under Article 21.

142. *Vishaka (supra)* was an instance where in every sense of the term, there was all round cooperation as is evident from the position taken by the Union of India which had expressly indicated that guidelines ought to be formulated by the Court. The trigger for these guidelines was the resolve that gender equality (manifested in Articles 14 and 15 of the Constitution as well as the right to

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[124] *Aruna Ramchandra Shanbaug v. Union of India*, (2011) 4 SCR 1057.
[125] (1996) 3 SCR 697

dignity) and the right to pursue one's profession and employment [Article 19(1)(g)] needed some express recognition to ensure protection from sexual harassment in the workplace and to work with dignity, is a basic human right which needed to be addressed in the context of women at workplace. The Court took note of international conventions and instruments and also held that guidelines had to be formulated for enforcement of Fundamental Rights till a suitable law is made. The Court expressly indicated what kind of behaviour was sexual harassment (para 2 of the guidelines) and further that regulations had to be formulated for prohibited sexual harassment and providing for appropriate penalties at workplace. Other directions were that if the conduct amounted to an offence, the employer had to initiate appropriate action according to law and also ensure that the victims had to be given the option of transfer of their perpetrator or their own transfer. Furthermore, disciplinary action in terms of the rules was directed with a further requirement that necessary amendments were to be carried out. The Court then went on to request the State to consider adopting suitable measures indicating legislation to ensure that the guidelines in the order were employed by the Government.

143. Central to the idea of issuing directions or guidelines in *Vishaka (supra)* was the felt need to address a living concern - that of providing redressal against socially repressible conduct suffered by women in the course of employment. The Court stepped in, so to say, to regulate this behaviour in public places, which though not criminalized or outlawed (other than in the limited context of Section 354 IPC) actually tended towards criminal behaviour. The Court articulated the constitutional vision for bringing about gender parity and to that end, elimination of practices which tended to lower the dignity and worth of women through unacceptable behaviour. Guided by Article 15(3), the court stepped in, while limiting itself to regulate workplaces essential in the public field (State or State agencies). The Union of India was actively involved and in fact had given suggestions, at the time of formulation of these guidelines. At the same time, the

court realized its limitation and declared that such guidelines shall continue till appropriate laws are made. Existing service rules were in fact amended to accommodate these concerned, to the extent of incorporating the forums through which such grievance could be articulated. This later culminated in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which applies not merely to public but all establishments.

144. In *NALSA (supra),* the Court again was confronted with an acute concern wherein the personhood of transgender persons itself, was not recognized. The court held that the intrinsic worth of every individual and the value of individuals to fully realise their rights, was a premise embedded in the Constitution. The Court sought to address hostile discriminatory practices, which included violence that transgender persons were subjected to routinely. Given all these circumstances, the Court located the right of those identifying themselves as transgender persons squarely under Article 21 of the Constitution. Any discriminatory practice against such persons, would violate their Article 15 right under the Constitution. The directions given by the Court were that such persons should be treated as third gender, where appropriate, and granted legal protection to their self-identified gender identity. Further, that the State and Central Government should seriously address problems faced by them by providing measures for medical care and facilities in hospitals, permitting them access to social welfare schemes for their betterment and take other measures. The court also constituted an expert committee to make an in-depth study of problems faced by transgender persons.

145. In the present case, however, the approach adopted in the above three cases would not be suitable. The court would have to fashion a parallel legal regime, comprising of defined entitlements and obligations. Furthermore, such framework containing obligations would cast responsibilities upon private citizens and not merely the State. The learned Chief Justice's conclusions also do not point towards directions of the kind contemplated in *Vishaka (supra)*.

However, the outlining of a bouquet of rights and indication that there is a separate constitutional right to union enjoyed by queer couples, with the concomitant obligation on the State to *accord recognition* to such union, is what we take exception to.

X. Conclusion and directions

146. Marriage, in the ultimate context, is not defined merely by the elements, which delineate some of its attributes, and the differing importance to them, depending on times, such as permanence of a sexual partner; procreation and raising of children, stability to family, and recognition in the wider society. Some, or most of these elements may be absent in many relationships: there may be no procreative possibility due to choice, or otherwise; some marriages may have no wider context, such as absence of the larger family circle, due to several reasons, including alienation or estrangement; there may be no matrimonial home, in some marriage, because of constraints including spouses being located in different places; some marriages may be (by choice or otherwise) bereft of physical or sexual content. Yet, these marriages might be as successful, as fulfilling and complete as any other. The reason, in this author's opinion, is that at its core, marriage has signified companionship, friendship, care and spiritual understanding a *oneness*, which transcends all other contents, and contexts. Thus, *"home"* is not a physical structure; it is rather the space where the two individuals exist, caring, breathing and thinking, living for each other. This is how traditionally it has been understood.

