B

SYNOPSIS

1. The present petition has been filed by the Petitioners, two adult women and citizens of India, who wish to get married to each other to ensure that their relationship is formally recognised and they are protected from the family of the Petitioner No. 2, but are unable to do, so due to the exclusionary, discriminatory and unconstitutional requirements of the *Special Marriage Act*, 1954 ("**SMA, 1954**"), which only permits marriage between a man and a woman.

2. The Petitioners have faced tremendous adversity, owing to their same-sex relationship, facing disapproval from the family of the Petitioner No. 2, and suffering grave threats of violence and harassment for the last almost five years. They had to get interim police protection from the Hon'ble Delhi High Court on 12.04.2019 in *Bhawna and Anr. v. State,* W.P. (Criminal) No. 1075 of 2019, after which an uneasy truce was arrived at, but even after that, the natal family of the Petitioner No. 2 continued to harass them, resulting in tremendous instability in their lives and grave harm to their education and employment prospects.

3. Despite the proceedings Hon'ble Delhi High Court, the Petitioners lived in constant fear, knowing that at any moment, they could be forcefully separated by the family of Petitioner No. 2. Out of fear that the family of the Petitioner No. 2 would go back on their word given to the Hon'ble Delhi High Court, they had no option but to stay in a shelter home in Delhi while the Petitioner No. 2 completed her graduation. In fact, the Petitioner No. 2 gave her college exams (B.Com.) at the [redacted], while being escorted by a LGBTQIA+ activist and another individual from her lawyers' office, as her parents

were waiting outside the college gate to forcibly take her back. As a result, the Petitioners were unable to stay in one place for longer than five months, and were time and again compelled to come back and stay at the shelter home in Delhi for long periods.

4. The Petitioners continue to live as a couple in [redacted]. They take great pride in having overcome the adversities over the past few years and cherish their relationship with each other. However, the Petitioners continue to face hurdles due to the non-recognition of their relationship, and are painfully aware of the precariousness of their shared life, which they have built together with utmost love and affection, which could be pulled out from under their feet at any moment. Not being able to live their lives jointly *de jure* though doing it *de facto* makes it a herculean task for them to access even basic services like putting their partner's name as a nominee in insurance or bank accounts. The constant dependence on the goodwill of the officials or trying to use some personal contacts to get even basic government work done *ex-facie* shows the uncertain nature of their existence, with no security or mental peace. The Petitioners are always deeply fearful that their families would continue to interfere in their lives, and if one of them is physically or mentally sick, they would take control over their lives and exclude their partner from all aspects. The ease with which their relationship can be erased or their partner can be excluded, owing to the complete lack of recognition of their relationship in the eyes of law, terrifies the Petitioners.

5. This Hon'ble Court in the successive landmark judgments of ***National Legal Services Authority v. Union of India*** [(2014) 5 SCC 538 '***NALSA***'], ***K.S. Puttaswamy v. Union of India*** [(2017) 10 SCC 1], and

Navtej Johar & Anr. v. Union of India [(2018) 10 SCC 1 ('***Navtej Johar***')] have upheld the fundamental rights of LGBTQIA+ persons to equality, non-discrimination, freedom of expression, privacy, dignity, autonomy and health guaranteed under Articles 14, 15, 19(1), and 21 of the Constitution. Their exclusion from the institution of marriage and its concomitant status, rights and entitlements that are available to heterosexual couples in India is incompatible with our Constitution.

6. The Special Marriage Act, 1954 ('**SMA, 1954'**) was enacted by the Parliament, post-Independence, to provide a secular institution of marriage, irrespective of the faith of the individuals, which was to be universally accessible to all Indians. Importantly, there were no discussions on the possibility of marriage amongst LGBTQIA+ persons during the legislative deliberations on the SMA, 1954. However, Section 4(c) mentions the gendered requirement of one party being male and the other female, which are reinforced by the use of gendered terms in the Second, Third and Fourth Schedule, including 'bride' and 'bridegroom', 'widow' and 'widower', as well as the text of the declarations to be made by the parties under the proviso to Section 12(2). The Petitioners submit that Section 4(c) and all other provisions of the SMA, 1954, which do not recognize marriage between people of the same gender and LGBTQIA+ individuals are unconstitutional.

7. The Petitioners approach this Hon'ble Court challenging *inter alia* the constitutional vires of Section 4(c) of the SMA, 1954 to the extent that it does not recognise marriages between LGBTQIA+ couples, and a consequent direction that the words "wife" and "husband" be read as "party" in the context of marriages involving LGBTQIA+ persons. The Petitioners also seek a declaration that the requirements of mandatory

notice, domicile requirement, publication of notice, and invitation of objections stipulated by Sections 5 – 8, SMA, 1954 are unconstitutional and ought to be struck down. Additionally, a direction to formulate a protocol to ensure protection is granted to LGBTQIA+ persons who wish to get married, as available to cisgender heterosexual couples in terms of the directions of this Hon'ble Court in *Shakti Vahini v. Union of India* [(2018) 7 SCC 192] has been sought by the Petitioners.

8. The Petitioners are entitled to the fundamental right to marry, which entrenched in the Constitution, and includes the choice of a marital partner. The Constitution protects the ability of each individual to pursue a way of life, including in matters of love and partnership, which are central to their identity and autonomy. Neither the State nor society can intrude into that domain, except for a compelling State interest. The crux of SMA, 1954 is to provide a civil form of marriage to all Indians, including the Petitioners, irrespective of faith or religion, and to release individuals from the restrictions of religious law, custom and practice. To restrict the fundamental element of decisional autonomy in matters relating to marriage and partnership to heterosexual couples, to the exclusion of LGBTQIA+ persons, would do injustice to the object of the law, i.e., to enable consenting adults to enter into marriage, without regard to their personal or customary norms and rituals.

9. To deny the Petitioners access to the institution of civil marriage under SMA, 1954 solely on the ground of their sexual orientation amounts to discrimination, which is prohibited under Article 14. The denial of the marriage rights and status to the Petitioners affects every aspect of their public and private lives in the most material and symbolic way and the

Petitioners are made to feel "*lesser beings*", as if their love and relationship is not enough.

10. The rights and obligations associated with marriage are multifold, as marriage is an important facet of the socio-economic security of the parties, particularly as there is often conflict with the natal family. This includes matters relating to inheritance and succession, medical insurance, adoption, access to post-death claims, spousal privilege, authority to take medical decisions, survivors' rights and benefits, workers' compensation, income tax, and child custody, amongst others. Exclusion of the Petitioners from SMA, 1954 not just interferes with their fundamental right to marry, but also denies them the plethora of rights and entitlements that the State provides to the heterosexual married couples.

11. Though the Petitioners are no longer 'outlaws', and their intimate relationship is no longer illegitimate, following the momentous decision of this Hon'ble Court in ***Navtej Johar***, the Petitioners are still considered as 'outcasts' in State and public sphere, with no aspect of their relationship having legal recognition or acceptance. They are 'strangers' to each other in law, and are living in a legal void, which is a clear anathema to their fundamental rights and freedoms guaranteed in the Constitution. It is not enough to be able to live together or love each other without the fear of law or the knock of the police on their door. The Petitioners should have the right to celebrate their relationship, and their commitment to each other in public as recognised by law. They should not bear the burden of always proving their relationship or live in the fear of uncertainty if something happens to the other.

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12. The exclusion of the Petitioners from the secular institution of civil marriage under SMA, 1954 has no legitimate purpose or rationality, while undertaking the most restrictive measure of complete exclusion of all LGBTQIA+ persons from accessing the institution of marriage, which is impermissible in law. Underlying this exclusion is a sex stereotype that marriage is essentially a union between a *cis man* and a *cis woman*, which is prohibited under Article 15(1).

13. The Constitution protects diverse forms of families, based on the inherent claims of dignity and autonomy of individuals. Without formal recognition of their marriage, the Petitioners are often faced into being identified as friends or cousins, which deeply impairs their dignity as it has the effect of denying their relationship entirely. The constitutional promise of equality, dignity and moral citizenship is denied to the Petitioners by restricting the secular institution of civil marriage under SMA, 1954 only to the heterosexual couples.

14. The Petitioners are well-aware that the legal recognition of their relationship, including the right to marry, is not going to undo the damage and harms caused by more than 150 years of criminalization of their identity and selves, but it would make their future better and more secure, than their current precarious reality. The Petitioner No. 1 is petrified of the future of her relationship with the Petitioner No. 2, and cannot accept the fact that their cherished relationship exists in a legal vacuum, constantly gasping for breath. These dignitary wounds will never be healed.

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15. Though the SMA, 1954 was considered revolutionary in its vision, the procedural requirements of notice, minimum domicile for 30 days, publication of notice, and inviting objections from the public under Sections 5-8, SMA, 1954 has made it virtually impossible for individuals, particularly from inter-faith backgrounds, to access the institution of civil marriage. The Law Commission of India in its successive reports in 1974, 2008 and in 2012 have called for the amendment or the removal of the notice and domicile requirement under SMA, 1954, in order to facilitate marriages under the SMA, 1954.

16. Most natal families do not accept the sexual identity or gender identity of queer persons and keep on imposing stereotypical sexual or gender norms on them. Families relentlessly pursue them, if they somehow manage to leave their abusive homes, through filing false missing complaints and false criminal cases, with active support of the State machinery as well as extra-judicial actors. In this regard, if a queer couple is required to give notice of 30 days, reside for a minimum of 30 days in a district where they intend to marry, and face the prospect of families being given ample time to object to their relationship, then no queer person would ever dream of solemnizing a civil marriage, but would fall prey to touts promising purported valid marriage ceremony and certificate of registration. Hence, unless the Sections 5-8 of SMA, 1954 are struck down by this Hon'ble Court, the fundamental rights of persons to opt for a civil marriage would be, in fact, meaningless, and rendered a nullity.