147. This *feeling* need not be unique to marriage; and in fact has come to be enjoyed by many without the cover of it (for e.g., those who are simply in committed cohabitational relationships). While many others, may only be able to experience such a feeling and way of life, if it were to have the legitimacy in society, akin to marriage. That law has the potential to play such a *legitimising* role, cannot be overstated. The feeling of exclusion that comes with this status

quo, is undoubtedly one which furthers the feeling of exclusion on a daily basis, in society for members of the queer community. However, having concluded that there exists no fundamental right to marry, or a right to claim a status for the relationship, through the medium of a law (or *legal regime*) and acknowledged the limitations on this court in moulding relief, this court must exercise restraint; it cannot enjoin a duty or obligation on the State to create a framework for civil union or registered partnership, or marriage, or abiding co-habitational relationship. Yet, it would be appropriate to note that everyone enjoys the right to choice, dignity, non-discrimination, and privacy. In a responsive and representative democracy which our country prides itself in being, such right to exercise choices should be given some status and shape. Of course, what that should be cannot be dictated by courts. At the same time, prolonged inactivity by legislatures and governments can result in injustices. Therefore, action in this regard, would go a long way in alleviating this feeling of exclusion that undoubtedly persists in the minds and experiences, of this community.

148. The resultant adverse impact suffered by the petitioners in relation to earned benefits [as elaborated in Part VI], solely because of the State's choice to not *recognise* their (social) union or relationship, is one which results in their discrimination. This *discriminatory <u>impact</u>* – cannot be ignored, by the State; the State has a legitimate interest necessitating action. The *form* of action – whether it will be by enacting a new umbrella legislation, amendments to existing statutes, rules, and regulations that as of now, disentitle a same-sex partner from benefits accruing to a 'spouse' (or 'family' as defined in the heteronormative sense), etc.– are policy decisions left to the realm of the legislature and executive. However, the recognition that their non-inclusion in a legal framework which entitles them, and is a prerequisite eligibility criteria for myriad earned and accrued benefits, privileges, and opportunities has harsh and unjust discriminatory consequences, amounting to discrimination violating their fundamental right under Article 15 – is this court's obligation, falling within its remit. The State has to take suitable

remedial action to mitigate the discriminatory impact experienced by the members of the queer community, in whatever form it deems fit after undertaking due and necessary consultation from all parties, especially all state governments and union territories, since their regulations and schemes too would have to be similarly examined and addressed.

149. This court hereby summarizes its conclusions and directions as follows:

i. There is no unqualified right to marriage except that recognised by statute including space left by custom.

ii. An entitlement to legal recognition of the right to union – akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting in legal status.

iii. The finding in (i) and (ii) should not be read as to preclude queer persons from celebrating their commitment to each other, or relationship, in whichever way they wish, within the social realm.

iv. Previous judgments of this court have established that queer and LGBTQ+ couples too have the right to union or relationship (under Article 21) – "be it mental, emotional or sexual" flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship.

v. The challenge to the SMA on the ground of under classification is not made out. Further, the petitioner's prayer to read various provisions in a 'gender neutral' manner so as to enable same-sex marriage, is unsustainable.

vi. Equality and non-discrimination are basic foundational rights. The indirect discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a relevant eligibility factor, for queer couples who in their exercise of choice form relationships, have to be suitably redressed and removed by the State. These measures

need to be taken with expedition because inaction will result in injustice and unfairness with regard to the enjoyment of such benefits, available to all citizens who are entitled and covered by such laws, regulations or schemes (for instance, those relating to employment benefits: provident fund, gratuity, family pension, employee state insurance; medical insurance; material entitlements unconnected with matrimonial matters, but resulting in adverse impact upon queer couples). As held earlier, this court cannot within the judicial framework engage in this complex task; the State has to study the impact of these policies, and entitlements.

vii. Consistent with the statement made before this Court during the course of proceedings on 03.05.2023, the Union shall set up a high-powered committee chaired by the Union Cabinet Secretary, to undertake a comprehensive examination of all relevant factors, especially including those outlined above. In the conduct of such exercise, the concerned representatives of all stakeholders, and views of all States and Union Territories shall be taken into account.

viii. The discussion on discriminatory impacts is in the context of the effects of the existing regimes on queer couples. While a heterosexual couple's right to live together is not contested, the logic of the discriminatory impact [mentioned in conclusion (vi) above] faced by queer couples cohabiting together, would definitionally, however, not apply to them.

ix. Transgender persons in heterosexual relationships have the freedom and entitlement to marry under the existing statutory provisions.

x. Regulation 5(3) of the CARA Regulations cannot be held void on the grounds urged. At the same time, this court is of the considered opinion that CARA and the Central Government should appropriately consider the realities of *de facto* families, where single individuals are permitted to adopt and thereafter start living in a non-matrimonial relationship. In an unforeseen eventuality, the adopted child in question, could face exclusion

from the benefits otherwise available to adopted children of married couples. This aspect needs further consideration, for which the court is not the appropriate forum.

xi. Furthermore, the State shall ensure - consistent with the previous judgment of this Court in K.S. *Puttaswamy (supra), Navtej Johar (supra), Shakti Vahini (supra)* and *Shafin Jahan (supra)*- that the choice exercised by queer and LGBTQ couples to cohabit is not interfered with and they do no face any threat of violence or coercion. All necessary steps and measures in this regard shall be taken. The respondents shall take suitable steps to ensure that queer couples and transgender persons are not subjected to any involuntary medical or surgical treatment.

xii. The above directions in relation to transgender persons are to be read as part of and not in any manner whittling down the directions in *NALSA (supra)* so far as they apply to transgender persons.

xiii. This court is alive to the feelings of being left out, experienced by the queer community; however, addressing their concerns would require a comprehensive study of its implications involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum to provide suitable remedies.

XI. Postscript

150. We have the benefit of the final draft by the learned Chief Justice, which contains Section E ‘responses to the opinion of the majority’ as well. Similarly, we have the benefit of perusing the separate opinion of Sanjay Kishan Kaul, J. While it would not be necessary to deal pointedly with the responses of my learned brothers, certain broad aspects are addressed in the following paragraphs, to clear the air or dispel any misunderstanding.

151. The learned Chief Justice in his response seeks to highlight that the Court has in the past exercised its powers under Article 32 in respect of enforcement of

various fundamental rights and cited certain precedents. A close look at each of them would reveal that in almost all cases, the Court enforced facets of personal liberty, or an aspect that was the subject of legislation. The allusion to cases dealing with subjects, particularly, incarceration of persons with mental disabilities (*Sheela Barse*[126]), the right to speedy trial (*State of Punjab v. Ajaib Singh*[127]), legal aid (*Manubhai Pragji* Vashi[128] etc. are directly concerned with personal liberty. The reference to cases dealing with clean environment, is also a facet of Article 21. In fact, there are enacted laws in the field of environment protection. The allusion to the directions in *PUCL v. UOI*[129] is pertinent; in that judgment, the Court in fact issued a series of directions to the State, operationalizing existing government schemes, and issuing consequential directions, to mitigate large-scale loss of grains, by directing that they be distributed/channelized by the State, into the PDS system. The other decision, *State of H.P. v. Umed Ram Sharma*[130] was a case where the High Court had directed speedy implementation and construction of a road which had been sanctioned by the State but had been left incomplete. It was held that direction was not to supervise the action but only to the apprise state of the inaction to bring about a sense of urgency. The court also observed importantly that it is primarily within the domain of the executive to determine the urgency and manner of priorities of the need of any law. This court by its judgment even observed that there was nothing wrong in such directions, since a sanction for the road had been obtained but there was tardy implementation of the same.