17. This Hon'ble Court remains the Petitioners' only support in the face of the violation of their fundamental rights, with the Respondent's failure to recognize their relationship, casting a disapproving authority on the

lives of the former, with unconstitutional patriarchal, heteronormative and transphobic gender norms. This Hon'ble Court has to thus step in, and protect LGBTQIA+ persons who seek to live with freedom and dignity, and to love, and marry their partner.

LIST OF DATES

1753	The first prominent legislative exercise with respect to marriage was enacted in Britain, titled, '*An Act for the better Preventing of Clandestine Marriages*.' The Act intended to regulate clandestine marriages, wherein young men and women were running away to marry each other against parental wishes. The Act contained provisions mandating that notice of intended marriage be published three Sundays prior to the marriage. A license of marriage could only be granted to persons who had resided in the parish for four weeks prior to its grant.
1823	The 1753 Act was amended by *An Act for Amending the Laws Respecting the Solemnisation of Marriages in England, 1823*, which reduced the domiciliary requirements to 15 (fifteen) days.
1836	*An Act for Marriages in England* was passed, which permitted marriages to be solemnised outside the Anglican Church. This Act opened up an avenue for non-religious marriage for the first time and was enacted in response to demands from Catholics and Dissenters

(people who refused to conform to the Church of England). Persons were required to give the Superintendent Registrar of Marriages a notice of 21 (twenty-one) days, which could be expedited to 7 (seven days).

1851-1852 *An Act for Marriages in India, 1851* was enacted by the British Parliament due to increased concerns about the validity of marriages solemnised by British persons in India. Though the law applied only to Christians, it allowed for the first time the possibility of a civil marriage before a registrar. The law was made applicable to India through Act No. V of 1852, passed by the President of the Council of India.

1865 The *Indian Marriage Act, 1865* was enacted and was applied to marriages where one or both parties were Christians. Marriages could be solemnised by ministers or clergymen, as well as marriage registrars appointed under the Act No. V of 1872.

1868 Due to increased concerns about the validity of marriages of those who disagreed with and sought reform in religious practices, particularly in Hindu religious rituals, Keshub Chanda Sen petitioned the colonial Government of India on behalf of the Brahmo Samaj for the legal recognition of Brahmo marriages. In response, Henry Maine, a member of the Council of the

Governor General of India, proposed to pass a law to legalise marriage between any two Indians, who did not wish to marry in accordance with religious rites. The first version of the Bill introduced by him on 18.11.1868 was rejected, as it was felt that it would cause too great an interference with the Indian law.

1872 The third version of the Bill was enacted as '*An Act to provide a form of Marriage in certain cases*,' was passed, which came to be known as the *Special Marriage Act, 1872* ("**SMA, 1872**"). The Act created a broad mechanism for civil marriage in India, however, it required the parties who wished to marry under the law to expressly renounce their religion. The Act mandated a notice period of 14 (fourteen) days and prescribed that at least one of the parties to an intended marriage was required to have resided in the district for 14 (fourteen) days.

1923 The SMA, 1872 was amended to make the Act applicable to Hindus, Jains, Sikhs and Buddhists; however it continued to exclude Muslim, Parsi, Jewish and other communities. Marriage under the amended SMA, 1872 also had the effect of severance from the joint family.

1952 The Special Marriage Bill, 1952 was introduced to replace the SMA, 1872, which aimed to allow "any

	person in India" to get marriage "irrespective of their faith," underscoring the intention to make a system of marriage that was universally accessible to all Indians.
09.10.1954	The Special Marriage Act, 1954 was passed and made enforceable from 01.01.1955, with the intent of the law to override the rigours of religious marriage evident in Section 4, which states, "*Notwithstanding anything contained in any other law for the time being in force relating to the solemnisation of marriages…"* .
May 2018	The Petitioners' first met at the home of Petitioner No. 2's cousin sister. They soon realized their attraction and affection towards each other and commenced a relationship. Despite living in two different States, they were able to stay in touch with each other and formed a deep, loving, and nurturing bond.
20.07.2018	The Petitioner No.2 was badly abused by her mother and uncle, which had come to be a regular occurrence. She feared for her life and sought refuge at the house of the Petitioner No. 1 in Mukstar, Punjab.
22.07.2018	The family of the Petitioner No.2 traced her location and barged into the home of the Petitioner No. 1 to forcefully take back the Petitioner No.2. The uncle of Petitioner No. 2 hurled the choicest of abuses against the Petitioner No. 1 and her family. He threatened to take their life if

	the Petitioner No. 1 did not cease all contact with Petitioner No. 2. In order to minimize the imminent threat to their lives, the Petitioner No. 2 promised her family that she would severe all contact with Petitioner No. 1, despite being deeply in love with her and relying on her for support and hope.
August-September, 2018	The family of the Petitioner No. 2 kept her under constant surveillance. They monitored her phone and took it away during the night, and followed her everywhere when she went outside the house. At the same time, they subjected the Petitioner No. 2 to grave emotional and physical torment all the time. However, the Petitioner No. 2 put up with the constant emotional and physical torment, in order to finish her education first, and for that reason, lived like a prisoner in her own house while being constantly subjected to bullying and violence from her family. Unable to cope with the isolation and loneliness she was experiencing, the Petitioner No. 2 procured another phone in secret to keep in touch with the Petitioner No. 1. She felt great relief at being able to talk to Petitioner No. 1 again, and felt that her life was made more bearable because of it. She also managed to keep the Petitioner No. 1 informed about the violent conditions that she was being subjected to at her parents' house
06.09.2018	This Hon'ble Court read down Section 377, Indian Penal Code, 1860 in ***Navtej Johar & Anr. v. Union of India***

	[2018 10 SCC 1 (‘***Navtej Johar***’)]. The Petitioners felt immense joy and euphoria having heard the news and began to believe that soon their life would change for the better, where they would not have to hide their relationship from the society.
November, 2018	However, the Petitioner No. 2’s family started putting enormous pressure on her for marriage, despite the fact that she was keen to finish her graduation. Her cousin was to be married in February 2019, and the Petitioner No. 2’s family decided that they would get her married immediately after that. Her desires, wishes and choice were of no concern to them, despite the fact that she was an adult.
February, 2019	The Petitioner No.2 lived in the constant fear of being forced into marriage and she constantly felt despair over her situation. It was the Petitioner No. 1 who offered her invaluable support and encouragement throughout these months, which helped her move forward day after day. However, the Petitioner No. 1 felt the same fear during this time, of losing the Petitioner No. 2, either due to the daily violence that was being inflicted on her, or the possibility of the Petitioner No. 2 being forcibly married to a man.
10.04.2019	Unable to bear the abuse and violence anymore, and not wanting to be forced into marriage, the Petitioner No. 2 left her house out of her own volition. She also got to

know that her parents had found out about her relationship with the Petitioner No. 2, as she had mistakenly left her secret phone in the bathroom, which made her panic out of fear for her life and liberty, and she realized that she was most unsafe at her own house. Accordingly, she travelled to Delhi and sought refuge in a shelter home in Delhi.

11.04.2019 The Petitioner No. 1 joined the Petitioner No. 2 at the shelter home in Delhi. The Petitioners gave a written complaint to the SHO, P.S. Lajpat Nagar, New Delhi and sought police protection. However, the police refused to even accept the written complaint, let alone grant protection. The Petitioners deeply feared for their life, knowing that the family of Petitioner No. 2 was highly conservative and their past history of inflicting emotional and physical violence on Petitioner No. 2. They even considered making a suicide pact, unable to bear the thought that they could be separated forever by the family of Petitioner No. 2.

12.04.2019 The Petitioners approached the Hon'ble High Court of Delhi through W.P. (Criminal) No. 1075 of 2019 under Article 226 of the Constitution, seeking police protection. On the same day, the Hon'ble High Court was pleased to grant interim protection to the Petitioners.

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April 2019	Despite being informed of the order dated 12.04.2019, the family of the Petitioner No. 2 repeatedly went to the shelter home where the Petitioners were staying and insisted on meeting them.
08.05.2019	The W.P. (Criminal) No. 1075 of 2019 was taken up by the Hon'ble Delhi High Court. On the suggestion of the Court, a meeting took place in the chambers of the Hon'ble Judge, with an attempt to arrive at a truce. Eventually, the family of the Petitioner No. 2 acknowledged that she left of her own accord, but insisted on meeting her regularly. The Petitioner No. 2 was extremely concerned for her safety, however, she accepted that she would meet her parents, and the petition was withdrawn.
May, 2019	The Petitioner No. 2 realized that her family was still following her, and was compelled to seek protection from the Lajpat Nagar Police Station so that she could appear for her semester examinations without being forcibly taken away by her family at the college gate. When the police refused protection, the Petitioners were unable to figure out any alternate system to ensure that the safety of the Petitioner No. 2. As a result, the Petitioner No. 2 came to be escorted by one LGBTQIA+ activist and an individual deputed from her lawyers' office to ensure that she could travel to her college for each exam safely

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May, 2019-September, 2019	Despite proceedings before the Hon'ble High Court of Delhi, the Petitioners lived in constant precarity, knowing that at any moment, they could be forcefully separated by the family of the Petitioner No. 2. Out of fear that the family of the Petitioner No. 2 would go back on their word given to the Hon'ble Delhi High Court, they had no option but to stay in the shelter while the Petitioner No. 2 completed her graduation.
November, 2019-May, 2020	Eventually, the Petitioners moved to a small flat in Rohini. However, they were forced to constantly be on the run as they found out that the family of Petitioner No. 2 had been following them constantly, and barged into the house they were staying in Rohini and announced to the residents and the landlord that the Petitioners were taking drugs, and that the Petitioner No. 1 had forced the Petitioner No. 2 to leave home.
May, 2020-April, 2021	In light of the aforesaid circumstances, the Petitioners were unable to stay in one place for longer than five months, and were time and again compelled to come back and stay at the shelter home in Delhi for long periods
April, 2021	Both the Petitioners fell severely ill during the second wave of Covid-19 and an uneasy truce was reached between the Petitioner No. 2 and her family. She managed to visit her natal home during Raksha

Bandhan, but not before informing her lawyers and her partner that if she did not return from her parental home, it was due to her family's actions. Even when the Petitioner No. 2 conducts phone conversation with her family, she is forced to have a separate number so that she can only call them through WhatsApp using internet network so as to not reveal her location to her family.

January, 2023 — The Petitioners continue to live as a couple in [redacted]. They take great pride in having overcome the adversities over the past few years and cherish their relationship with each other. However, the Petitioners continue to face hurdles due to the non-recognition of their relationship. They feel agitated by having to hide their relationship to each other constantly and are afraid of being placed in a helpless situation where they are forcefully separated by the family of Petitioner No. 1. They are painfully aware of the precariousness of their shared life, which they have built together with utmost love and affection, which could be pulled out from under their feet at any moment. They will continue to fight against any law, rule, or policy, which invisibilises their relationship. They have promised each other that the day they are permitted to get married, they will immediately solemnise their marriage so that not a single day is lost where they can be mistakenly referred to as just friends.

HENCE THIS PETITION.

IN THE HON'BLE SUPREME COURT OF INDIA
WRIT PETITION (CIVIL) NO. _____ OF 2023
(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)
(O. XXXVIII, R. 7, Supreme Court Rules, 2013)

IN THE MATTER OF:

1. **KAJAL**
[redacted]
…PETITIONER NO. 1

2. **BHAWNA**
[redacted]
…PETITIONER NO. 2

VERSUS

1. **UNION OF INDIA**
Through the Secretary,
Ministry of Law and Justice,
A-Wing, Shastri Bhawan,
New Delhi-110001
…RESPONDENT

IN THE MATTER OF:
WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS UNDER ARTICLES 14, 15, 19(1)(a), 19(1)(d), 21 and 25 OF THE CONSTITUTION

AND IN THE MATTER OF:
THE CONSTITUTIONAL VIRES OF SECTIONS 4(c), 5, 6, 7 and 8 OF THE SPECIAL MARRIAGE ACT, 1954

TO,
THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUSTICES OF THE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE PETITIONERS ABOVE-NAMED

MOST RESPECTFULLY SHOWETH:

1. The present petition has been filed on behalf of the Petitioner Nos. 1 and 2, two adult women and citizens of India, who have been in a relationship since May, 2018. The Petitioners have faced tremendous adversity, owing to their same-sex relationship, facing disapproval from the family of the Petitioner No. 2, and suffering grave threats of violence and harassment for the last almost five years. They had to get interim police protection from the Hon'ble Delhi High Court on 12.04.2019 in *Bhawna and Anr. v. State,* W.P. (Criminal) No. 1075 of 2019, but even after that, the natal family of the Petitioner No. 2 continued to harass them, resulting in tremendous instability in their lives and grave harm to their education and employment prospects. They wish to get married to each other to ensure that their relationship is formally recognised and they are protected from the family of the Petitioner No. 2, but are unable to do, so due to the exclusionary, discriminatory and unconstitutional requirements of the *Special Marriage Act*, 1954 ("**SMA, 1954**"), which only permits marriage between a man and a woman. The Petitioners approach this Hon'ble Court challenging *inter alia* the constitutional vires of Section 4(c) of the SMA, 1954 to the extent that it does not recognise marriages between LGBTQIA+ couples,

and a consequent direction that the words "wife" and "husband" be read as "party" in the context of marriages involving LGBTQIA+ persons. The Petitioners also seek a declaration that the requirements of mandatory notice, domicile requirement, publication of notice, and invitation of objections stipulated by Sections 5 – 8, SMA, 1954 are unconstitutional and ought to be struck down. Additionally, a direction to formulate a protocol to ensure protection is granted to LGBTQIA+ persons who wish to get married, as available to cisgender heterosexual couples in terms of the directions of this Hon'ble Court in *Shakti Vahini v. Union of India* [(2018) 7 SCC 192] has been sought by the Petitioners.

2. This petition raises several substantial questions of law of constitutional and public importance as they concern the protection of fundamental rights of LGBTQIA+ persons to equality, human dignity, privacy and personhood, as follows:

a. Whether the LGBTQIA+ persons have a fundamental right to marry and found a family under the Constitution, on the equal terms as available to the heterosexual citizens of India?
b. Whether the blanket exclusion of LGBTQIA+ persons from the solemnisation and registration of marriage under the SMA, 1954 violates their fundamental rights to equality, non-discrimination, freedom of expression, privacy, dignity, autonomy and freedom of conscience guaranteed under Articles 14, 15, 19(1), 21 and 25 of the Constitution?
c. Whether the exclusion of LGBTQIA+ persons from the institution of civil marriage under SMA, 1954 is excessive, unreasonable and manifestly arbitrary, while only recognising marriages between a man and woman, and thus violative of Article 14 of the Constitution?

d. Whether the failure to recognise marriages between LGBTQIA+ persons leaves their status towards each other and society at large unsettled, which disproportionately affects poor and vulnerable persons from the LGBTQIA+ community, who have neither State support nor social support, and are subject to constant threats of harassment and violence from their natal families?

e. Whether the exclusion of LGBTQIA+ persons from the institution of civil marriage under SMA, 1954 is contrary to the inclusive and secular ethos of the Act that emphasises autonomy and choice in marriage, in terms of one's partner, as well as the content and form of the marriage itself, irrespective of religious restrictions?

f. Whether the provisions of domicile requirement, notice of intended marriage, publication of notice, inviting objections and inquiry by the Marriage Officer under Sections 5-8, SMA, 1954 are violative of the fundamental rights of equality, freedom, privacy and security of the individuals wanting to marry?

g. Whether it is constitutional for a secular State to exclude an entire class of LGBTQIA+ persons from the institution of civil marriage under SMA, 1954 on the ostensible basis of religious disapproval?

h. Whether the Constitution allows an entire class of LGBTQIA+ persons to be left out of the legal regime of status, rights and benefits available to heterosexual married couples?

i. Whether the non-recognition of the right to marry of the LGBTQIA+ persons from SMA, 1954, is unconstitutional as it leaves LGBTQIA+ persons, particularly lesbian, bisexual and transgender persons vulnerable into being coerced into marriages against their wishes?

PARTIES

3. The Petitioners No. 1 and 2 are citizens of India, from Punjab and Haryana respectively, who have been in a relationship with each other since May, 2018 and presently live together in [redacted]. The Petitioner No. 1, currently works as a Sales Executive at a Bakery in [redacted]. The Petitioner No. 2, having graduated with a B.Com (Hons) from [redacted], currently works as an Accountant at a firm in [redacted]. Since the time of the families of the Petitioners have found out about their relationship, the Petitioners have been facing constant threats to their safety and security from the family of Petitioner No. 2. They have painstakingly built a life together in [redacted], which they seek to protect *inter alia* by getting married to each other, and their relationship being recognised in law.

4. The Respondent is the Union of India through the Secretary, Ministry of Law and Justice, the nodal ministry responsible for administering the statute in question, i.e., SMA, 1954.

FACTS LEADING UP TO THE PETITION

5. The Petitioner No. 1 hails from [redacted] where she used to reside with her family. Growing up, she felt an attraction towards other girls, but having always been told that such attraction could only occur between a man and a woman, she did not acknowledge her feelings towards other girls. Her misery grew after she reached puberty, her friends noticed something different about her and taunted her with words like *"Maa baap ne galat paida kiya hai"* ("Her parents have given birth to someone defective"). She resolved to repress any such feelings towards other women. It was only when she came to a city such as Delhi that she realized

that it was possible for two women to have romantic and sexual feelings for each other.

6. The Petitioner No. 2 is from [redacted], where she used to reside with her family and relatives. Being from a conservative Jat family, she had a difficult relationship with her parents and relatives, who resided together as a joint family. Her movement was always restricted and subjected to the constant surveillance of her family and had to suffer mental and physical torture at their hands. She had always felt different from her peers, and realised she was attracted to women. With the feeling of being different came the intense isolation even when surrounded by family. It was only when she started studying in a girls' college, and was exposed to diverse ways of life, including the fact that some of her classmates were in same-sex relationships that she realised that it was possible to fall in love and be with another woman.

7. In May 2018, the Petitioner No. 1, then aged 23, and the Petitioner No. 2, then aged 18, came to be acquainted after they met at the home of the Petitioner No. 2's cousin sister. They soon realised their attraction and affection towards each other and commenced a relationship. Even though they were living in different States, that is, Punjab and Haryana, they were able to stay in touch with each other on phone and formed a deep, loving, and nurturing bond.

8. On 20.07.2018, the Petitioner No. 2 was badly abused by her mother and uncle, to such an extent that the Petitioner No. 2 began to fear for her life. This was happening regularly, and there was never a particular reason for the abuse to start. Realising that she had no other option but to leave her home, she sought refuge at the house of the Petitioner No. 1 in Muktsar,

Punjab. However, within two days, on 22.07.2018, her family traced her location and followed her to Punjab, barging into the home of Petitioner No. 1 and dragged the Petitioner No. 2 out to forcefully take her back to Haryana, despite her complete unwillingness to go back. The uncle of Petitioner No. 2 began to hurl the choicest of abuses against the Petitioner No. 1 and her family, making threats to their life, and warned the Petitioner No. 1 to cease all contact with Petitioner No. 2.

9. Both the Petitioners were deeply scarred by this turn of events and feared greatly for their lives. They also knew that once the Petitioner No. 2 was taken back home, she would be subject to severe violence, and that her family would ensure that she would have no means of communicating with the Petitioner No. 1. In order to minimise the imminent threat to their lives, the Petitioner No. 2 assured her family that she would sever all contact with Petitioner No. 1, even though she was deeply in love with Petitioner No. 1 and relied on her for support and hope.