152. That certain fundamental rights have positive content, or obligation, is not disputed – in fact, in paragraph 57 this has been elaborated; exception was instead taken to the approach suggested by the learned Chief Justice, of tracing the right

[126] 1993 Supp (1) SCR 561
[127] 1995 (1) SCR 496
[128] 1995 Supp (2) SCR 733
[129] W.P.(C)196/2001
[130] 1986 (1) SCR 251

to union from a conjoint reading of multiple Articles (clauses of Article 19, 25 and 21), as necessitating the creation of a legal status to the relationship (a result of the obligation to "accord recognition") and enunciation of a bouquet of entitlements flowing from this [see paragraph 336(i)]. With respect, such a direction is in the nature of creating a legal status. Further, the discussion on the absence of law, and limited extent of positive rights under Article 19 and 25 in our opinion, was in fact to insist that rather than ordering liberties and enumerating every possible right or the way in which it is to be enjoyed, the content of fundamental rights are that they take up all the space, *until restricted* – which can be tested on the ground of its reasonableness, as per the limitations in Part III. This in no manner takes away from the previous jurisprudence of this Court where positive obligation under Article 21 has been expounded to locate several obligations upon the State.

153. This Court's observations with respect to the learned Chief Justice's reasoning centered around the enunciation of the bouquet of rights emanating from various provisions other than Article 21 [Article 19 and 25], and locating an obligation, has to be seen in the backdrop of the unanimous view of this Court, that the *fundamental right to marry* is not found within the Constitution. Therefore, it is our considered opinion that to create an overarching obligation upon the State to facilitate through policies the fuller enjoyment of rights under Article 19 and 25, is not rooted in any past decision, or jurisprudence. That queer couples have the right to exercise their choice, cohabit and live without disturbance – is incontestable. In the same vein, that they are owed protection against any threat or coercion to their life, is a positive obligation that binds the State– this is a natural corollary of their right under Article 21.

154. Consider in this context, also the *nature* of the relief sought, and the positive obligation fashioned. While there are innumerable judgments on the positive content of rights under Article 21, there are also countless judgments that insist upon the separation of powers, when it comes to matters of policy, and the

courts not being the appropriate forum for the adjudication of the same. The polycentric nature of the issue, is compelling.

155. Next, on the charge levelled that our conclusion on the challenge to the SMA (**Part V** of this judgment) and subsequently finding on the disparate or discriminatory impact faced by the queer community (Part VI) being contradictory – a small comment is called for. The section discussing the provisions of the SMA and the challenge to its validity, was based entirely upon whether it violated the Constitution on the ground of *impermissible classification* (under Article 14) – for which, the *object* of the Act (i.e., to facilitate marriage between inter-faith couples, wherein at the time 'marriage' or even a 'couple' only denoted heterosexual couples in light of same sex relations being criminalized), and its provisions, are relevant factors. Classification, involves differentiation; further, this court has discussed how 'under classification' per se does not warrant invalidation. In contrast, in the latter segment on discriminatory impact (Part VI), the issue that this court was considering, was not reasonable classification but the impact upon queer couples through neutral laws or regulations that they encounter in their everyday lives; the purpose of which, or even their substantive provisions, have nothing to do with matrimony. Its rather to confer other benefits – many of which are earned or accrued on account of individual skill and attainment. Yet the framing of some benefits or their intended beneficiary – wherever articulated in terms of entitlement to families or spouses, tends to exclude from its ambit, queer couples and their lived realities. When such queer couples are entitled to benefits wherever they fulfil other eligibility criteria; it is the disparate impact of these neutral laws in disbursal of entitlements or benefits, which is seen through the *effect/impact* lens. Therefore, the discussion on the constitutionality of the SMA is markedly different from the section on discriminatory impact in *certain points* for queer persons, as they have no avenue for marriage like heterosexual persons. In the latter, the impact of various laws were pointed as a starting point for the State to take remedial action.

156. What is apparent, however, from our judicial differences and the manner in which we have articulated them – is that a certain question, of fair significance, arises: whether the absence of law or a regulatory framework, or the failure of the State to enact law, amounts to *discrimination* that is protected[131] against under Article 15? With respect, this was perhaps neither argued, nor answered by us; our opinion is limited to testing the provisions of the SMA for violation of fundamental rights and noticing that there are various cracks through which the queer community slip through, in other neutral laws, policies and frameworks, due to the manner in which they privilege marital/spousal status (access to which, is not enabled/possible under existing law). Article 15(1) now, can be understood as permitting a classification for the purpose of fashioning policies. Can the state's omission to create a classification, and further, its absence of a policy for a distinct group, which in the court's opinion deserves favourable treatment, amount to violation of Article 15? There is no known jurisprudence or case law (yet) pointing to the absence of law being considered as discrimination as understood under Article 15.