10. The fears of the Petitioners were realised when the family of the Petitioner No. 2 began to keep her under constant surveillance and scrutiny. She had no privacy in her own life, with her mobile phone constantly being checked and taken away during the night. Her family members ensured that they kept a watchful eye on her even when she went out, and followed her everywhere. However, the Petitioner No. 2 put up with the constant emotional and physical torment, in order to finish her education first, and for that reason, lived like a prisoner in her own house while being constantly subjected to bullying and violence from her family. Unable to cope with the isolation and loneliness she was experiencing, the Petitioner No. 2 procured another phone in secret to keep in touch with the Petitioner No. 1. She felt great relief at being able to talk to the Petitioner No. 1 again,

and felt that her life was made more bearable because of it. She also managed to keep the Petitioner No. 1 informed about the violent conditions that she was being subjected to at her parents' house.

11. Upon hearing news that on 06.09.2018, this Hon'ble Court read down Section 377, Indian Penal Code, 1860 in ***Navtej Johar & Anr. v. Union of India*** [(2018) 10 SCC 1 ('***Navtej Johar***')] , they felt immense joy and euphoria. They began to believe that soon their life would change for the better, where they would not have to hide their relationship from the society. In an interview that was given to the Hindustan times two years later in 2020, the Petitioner No. 1 recalled the feeling they had as follows, *"We felt, we're not criminals anymore. No one can stop us now,"*. A true copy a the article *"Marking two years of freedom"* by Dhamini Ratnam and Dhrubo Jyoti, Hindustan Times, 05.09.2020 is annexed herewith as **Annexure P-1 (pages 79 to 84)**.

12. From November 2018 onwards, the Petitioner No. 2's family started putting enormous pressure on her for marriage, despite the fact that she was keen to finish her graduation. Her cousin was to be married in February 2019, and the Petitioner No. 2's family decided that they would get her married immediately after that. Her desires, wishes and choice were of no concern to them, despite the fact that she was an adult.

13. By February 2019, the Petitioner No. 2 was living under the constant fear of being married against her wishes. This was a very difficult time for her, and she constantly felt despair over her situation. It was the Petitioner No. 1 who offered her invaluable support and encouragement throughout these months, which helped her move forward day after day. However, the Petitioner No. 1 felt the same fear during this time, of losing the Petitioner

No. 2, either due to the daily violence that was being inflicted on her, or the possibility of the Petitioner No. 2 being forcibly married to a man.

14. On 10.04.2019, unable to bear the abuse and violence anymore, and not wanting to be forced into marriage, the Petitioner No. 2 left her house out of her own volition. She also got to know that her parents had found out about her relationship with the Petitioner No. 1, as she had mistakenly left her secret phone in the bathroom, which made her panic out of fear for her life and liberty, and she realized that she was most unsafe at her own house. Accordingly, she travelled to Delhi and sought refuge in a shelter home in Delhi.

15. Within a few hours, the Petitioner No. 2's uncle called the Petitioner No. 1 asking for the whereabouts of Petitioner No. 2, threatening to kill Petitioner No. 1 and her entire family if she did not reveal the said information. He abused her incessantly and blamed her entirely for Petitioner No. 2 leaving her natal home. The Petitioner No. 1 realised that she too was not safe at home, given that the family of the Petitioner No. 2 knew about her residence, having earlier forced himself into her home, threatening her and her family with violence and as a result she also left her residence. Upon leaving, the Petitioner No. 1 received innumerable calls from the uncle of Petitioner No. 2, who issued such vile threats against her that she was forced to break her old SIM card and purchase a new one after getting off the bus.

16. On 11.04.2019, the Petitioner No. 1 came to Delhi and sought shelter at the same shelter home that Petitioner No. 2 was residing in. The Petitioners also gave a written complaint to the SHO, P.S. Lajpat Nagar, New Delhi asking for police protection. However, the police refused to even accept the complaint, let alone grant protection. The Petitioners felt deeply scared

for their life and liberty. They knew they needed immediate protection. They knew that the Petitioner No. 2's family was highly conservative and given their past history of inflicting emotional and physical violence on Petitioner No. 2, knew that they could go to any extent to protect their 'honour,' including killing the Petitioners. Such was the extent of the Petitioners' despair, that they even considered making a suicide pact before the family of Petitioner No. 2 could separate them forever.

17. On 12.04.2019, while the Petitioners were still staying in the shelter home, they approached the Hon'ble Delhi High Court through W.P. (Criminal) No. 1075 of 2019 under Article 226 of the Constitution, seeking police protection. On the same day, by order dated 12.04.2019, the Hon'ble Delhi Court was pleased to grant the Petitioners interim protection. A true copy of the order of the Hon'ble Delhi High Court dated 12.04.2019 is annexed herewith as **Annexure P-2** (pages 85 to 86).

18. After being informed of the order dated 12.04.2019, the family of the Petitioner No. 2 repeatedly went to the shelter home where the Petitioners were staying in and insisted on meeting them. Fearing of both of their lives, the Petitioner No. 2 categorically refused to meet her family. Thereafter, the father of the Petitioner No. 2 filed an application in W.P. (Criminal) No. 1075 of 2019 *inter alia* stating that he had to meet the Petitioner No. 2 in order to ascertain if she was actually in a relationship with the Petitioner No. 1, and that he apprehended she was under *"threat and coercion"*. A true copy of the order of the Hon'ble Delhi High Court dated 30.04.2019 is annexed herewith as **Annexure P-3** (pages 87 to 88)

19. On 08.05.2019, W.P. (Criminal) No. 1075 of 2019 was taken up by the Hon'ble Delhi High Court. On the suggestion of the Court, a meeting took

place in the chambers of the Hon'ble Judge, with an attempt to arrive at a truce. Eventually, the family of the Petitioner No. 2 acknowledged that she was an adult and left of her own accord, but insisted on meeting her regularly. The Petitioner No. 2 was extremely concerned for her safety, however, she accepted that she would meet her parents, and the petition was withdrawn. A true copy of the order dated 08.05.2019 is annexed herewith as **Annexure P-4 (pages 89 to __).**

20. Despite proceedings before the Hon'ble Delhi High Court, the Petitioners lived in constant precarity, knowing that at any moment, they could be forcefully separated by the family of Petitioner No. 2. Out of fear that the family of the Petitioner No. 2 would go back on their word given to the Hon'ble Delhi High Court, they had no option but to stay in the shelter while the Petitioner No. 2 completed her graduation. Even so, they managed to make the best of their time together there. They made friends, and the Petitioner No. 1 would give dance classes to the women who were staying at the shelter home. They became close friends with another woman, who herself was forced to seek refuge at the shelter home after being subjected to violence from her family for being in an inter-faith relationship. The friendships they forged at the shelter home and the acceptance they received strengthened their will to not succumb to the threats and pressure from the family of Petitioner No. 2.

21. Despite the emotionally taxing times that the Petitioners were going through, they were keen to ensure that the Petitioner No. 2 would not leave her education mid-way. She continued to study and appear for her B.Com (Hons) exams. However, the Petitioner No. 2 realized that her family was still following her, and was compelled to seek protection from the Lajpat Nagar Police Station so that she could appear for her semester

examinations without being snatched away by her family at the college gate. When the police refused protection, the Petitioners were unable to figure out any alternate system to ensure that the safety of the Petitioner No. 2. As a result, the Petitioner No. 2 came to be escorted by one LGBTQIA+ activist and an individual deputed from her lawyers' office to ensure that she could travel to her college for each exam safely.

22. Eventually, the Petitioners moved to a small flat in Rohini. However, the were forced to constantly be on the run as they found out that the family of Petitioner No. 2 had been following them constantly, and had even barged into the house they were staying in Rohini and announced to the residents and the landlord that the Petitioners were taking drugs, that the Petitioner No. 1 had forced the Petitioner No. 2 to leave home. During her fifth semester examinations, in November, 2019, the Petitioners' fear almost came true when the Petitioner No. 2 found out that her family, along with 10-15 other people, had barged into the college and demanded that college authorities "return" their daughter to her. Fortunately for the Petitioners, the principal of the college intervened and refused to let the family of Petitioner No. 2 take her away.

23. In light of the aforesaid circumstances, the Petitioners were unable to stay in one place for longer than five months, and were time and again compelled to come back and stay at the shelter home in Delhi for long periods. It was only during the sixth semester of the Petitioner No. 2, when both the Petitioners fell severely ill during the second wave of Covid-19, that an uneasy truce was reached between the Petitioner No. 2 and her family. She visited her natal home during Raksha Bandhan, but not before informing her lawyers and her partner that if she did not return, it was due to her family's actions. Even when the Petitioner No. 2 has a phone

conversation with her family, she is forced to have a separate number so that she can only call them through WhatsApp using internet network so as to not reveal her location to her family.

24. Periodically, both the Petitioners receive calls from their respective families, trying to convince them to marry men and leave behind the "mistake" that they made by being with each other. Despite attempts to sensitise them, the families of the Petitioners continue to believe that the Petitioners' relationship is fleeting and that soon, they would 'come back to their senses', return home and marry a man. The Petitioner No. 2 particularly fears the day when the uneasy truce between herself and her family breaks, and the cycle of running away from one place to another would start over. The Petitioners have wanted to get married not only as a recognition of their commitment to each other, but also in order to put a stop to this regular harassment they face about entering into a heterosexual marriage with a man.

25. The Petitioners continue to live as a couple in [redacted]. They take great pride in having overcome the adversities over the past few years and cherish their relationship with each other. However, the Petitioners continue to face hurdles due to the non-recognition of their relationship. They are in a position where they have to refer to each other as 'friends' and 'cousins' to their landlord, their neighbours and their colleagues. They feel agitated by having to hide their relationship to each other constantly and are afraid of being placed in a helpless situation where they are forcefully separated by the family of Petitioner No. 1. They are painfully aware of the precariousness of their shared life, which they have built together with utmost love and affection, which could be pulled out from under their feet at any moment. They will continue to fight against any law,

rule, or policy, which invisibilises their relationship. They have promised each other that the day they are permitted to get married, they will immediately solemnise their marriage so that not a single day is lost where they can be mistakenly referred to as just 'friends', and not partners.

LEGISLATIVE HISTORY OF THE SPECIAL MARRIAGE ACT, 1954

Pre-Constitutional developments and the Special Marriage Act, 1872

26. The legislative history of the SMA, 1954 is an account of the State trying to regulate marriage, away from the hold of religion. Prior to 1753 in Britain, marriage was regulated through canonical law and the ecclesiastical courts, with limited legislative intervention by the State. Issues began to crop up with clandestine marriages, wherein young men and women were running away to marry each other, against the parental wishes, which were being entered into against the rules of the Church. They were considered detrimental to the concerns of wealth, property and class, nut because of the sanctity accorded to marriage, they were still valid.

27. In 1753, *An Act for the better Preventing of Clandestine Marriages* was enacted seeking to prevent such clandestine marriages, marking the first prominent legislative exercise with respect to marriage in Britain. The law established a Church monopoly on the solemnisation of marriages, albeit with limited exceptions. It also mandated that 'banns of marriage' or notice of intended marriage be published three Sundays prior to the marriage, in parishes where the individuals resided, in order to enable their families to register their dissent (Section I). A license for marriage could only be granted to persons who had resided in the parish for four weeks prior to its grant (Section IV). The law was amended in 1823 *inter alia* to reduce the domiciliary requirement to 15 (fifteen) days, but the notice period of three

Sundays prior to the marriage remained. These very requirements of notice and domicile, enacted to prevent marriages against social norms in Britain, have carried through two and a half centuries of legislation and continue to be mandatory requirements under SMA, 1954, which was enacted to facilitate marriages against religious and social norms in India. A true copy of *An Act for the better Preventing of Clandestine Marriages, 1753* is annexed herewith as **Annexure P-5 (pages 90 to 95)**. A true copy of *An Act for Amending the Laws Respecting the Solemnisation of Marriages in England, 1823* is annexed herewith as **Annexure P-6 (pages 96 to 100)**.

28. In 1836, *An Act for Marriages in England* was passed, which for the first time permitted marriages to be solemnised outside the Anglican church. The law was enacted in response to demands from Non-conformists, and permitted Catholics and Dissenters (protestants who refused to conform to the Church of England) to marry. It came to be known as the Dissenters' Marriage Act. Persons were required to give a Superintendent Registrar of Marriages, a government official, notice of 21 (twenty one) days, which could be expedited to 7 (seven) days in certain circumstances, after which they were issued a certificate (Section 7). Thereafter, they could present the certificate to the officiant of their religion or to a registrar of marriages, where they were entitled to solemnise the marriage "*in such form and ceremony as they may see fit to adopt*", so long as they made the prescribed declarations (Section 20). The law opened up an avenue for a non-religious marriage, both in terms of the rituals and ceremonies prescribed, making only a simple declaration mandatory, and also provided that a non-religious individual, an appointed civil government functionary, could solemnise the marriage. This was the beginning of the civil marriage in England, which then got transplanted in the British colonies like India. A true copy of *An*

Act for Marriages in England, 1836 is annexed herewith as **Annexure P--7 (pages 101 to 128)**.

29. In India, marriage continued to be governed by religious law, customs and usage. However, concerns grew about the validity of marriages solemnised by British persons in India, as the *Act for Marriages in England, 1836* had not been formally applied to India. The status of British persons entering into marriages in India, their property and the legitimacy of their children, had to be settled. In 1850, the *Second Report of the Commissioners Appointed to Inquire into the State and Operation of the Law of Marriage, East India Marriages*, was presented to the Parliament in Britain, proposing to make the law in India relating to the marriage involving British persons *mutatis mutandis* to that in Britain, such that marriages relating to Christians could be solemnised by one of the following: (i) the rites of the Church of England, (ii) by Roman Catholic priests, and dissenting members, or (iii) a civil officer. A true copy of *Second Report of the Commissioners Appointed to Inquire into the State and Operation of the Law of Marriage, East India Marriages, 1850* is annexed herewith as **Annexure P-8 (pages 129 to 141)**.

30. Following the recommendation of the Second Report of the Commissioners, *An Act for Marriages in India, 1851* was enacted by the British Parliament, and made applicable to India through *Act No. V of 1852* passed by the President of the Council of India. The law was framed along the lines of the *Act for Marriages in England,* 1836, and applied to marriages where one or both of the parties were Christian. Marriage registrars were empowered to issue certificates, after which marriages could be solemnised in a church, chapel or before the registrars themselves. Parties had to be domiciled in an area for 5 (five) days before they could

give notice of marriage, and a notice for an unspecified period of up to 14 (fourteen) days was required to be provided, in order to receive the certificate. Though the law applied only to Christians, it created for the first time the possibility of a civil marriage before a registrar in India. A true copy of *An Act for Marriages in India, 1851* is annexed herewith as **Annexure P-9 (pages 142 to 151)** and *Act No. V of 1852* is annexed herewith as **Annexure P-10 (pages 152 to 163)**.

31. Thereafter, Act No. XXV of 1864 titled '*An Act to provide further for the solemnisation of marriages in India of persons profession the Christian religion'*, was enacted, which was then repealed by the *'Indian Marriage Act, 1865'*. The Indian Marriage Act, 1865 applied to marriages where one or both parties were Christian. Marriages could be solemnised by ministers or clergymen, as well as marriage registrars appointed under Act No. V of 1852. Eventually, when the Christian Marriage Act, 1872 was passed, the Indian Marriage Act, 1865 and Act No. V of 1852 were repealed. A true copy of the Indian Marriage Act, 1865 is annexed herewith as **Annexure P-11 (pages 164 to 187)**.

32. While matters of marriage between Indians (non-Christians) continued to be governed by religious law and custom, the validity of marriages of those who disagreed with, as well as sought reform in, the religious practices, especially in the Hindu religious rituals, came into question. In 1868, Keshub Chanda Sen petitioned the colonial Government of India on behalf of the Brahmo Samaj for the legal recognition of Brahmo marriages, which were devoid of certain rituals, and could be solemnised between persons of different castes. In response, Henry Maine, a member of the Council of the Governor General of India, proposed to pass a law to legalise marriage between any two Indians, who did not wish to marry in accordance with

religious rites. The first Bill, however, introduced on 18.11.1868 by Maine, was rejected by the Council of the Governor General of India, as it was felt that it would cause too great an interference with Indian law. The second version of the Bill, drawn by, James Fitzjames Stephen, covered only Brahmo Samaj weddings, which was opposed by the conservative faction of the Brahmo Samaj. Eventually, the third version of the bill, also drawn by James Fitzjames Stephen, was enacted as '*An Act to provide a form of Marriage in certain cases*' (Act III of 1872) on 22.03.1872, which came to be known as the *Special Marriage Act*, 1872 ("**SMA, 1872**") a true copy of which is annexed herewith as **Annexure P-12 (pages 188 to 197)**.

33. The SMA, 1872 created a broad mechanism for civil marriage in India. Its Preamble recognised that its main objective was to *"provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion, and to legalise certain marriages the validity of which is doubtful"*. In creating a system of civil marriage where inter-religious and inter-caste marriages could take place, however, the law required that the parties marrying renounce their religion entirely. The conditions laid down for the celebration of marriages required that neither party profess any of the specified religions (Section 2). They were required to make the express declaration, *"I do not profess the Christian, Jewish, Hindu, Muhamadan, Parsi, Buddhist, Sikh or Jaina religion"* (Section 10 read with Second Schedule). The Act also provided for the appointment of 'Registrars of Marriage'. Parties intending to get married were required to give notice of 14 (fourteen) days, during which time persons were entitled to object that the intended marriage contravened the conditions of a valid marriage (Section 6). Prior to giving notice of intended marriage, one of the parties was required to have resided in the district for 14 (days) Marriages could be solemnised in "any form" and at

any place, so long as each party made the required declarations (Sections 11 and 12). Thus, the law created an entirely civil form of marriage, with a civil functionary having the power to solemnise it, and the parties being free to determine the ceremonies that they wished to undertake, if any.

34. The *Indian Divorce Act*, 1869 was made applicable to marriages that were solemnised under the SMA, 1872 (Section 17). Further, children from such marriages, would at the time of their own marriage, be governed by the law that would have applied to their father (based on his religion), with respect to the conditions of a valid marriage (Section 18).

35. The mandatory disassociation of one's religion made the SMA, 1872 unpopular, even amongst members of the Brahmo Samaj, who considered themselves Hindu. As a result, Dr. H.S. Gour, Member of the Legislative Assembly, introduced an amendment in 1921, seeking to permit all classes and communities to marry under the SMA, 1872, without severing association from their own religion. The amendment was referred to a Select Committee, which drastically changed the law. After a long debate, eventually the amendment was passed in 1923. The debates indicate that members of the Legislative Assembly were keen to ensure that all persons who wanted to marry, were not denied the opportunity to do so, and that their freedom of conscience was preserved by not being compelled to renounce their religion. A true copy of the Joint Select Committee Report of the Legislative Assembly, 1923 on the Civil Marriage (Amendment) Bill is annexed herewith as **Annexure P-13 (pages 198 to 204)**.

36. The 1923 amendment made the SMA, 1872 applicable to Hindus, Jains, Sikhs and Buddhists, but Muslim, Parsi, Jewish and other communities were excluded. Marriages by Hindus, Jains, Sikhs and Buddhists under the

1872 Act would then result in a number of consequences, (i) severance from the joint family (Section 22); (ii) the inability to adopt children, which was only available to Hindus at the time (Section 25); (iii) the right of succession of the party entering into a marriage was not to be affected by marriage under the Act (Section 23); and (iv) for their children, however, succession was to take place in accordance with the Indian Succession Act, 1865 (Section 24). The clause regarding the severance of a person from their joint family was seen as a concession to those who were concerned that the law might incentivise persons to marry under the SMA, 1872 after denouncing their own religion.