157. The learned Chief Justice has dealt with in some detail on that section of our judgment, on adoption [Part VIII]. The underlying premise of his comments seek to highlight that the existing legal framework affords protection in the event of an unforeseen eventuality like abandonment, or sudden death of one partner. It is incontestable that Section 63 of the JJ Act, provides *legal* status to the child, in relation to their adoptive parent(s). However, that per se, is not adequate to address all concerns relating to the child. There would be difficulties faced by children, in claiming entitlements such as maintenance, in the absence of a *general* law. The example given by the learned Chief Justice illustrates this: benefit under the Hindu Adoption and Maintenance Act (which is available only

[131] Sexual orientation has been recognised under 'sex' in Article 15 by this court in *Navtej Johar* (supra) and does not merit elaboration, further than to say that any law or policy which directly, or indirectly, discriminates against a queer individual on the basis of their sexual orientation would fall foul of the Constitution, unless the law is a permissible classification.

to Hindus, but accommodates both genders, unlike other laws). A suggestion of Section 125 of the Criminal Procedure Code would give rise to the same set of difficulties as the earlier discussion on SMA. In other words, to obviate the gendered language, an interpretive exercise of the kind ruled out for the interpretation of SMA, would be necessary. It is for these reasons, that we highlighted the need for the State to consider all aspects [para 133-135]. This court would reiterate that there is no basis for interpreting the term 'couple' under Section 57(2) of the JJ Act as including both married and unmarried couples, given the use of the word 'spouse' in the very same provision. It is pertinent to highlight that Section 2(61) of the JJ Act prescribes that expressions not defined, would have the same meaning as in other enactments.

158. As far as the learned Chief Justice's comment with respect to this court not reading down 'marital' or striking down Regulation 5(3), the earlier discussion in Part VIII clarified that there was a conscious legislative policy while highlighting the interpretation of the term 'spouse'. At the same time the court recognised the disparate, and even discriminatory impact, on children of individuals, who formed *de facto* families (with their unmarried partner). In our opinion, striking down the term 'marital' under Regulation 5(3) – would likely have unintended consequences, which cannot be comprehended by the court as it involves policy considerations. This is the reason for desisting from invalidating the provision but having left it to the State to take measures to remedy these impacts.

159. Lastly, a small note of caution is expressed in relation to a few conclusions of our learned brother Kaul, J. There can hardly be any dispute of the positive outcomes or the need for a broadly applicable non-discriminatory law (as elaborated by Kaul, J). However, the wisdom or unwisdom of such a law, the elements that go into its making are matters that are not before this Court to comment on. Nor can we anticipate what would be its content. We are of the opinion that it is not possible to hold that a positive obligation to enact such a law

exists. We, therefore, expressly place our disagreement with the reasoning of Kaul, J on this aspect.

160. The known canons of interpretation require the courts to take any statute and interpret its provisions keeping in mind their contextual setting. Likewise, the meaning of words have to be understood in the totality of provisions of the statute. Thus, wherever a word is used, the overall context of its location plays a role; sometimes, its meaning changes wherever the context is different. We have hence held that the expressions in the SMA ["wife" and "husband" or "male" and "female"] cannot, have a uniform meaning, because there is an intended gendered binary [e.g., male and female] in the specific enacting provisions. As far as *inter se* statutes are concerned, the inexpedience of a singular, gender neutral meaning is not a possible outcome, as explained previously. Therefore, it is our considered view, that there is no known interpretive tool enabling an exercise *inter se* and in between statutes, as held by Kaul, J.

161. Undoubtedly, constitutional values endure; they are not immutable. To the extent it is possible, the statutes may be interpreted in tune with such evolving values. Yet, statutes are neither ephemeral, nor their terms transient, and are meant to confer rights, duties, and obligations – and sometimes impose burdens and sanctions. This means that their contents have to be clear and capable of easy interpretation. The text of the statute therefore must be given meaning – any interpretive exercise must therefore begin with the text of the enacted law.

162. The gaps and inadequacies outlined earlier by this judgment result in wide-reaching impacts and concern crucial aspects of everyday life. Therefore, the respondents and all institutions should take note of the lived realities of persons across the range of gender identities and suitably prioritize their needs of social acceptance. There is also need for a move towards greater acceptance of personal choices and preferences, and an equal marking of our differences in all their varied hues.