37. Thus, post the 1923 amendment, a person could enter into marriage through three ways, i.e., through the religious law applicable to them, by renouncing their religion such that their marriage would be governed by the SMA, 1872 as originally enacted, or Hindus, Jains, Sikhs and Buddhists could get married under the amended SMA, 1872, with the consequence of severance from joint family. A true copy of the paper "Love and the Law: Love-Marriage in Delhi" by Perveez Mody published in, Modern Asian Studies , Feb., 2002, Vol. 36, No. 1 (Feb., 2002), pp. 223-256 is annexed herewith as **Annexure P-14 (pages 205 to 238)**. A true copy the article, *"English Law, Brahmo Marriage, and the Problem of Religious Difference: Civil Marriage Laws in Britain and India"*, by Nandini Chatterjee published in Comparative Studies in Society and History 2010;52(3):524–552, is annexed herewith as **Annexure P-15 (pages 239 to 267)**. A true copy of the article, *"Ambedkar's illegal marriage: Hindu nation, Hindu modernity and the legalization of intercaste marriage in India"*, by Saptarshi Mandal published in the Indian Law Review, 6:2, 147-169, 2022 is annexed herewith as **Annexure P-16 (pages 268 to 290)**.

38. The institution of marriage has also been a long-standing site of engagement within anti-caste movements to challenge hegemonic Brahminical practices and the subjugation of women. The ceremony of marriage became a mode of expressing and asserting their values and ideologies. The Satyashodak Samaj, co-founded by Jotirao Phule in 1872, sought to challenge the hegemony of Brahmins in spiritual and religious matters and advocated for weddings without the presence of Puranic rituals or Brahmin priests, known as Satyashodak Weddings. However, these weddings faced frequent legal challenges, particularly in the form of suits for recovery of fees. Colonial jurisprudence, based on an textual interpretation of Hindu texts, was that Brahmin priests (joshis), having the hereditary rights to perform and officiate religious ceremonies, were entitled to the fees paid for any such ceremonies, even if a priest of another caste was employed for the ceremony. Such suits were only brought to a halt by the passing of the *Invalidation of Hindu Ceremonial Emoluments Act* of 1926, which stated that no person, on the basis of being a hereditary priest, shall be entitled to claim any ceremonial emoluments from any Hindu who has not availed the services of that person.

39. The Self-Respect Movement in Tamil Nadu emerged in the mid 1920s, as a social reform to uplift the social and material conditions of non-Brahmins and women, with the ceremonial aspects of Self-Respect Weddings reflecting the ideals and values of the movement. A self-respect marriage is performed without the presence of a Brahmin priest, with an exchange of garlands, rings or the tying of thaali/mangalsutra, in the presence of friends and relatives. In *Deivanai Achi & Anr v. R.M. Al. Ct Chidambaram Chettiar*, AIR 1954 Mad 657, a partition suit held the children borne out of two persons who underwent a Self-Respect Marriage to be illegitimate, stating that the parties have not been able to establish “a marriage

according to Hindu Law, i.e. according to the dharmashastras" nor according to their caste customs. It was only in 1967, with the *Hindu Marriage (Tamil Nadu Amendment) Act*, 1967 that legal recognition was given to such marriages, albeit solely under the Hindu Marriage Act, 1955.

Post-Independence Enactment of the Special Marriage Act, 1954

40. Efforts to reform religious personal law, which had begun pre-Independence, gathered momentum after India's independence. Civil marriage, as envisaged under the SMA, 1872, also became a frame of reference for the reform and codification of Hindu Law from 1941 to 1952. The Hindu Law Committee, constituted in 1941 and chaired by Dr. B.N. Rau, drafted an early version of a Hindu Code in 1944. The Draft Hindu Code Bill was introduced in its complete form to the Central Legislature by the first Minister for Law and Justice, Dr. B.R. Ambedkar in April 1947 ("**Hindu Code Bill**"). The Hindu Code Bill proposed two forms of Hindu Marriage, 'sacramental marriage', and 'civil marriage', with the provisions concerning civil marriage largely being analogous to the provisions contained in the SMA, 1872 (Section 2, Part II, Hindu Code Bill). The Bill was then referred to the Joint Select Committee, presided over by Dr. B.R. Ambedkar, who introduced the revised Hindu Code Bill ("**Revised Hindu Code Bill**") to the Legislative Assembly in August 1948. While sacramental marriages under the Code prescribed ceremonial rituals such as *saptapadi* to appease concerns from orthodox Hindu groups, civil marriage prescribed no such rituals, and permitted inter-caste marriages. (Section 6, Revised Hindu Code Bill, 1947). Marriages that would be void under sacramental marriages were therefore permissible under civil marriage. Dr. B.R. Ambedkar, for whom the Revised Hindu Code Bill presented a transformative opportunity to reform Hindu caste society, including the abolition of caste in marriage and adoption, brought in wide-

ranging reforms pertaining to property rights in Hindu Law, including an abolition of the Mitakshara coparcenary, in a bid to ensure gender equality in Hindu Law. The provisions regarding 'civil marriage' were brought in as a means to enable Hindus whose choice of spouse fell outside the rigid confines of Hindu caste endogamy and customary practices. It also envisioned greater individual control over matters of marriage and property. However, due to the non-passage of the Hindu Code Bill in its intended format, the provisions pertaining to civil marriage were later dropped from the Hindu Marriage Act, 1955 that came to be enacted.

41. With respect to the marriages not permitted by religious law and custom, the Special Marriage Bill, 1952, which would become the Act of 1954, was introduced to replace the SMA, 1872. The Statement of Objects and Reasons acknowledge that it was drawn along the lines of the SMA, 1872. However, it was a fundamental departure from the previous law as it was aimed to allow *"any person in India"* to get married "*irrespective of their faith*", underscoring the intention to make a system of marriage that was universally accessible to all Indians. Parties would be entitled to observe any ceremonies they wished, in addition to the basic formalities prescribed. Those who had gotten married under religious law, were also entitled to register their marriage under the law, and have its provisions apply to their marriage. The 1952 bill was met with vociferous opposition by some Members of the Parliament, even at the stage of its introduction, who saw it as a means to dilute religious laws and in effect, the fundamental right to religion guaranteed under Article 25 of the Constitution. However, in response, the Minister for Law and Minority Affairs, Mr. C.C. Biswas highlighted that the Bill did not create a mandatory imposition, but created an alternate form of marriage, for those who wished to avail of it. A true

copy of the Rajya Sabha Debate on the Special Marriage Bill, 1952 on 28.07.1952 is annexed herewith as **Annexure P-17 (pages 291 to 294)**.

42. The 1952 Bill was sent to a Joint Parliamentary Committee, headed by Mr. C.C. Biswas, which delivered its report in March 1954. The Committee recommended the reduction of the notice to intended marriage to 14 (fourteen) days, from 30 (thirty) days as originally proposed, as well as similar reduction of a domicile requirement of 14 (fourteen) days from 30 (thirty) days. However, it agreed to the concerns about 'run away' couples, and recommended that notice of intended marriage also be provided at the office of the marriage officer where the person was a permanent resident, apart from where they were a temporary resident. The Committee also proposed retaining the section pertaining to severance of a Hindu, Sikh, Jain or Buddhist person married under the Act from their joint family. A true copy of the Report of the Joint Parliamentary Committee dated March, 1954 is annexed herewith as **Annexure P-18 (pages 295 to 356)**.

43. The 1952 Bill, as revised by the Joint Parliamentary Committee, was subject to a long and fractious debate in both houses of the Parliament. Concerns about the proposed laws' impact on religion were repeatedly raised, especially the consequence of severance from the joint family. In response, however, it was emphasised that the Bill provided for all forms of inter-caste and inter-faith marriages and would give people "*an opportunity that was denied [to them] for a long time*". The Act was seen as removing the barrier that came in the way of marriages between citizens**,** irrespective of their faith and caste, and was intended to pave the way for an egalitarian society and polity, based on equality and dignity, and not on religious/caste practices. At the same time, there were also strong opinions pushing for the increase of the duration of residence before which notice

could be given, so as to ensure that 'runaway' marriages, i.e., marriages between individuals who did not have their parents' consent and chose to relocate to another district, would not take place. Eventually, it was agreed to reinstate the 30 days' domicile period and 30 days' notice of intended marriage.

44. It is important to note that there were no discussions on the possibility of marriage amongst LGBTQIA+ persons, either during the debates on the SMA, 1872 or during the legislative deliberations on the SMA, 1954. Neither the legislators nor the religious and/or civil society groups sought explicit prohibition on same-sex marriage or marriage involving LGBTQIA+ persons.

45. The SMA, 1954 thus came to be passed on 09.10.1954 and was made enforceable from 01.01.1995. Though the Act was considered revolutionary in its vision, the procedural requirements of notice, along with the effect of severance from the joint family, has made it difficult for individuals, particularly those that do not conform to social mores, to access the institution of civil marriage.

46. The Law Commission of India in its 59th Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954 in March, 1974, gave a range of recommended amendments to the SMA, 1954, in order to encourage persons to use the law. It acknowledged the criticism that Section 19 pertaining to severance of a person from the joint family on their marriage under the Act acted as a deterrent to utilising the SMA, 1954. The Commission recommended that where both parties to the marriage belonged to Hindu, Buddhist, Sikh, or Jain religion, such individuals should not be severed from the joint family and that Hindu Law should

continue to apply to them, instead of the Indian Succession Act, 1925. Pertinently, the Law Commission also recommended that Section 24, relating to nullity of marriage, be changed to reflect that only a party to the marriage could petition for such a decree, so as to reduce the interference from external parties. These recommendations led to the insertion of Section 21A in 1976, which acts as an exception to Section 19 and permits two Hindu, Buddhist, Sikh, or Jain persons to get married under the SMA, 1954 without severance from their joint family, as well as an amendment to Section 24 to state that only parties to the marriage could file for a decree for nullity.

47. In its 212th Report published in October, 2008, titled 'Laws of Civil Marriages in India – A Proposal to Resolve certain Conflicts', the Law Commission *inter alia* recommended the word 'special' be removed from the title of the SMA, 1954, to reinforce the idea that the SMA, 1954 provided for the law of general marriage in India, and it was marriage under religious personal law that was 'special'.

48. The national and inclusive nature of the SMA, 1954 has been acknowledged by the Bombay High Court in *Dr. Abdur Rahim Undre v. Padma Abdur Rahim Undre*, AIR 1982 Bom 341, where it observed, *"It can safely be said that Special Marriage Act is in reality an Indian Marriage Act, which applies to all Indian Communities irrespective of caste, creed or religion. The concept of marriage under the said Act, is monogamous, that is union for life, dissoluble by judicial authorities*". It is to this institution, meant for every Indian, irrespective of their religion, caste or gender, that the Petitioners seek to enter.

IMPUGNED PROVISIONS OF THE SMA, 1954

49. The conditions of a marriage under the SMA, 1954 are set out in Section 4, which indicates the intent of the law to override the rigours of religious law with the opening words *"Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages..."*. Thus, even if a marriage is invalid under a religious personal law, it could be solemnized under the SMA, 1954, so long as the prescribed requirements under Section 4 are met.

50. While Section 4 further mentions marriage between any "two persons", the gendered requirement of one party being male and the other female, is evident in Section 4(c) which states:

> *"the male has completed the age of twenty-one years and the female the age of eighteen years"*

This is reinforced by the use of gendered terms in the Second, Third and Fourth Schedule, including 'bride' and 'bridegroom', 'widow' and 'widower', as well as the text of the declarations to be made by the parties under the proviso to Section 12(2). As set out more elaborately hereinafter, the Petitioners submit that Section 4(c) and all other provisions of the SMA, 1954, which do not recognize marriage between people of the same gender and LGBTQIA+ individuals are unconstitutional.

51. Importantly, under the SMA, 1954, the form of solemnization of the marriage is left to the parties to decide under Section 12(2), so long as they make the binding statement prescribed under the proviso. In doing so, the law permits the parties to marry in accordance with their own wishes, without making any religious or cultural ritual a precondition to the marriage.

52. In terms of Section 5, those seeking to get married under SMA, 1954 are required to give the Marriage Officer, appointed under Section 3, notice of intended marriage in a district where at least one of the parties has resided for a minimum of 30 (thirty) days. Under Section 6, the notices are to be kept in Marriage Notice Book, as well as affixed in a conspicuous place in the office of the Marriage Officer. Where either party is not a permanent resident of the district, the Marriage Officer will also send the notice to the Marriage Officer of the district where the individual is a permanent resident for it to be affixed on a conspicuous place in that office under Section 6(3). A person may object to the marriage within 30 (thirty) days of the publication of the notice on the ground that it would convene a condition for valid marriage under Section 4. The Marriage Officer is required to decide the objection and determine whether or not to solemnize the marriage.

53. The imposition of a notice period prior to the marriage under the SMA, 1954 is entirely discriminatory as there is no such requirement under the Hindu Marriage Act, 1955 or the Parsi Marriage and Divorce Act, 1936. The requirement of prior notice is only found under the Christian Marriage Act, 1872, which is currently 4 (four) days under proviso (1) to Section 17 and proviso to Section 41. This requirement was peculiar to the Christian law for two reasons, first, it relates back to the Crown's attempt to prevent marriages against social norms under *Act for the better Preventing of Clandestine Marriages, 1753,* which is entirely the opposite of the intention of the SMA, 1954 to facilitate marriages for all persons and second, divorce was not initially not permitted by Christian law, and once permitted, was frowned upon. It was for this reason, there was focus on preventing 'undesirable' marriages. Requirements that are part of a specific

religious personal law ought not to be imposed through the secular SMA, 1954.

54. It may also be pointed out that the notice period under the SMA, 1954 is the longest it has ever been in history and places an unreasonable restriction on persons getting married under the Act. The historical development of the notice period is set out below:

Law	Pre-Notice Domicile	Notice Period
England		
An Act for the better Preventing of Clandestine Marriages, 1753	Four weeks	Three Sundays (2 weeks)
An Act for Amending the Laws Respecting the Solemnisation of Marriages in England, 1823	15 days	Three Sundays (2 weeks)
An Act for Marriages in England, 1836	7 days	21 days without a license or 7 days with license
India		
An Act for Marriages in India, 1851 and Act No. V of 1852	5 days	Unspecified and 14 days in some cases
The Special Marriage Act, 1872	14 days	14 days
Joint Parliamentary Committee on the Special Marriage Bill, 1952	14 days	14 days
The Special Marriage Act, 1954	**30 days**	**30 days**

55. The Law Commission in its 242nd Report titled *Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A suggested Legal Framework,* published in August, 2012, sought to address the issue of honour crimes in society and proposed a separate law on the issue, noting that couples choosing inter-caste and inter-faith marriage often faced the wrath of the community, thereby facing grave threats to their safety and security. It also recognized the urgent need to simplify the procedure under the SMA, 1954 and recommended the removal of the domicile requirement and the notice period entirely.

56. In a Consultation Paper submitted by the Law Commission in 2018, titled '*Consultation Paper on Reform of Family Law*', the Commission recognized that a major impediment to freedom of autonomy exercised by couples and enable violence against them was the 30-day notice period in the SMA, 1954. It noted how the provision offered an opportunity to third parties to discourage inter-caste and inter-faith marriages. The Commission emphasized that procedures pertaining to marriages must reflect the changing times in a secular nation, which must encourage and facilitate marriages outside the rigid rules of religion.

57. The requirement of the notice prior to the marriage, will particularly endanger LGBTQIA+ individuals who very often face violence and disapproval from their family members. It is the common experience for LGBTQIA+ individuals, especially lesbian, bisexual and transgender persons that they have to leave their homes suddenly to avoid being coerced into a marriage by their families. Where a couple runs away together and wishes to get married, under the SMA, 1954, they would have to reside in the new city for 30 days and then provide notice of intended marriage for another 30 days, leaving them vulnerable to being separated and harassed in the meantime. In *Pranav Kumar Mishra v. Govt. of NCT of Delhi*, W.P.(C) No. 748 of 2009, judgment dated 08.04.2009, the Hon'ble High Court of Delhi deprecated the practice of sending notices to the residential addresses of parties, reiterating that the notice was only required to be placed within the office of the Marriage Officer. It noted that the unwarranted disclosure of a person's marriage plans may jeopardise the marriage itself, and even endanger the life of one or both of the parties due to parental inference.

58. In *Safiya Sultana v. State of Uttar Pradesh Ors.*, Habeas Corpus No. 16907 of 2020 dated 12.01.2021 (‘***Safiya Sultana’***), the Allahabad High Court concluded that there was a long line of decisions, which upheld the fundamental right to personal liberty and privacy extended to one’s choice to partner without interference from the State, family or society. It further held that it would be cruel and unethical to force the present generation to follow the customs and traditions adopted 150 years prior, and in violation of the fundamental rights guaranteed by the Constitution. It read down the requirements under Section 6 and 7, SMA,1954 to be directory and not mandatory. It was open for a couple to make a request to the Marriage Officer not to publish a notice under Section 7 or follow the objection procedure prescribed under Section 7.

IMPACT OF NON-RECOGNITION OF MARRIAGES OF LGBTQIA+ PERSONS

59. The exclusion of the Petitioners from marriage, as recognised by the SMA, 1954, has the effect of communicating to the world that their relationship does not merit the same social and legal sanction as that of a heterosexual relationship, relegating it to a lower tier. This has the effect of affirming the homophobic and transphobic notion that relationships, and marriages, can only be entered into by a man and a woman. For the Petitioners, from the time they declared to their families that they were in a relationship, they were met with the response that it was not legally or socially permissible for two women to be in a relationship or get married. The non-recognition of their relationship in law reinforced the social stigma that they faced.

60. The inability of the Petitioners to enter into a marriage is a State imposed restriction to the limits of their relationship. While cisgender heterosexual couples have the choice to enter into a marriage or not, no matter what the

Petitioners choose, they are unable to enter into a marriage. The Petitioners' relationship has been treated differently as compared to other relationships between consenting adults. The Petitioners have endured public verbal abuse, blackmail and threats from the family members of the Petitioner No. 2, and aggravated threats to their safety. Without the recognition of their marriage, they are unable to settle their respective statuses vis-à-vis each other, as well as the world at large, leaving them vulnerable to continued violence and harassment.

61. Many LGBTQIA+ persons face immense violence from their natal families on account of their sexuality or gender identity. Queer women and transmen, in particular, are subject to an extreme amount of scrutiny and body policing from an early age for failing to act according to purported female gender norms. An ethnographic study conducted in India in 2013 found that LGBTQIA+ persons assigned female gender at birth, suffer gross constitutional rights violations on account of common historical, social and political factors, which make them the focus of intense patriarchal control. Any gender non-conformity within a family can attract severe physical and emotional violence; coerced marriage; forced discontinuation of education; illegal confinement and house arrest; and being forced to undergo 'conversion therapy', with the underlying unscientific aim to 'cure' the person, by quacks, portraying themselves to be medical professionals. These experiences are further impacted by other critical factors such as caste, class, religion, disability, geographic and other differences. A true copy of an extract from "*Towards Gender Inclusivity – A Study on Contemporary Concerns Around Gender"*, by Sunil Mohan and Sumathi Murthy, published Alternate Law Forum and LesBiT, 2013 is annexed herewith as **Annexure P-19 (pages 357 to 390)**.

62. A study of 50 queer persons assigned female gender at birth from across India found that a majority had difficulties with their families. Enforced gender norms while growing triggered severe distress, with persons reporting attempts of suicide and self-harm as consequences of dealing with family pressure. Over one-third of the persons reported having hidden important parts of their lives from their families. This meant going through severe emotional trauma alone, without their families knowing anything about it, an extremely isolating experience. A copy of the study, *"Breaking the Binary: Understanding Concerns and Realities of Queer Persons Assigned Gender Female at Birth across a Spectrum of Lived Gender Identities"*, by LABIA, 2013 is annexed herewith as **Annexure P-20 (pages 391 to 457)**.