163. In various countries that have since legislated on same-sex marriage, the precursor to this regime was often the civil union route. Known by many names, the concept of civil union enjoys varying rights and entitlements in different jurisdictions. This was a legal relationship for unmarried, yet committed couples, who cohabited together and sought certain rights, and the protection of law. The rights that flowed were not identical in scope or extent of rights arising from marriage, but was still an avenue to provide certain limited, but enforceable rights. In the US, for instance this was rolled out by many state governments, when same-sex marriage was not legalized by the federal government. What began as an option for same sex couples, to attain financial and legal partnership (tax benefits, property rights, child adoption in some jurisdictions, inheritance, etc.) now remains on the statute books for some states, with which couples who do not want to enter the societal pressures or institution of marriage, are able to protect their rights. However, many advocates for LGBTQ rights have strongly opposed civil unions in other jurisdictions, as offering a 'second class' status, in the absence of the marriage route. Other alternatives available in some of these countries – the suitability of which have also been subject to criticism of varying degrees, but includes – domestic partnerships, cohabitation agreements, common law marriages, etc.

164. This court would be sorely mistaken if we presume what the queer community – in all its diversity, seeks and lay it out in a formulaic framework. Many may welcome civil unions as a pragmatic first step, while some may find it to be yet another inequitable solution to the feeling of exclusion that persists in society against this community, and one which simply repackages the stigmatization felt. Many may desire marriage as understood in the 'traditional' sense to escape their societal realities – a form of financial and social emancipation from opposing natal families, or diametrically opposite – to assimilate and gain more social acceptance in their natal families. Yet, others may, as a result of their experience reject altogether the institution of marriage and all

the social obligation and associations that come with it, but still want legal protection of their rights. Certainly, what the former group may want, does not hamper or hinder the latter, in any manner – for it is a *choice* that they seek. That the state should facilitate this choice for those who wish to exercise it, is an outcome that the community may agree upon. Yet, the modalities of how it should play out, what it will entail, etc. are facets that the State – here the legislature, and executive – needs to exercise its power in furtherance of. Now whether this will happen through proactive action of the State itself, or as a result of sustained public mobilization– is a reality that will play out on India's democratic stage, and something only time can tell.

165. The State may choose from a number of policy outcomes; they may make all marriage and family related laws gender neutral, or they may create a separate SMA-like statute in gender neutral terms to give the queer community an avenue for marriage, they may pass an Act creating civil unions, or a domestic partnership legislation, among many other alternatives. Another consequence may be that rather than the Union Government, the State legislatures[132] takes action and enacts law or frameworks, in the absence of a central law. What is certain however, is that in questions of such polycentric nature – whether social, or political – the court must exercise restraint and defer to the wisdom of the other branches of the State, which can undertake wide scale public consultation, consensus building and reflect the will of the people, and be in their best interest. If as a result of this, a law is enacted that undermines or violates the constitutionally protected rights of an individual, or a group – no matter how miniscule, their right to seek redressal from this Court is guaranteed under Article 32.

166. That the petitioners seek, what many of us may deem to be the normal, or accepted next step in life upon attaining a certain age, and perhaps take for

[132] Entry 5, List III of the Constitution of India.

granted, is not lost on us. Their desire, for social acceptability, in the manner that has been historically known – through the social recognition that marriage affords– and the lack of which causes them feeling of exclusion and hurt, is one that as individuals, especially those donning the robes of justice, we can certainly have deep empathy with. However, we are deeply conscious, that no matter how much we empathize with the outcome sought, the means to arriving at such a destination, must also be legally sound, and keep intact, the grand architecture of our Constitutional scheme. For if we throw caution to the wind, we stand the risk of paving the way (wherein each brick may feel justified) to untold consequences that we could not have contemplated. While moulding relief, as a court we must be cognizant that despite being empowered to see the capabilities of the law in its grand and majestic formulation, we must not be led aground because we are blinded, by its glow.

167. The petitions are disposed of in the above terms. Pending applications (if any) are disposed of.

…….....J.
[S. RAVINDRA BHAT]

….....J.
[HIMA KOHLI]

NEW DELHI;
OCTOBER 17, 2023