63. Studies have also documented the endemic and pervasive nature of violence faced by lesbian and bisexual women, including bodily harm, verbal abuse, forced marriage, psychological violence, medical abuse, wrongful confinement, and even corrective rape. A copy of the study, *"Vio Map: Documenting and Mapping Violence & Rights Violation Taking Place in lives of Sexually Marginalised Women to Chart Out Effective Advocacy Strategies: A Feminist Qualitative Research"*, published by Sappho for Equality in 2011, is annexed herewith as **Annexure P-21 (pages 458 to 496)**. In another study, it was found that lesbian women reported high levels of social exclusion and outright discrimination from employers, landlords, and others. A copy of the study, *"Count Me In! Research Report on Violence against Disabled, Lesbian and Sex Working Women in Bangladesh, India and Nepal"*, published by CREA, Delhi in 2012, is annexed herewith as **Annexure P-22 (pages 497 to 519)**. Studies have also indicated that the family is a major site of violence and a 'normativising' force in the life of LGB persons, wherein families

perpetrate enormous psychological, physical and sexual violence against lesbian and bisexual women. A copy of the study, Ranade Ketaki et. al., *"Making Sense: Familial journey towards Acceptance of Gay and Lesbian Family Members in India"*, the Indian Journal of Social Work, 77(4), 437-458, October 2016, is annexed herewith as **Annexure P-23 (pages 520 to 541)**.

64. This Hon'ble Court in ***National Legal Services Authority v. Union of India*** [(2014) 5 SCC 538 ('***NALSA***')], passed a landmark judgment holding that Articles 14, 15, 16, 19(1)(a) and 21 required the State to recognise transgender persons in their self-identified gender, as a male, female or transgender person, without the insistence of sex reassignment surgery. In light of the historical exclusion of transgender persons from the law and participation in the political, economic, social and cultural landscape of the country, this Hon'ble Court saw it fit to pass a series of specific directions, which included that transgender persons had the right to be recognised in their self-identified gender; the implementation of reservations in educational institutions and public employment; and ensuring the provision of appropriate medical care and the implementation of government programs aimed at the reduction of stigma.

65. This Hon'ble Court's decision in ***NALSA*** was followed in a nine-judge constitutional bench of this Hon'ble Court in ***K.S. Puttaswamy v. Union of India*** [(2017) 10 SCC 1]. This Hon'ble Court held that privacy was not about spatial privacy alone, but had multiple facets, privacy of person, protecting against interference of one's body; privacy relating to a person's mind, protecting against personal information; and privacy of choice, protecting the individual's autonomy. The fundamental right to privacy creates a protected space against State interference, guaranteeing to an

individual the "*freedom of thought, the freedom to believe in what is right, and the freedom of self-determination*". It was further held that when these freedoms intersect with gender, they guarantee to an individual the freedom to make decisions related to their gender identity. The Constitution, therefore, assures each person a dignified life, where they are entitled to take decisions about personal aspects of their life, including their gender identity.

66. Thereafter, in ***Navtej Johar***, a bench of five judges of this Hon'ble Court applied *NALSA*, while holding Section 377, Indian Penal Code, 1860 unconstitutional to the extent that it criminalized consensual sexual acts between same-sex couples. This Court *inter alia* held that LGBTQIA+ individuals have been constrained to live under a coercive environment of conformity, grounded in cultural morality, stereotypes and prejudice. It held that constitutional morality required the Court to ensure the respect of the dignity of LGBTIA+ persons, so as to fulfil the promises of the Constitution.

67. Encouraged by the landmark decisions of this Hon'ble Court, a large number of LGBTQIA+ individuals have sought to assert their rights to be in relationships contrary to the wishes of their parents. Very often this requires them to move to different cities or states in order to get support and other resources to be able to live their lives. LGBTQIA+ individuals and couples, however, are being harassed in numerous ways by their natal families, including on the purported basis that they are missing or been kidnapped. The invocation of the criminal law machinery has been particularly noted to impact queer women and transmen. One partner is often compelled to approach a High Court for a writ petition for Habeas Corpus if they've been separated by the police at the behest of their parents.

Even there, courts frequently question the locus standi of the individual, due to a non-recognition of the relationship between the couple. A true copy of the chapter *"Queer Women and the Law in India"* by Arasu P and Thangarajah P. in Arvind Narrain and Alok Gupta (eds), Law Like Love: Queer Perspectives on Law (Yoda Press 2011), is annexed herewith as **Annexure P-24 (pages 542 to 556).**

68. No matter where an individual or couple have moved to in India for their safety, they are back to the police station where the complaint/FIR has been registered by their family in order to 'ascertain' whether they have left on their own accord. While without a doubt a relationship between two adult LGBTQIA+ individuals would not be criminal, the lack of recognition in terms of marriage indicates a State disapproval of the relationship itself, which in turn is used against them. A seemingly straightforward procedure of recording an individual's statement to determine whether they are acting in accordance with their own wishes as an adult is being used to defeat their constitutional right to life with dignity and autonomy, and their ability to move to any part of the country and live with safety and peace. Individuals are called to the police station, interrogated about their relationships, and given prescriptions to obey their parents. Without being able to enter into marriage, every interaction with the police or any other authority requires them to be convinced of the legitimacy of the relationship. On many occasions, the individuals are separated and placed into shelter homes till the issues are resolved. The manner in which families are being able to weaponise the criminal legal system places an unreasonable burden on queer and transgender individuals, such that it defeats their much-cherished constitutional rights. A true copy of an extract from the book in Maya Sharma, Footprints of a Queer History, Life-Stories from Gujarat, Yoda Press, 2023 is annexed herewith as **Annexure P-25 (pages 557 to 604)**.

69. In this context, where LGBTQIA+ couples have to move interstate for their safety, if they wish to get married without interference of their families, the domicile and notice requirements of the SMA, 1954 would require them to wait for a minimum of 60 (sixty) days before getting married, which is highly restrictive and discriminatory. In a series of published case studies on the repercussions faced by women exercising their agency in choosing their romantic and sexual partners, it has been documented that the procedural requirements of the SMA, 1954 have posed a barrier even to couples who have the option of accessing the institution of marriage, such as inter-faith couples. Organizations and lawyers providing legal aid to such couples are often compelled to assess the likelihood of violence faced by the couple and advise them to leave their home state. A true copy of the study *"Facing Reality: A Journey on the Path of Choice. A Compilation of Case Studies."* by Association for Advocacy and Legal Initiative (AALI), 2010, is annexed herewith as **Annexure P-26 (pages 605 to 620)**.

70. Legal exclusion of diverse marriages involving LGBTQIA+ persons has resulted in LGBTQIA+ persons being forced into cisgender heterosexual marriages, with natal families not accepting the sexual identity of queer persons and forcing them to get married against their wishes. Without being able to get married in accordance with their wishes, many families, including that of the Petitioner No. 2 continue to pressurise LGBTIA+ individuals to get married in accordance with social norms. In particular, lesbian, bisexual and transgender men are vulnerable to forced separation of their partners of choice, and coerced marriages to men in accordance with their families wishes, against their sexual orientation. This has resulted in many individuals facing years of abuse and mental cruelty for hiding their true selves.

71. The Petitioners are well-aware that no matter how much they try to progress or financially sound they try to be, if their relationship remains invisible in law, then it would be a source of stress and anxiety throughout their lives. Not being able to live their lives jointly *de jure* though doing it *de facto* makes it a herculean task for them to access even basic services like putting their partner's name as a nominee in insurance or bank accounts. The constant dependence on the goodwill of the officials or trying to use some personal contacts to get even basic government work done *ex-facie* shows the precarious nature of their existence, with no security or mental peace. The Petitioners are always deeply fearful that their families would continue to interfere in their lives, and if one is physically or mentally sick, they would take control over their lives and exclude the partner from all aspects. The ease with which their relationship can be erased or the partner can be excluded, owing to the complete lack of recognition of their relationship in the eyes of law, terrifies the Petitioners.

INTERNATIONAL LAW

72. Article 51(c) of the Constitution requires the State to foster respect for international law and treaty obligations in the dealings of organized peoples and one another. Accordingly, the *Protection of Human Rights Act*, 1993 recognises and incorporates international conventions and treaties as part of the Indian human rights law. It is well-settled that the international human rights norms contained in the treaties and covenants ratified by the Respondent are binding on the State to the extent that they elucidate and advance the fundamental rights guaranteed in the Constitution of India, unless they are inconsistent with domestic law.

73. This Hon'ble Court has for long incorporated the principles enshrined in the important covenants and treaties in the domestic law, including those contained in the Universal Declaration of Human Rights, 1948 ('**UDHR**'); International Covenant on Civil and Political Rights, 1966 ('**ICCPR**'), International Covenant on Economic, Social and Cultural Rights, 1966 ('**ICESCR**'), Convention on the Elimination of All Forms of Racial Discrimination, 1965 ('**CERD**'); Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ('**CEDAW**'); Convention on the Rights of the Child, 1989 ('**CRC**') and the Convention on the Rights of Persons with Disabilities, 2006 ('**CRPD**').

74. Similarly, this Hon'ble Court has extensively referred to the provisions of the European Convention on Human Rights, 1950 ('**ECHR**'), along with the decisions of the European Court of Human Rights ('**ECtHR**') as well as the American Convention on Human Rights, 1969 ('**ACHR**'), along with the decisions of the Inter-American Court of Human Rights ('**IACtHR**'), in order to expand the content and scope of the fundamental rights in India.

75. In the last three decades, the international human rights law has developed an established jurisprudence on the protection of the rights to equality, privacy and autonomy of LGBTQIA+ persons and freedom from discrimination on the grounds of sexual orientation and gender identity. In their general comments, concluding observations and communications, the human rights treaty bodies have affirmed that the States are obligated to protect individuals from discrimination on the basis of sexual orientation and gender identity, as these factors do not limit an individual's entitlement to enjoy the full range of human rights, as evident from the report of the UN Human Rights Council, "*Discriminatory laws and practices and acts*

of violence against individuals based on their sexual orientation and gender identity" (2011).

76. However, the progress of the international human rights law jurisprudence on the rights of same-sex couples to marry has been gradual, though there is no explicit provision prohibiting the right of same-sex couples to marry. However, a meaningful interpretation of the right to marry provisions of the treaties mentioned above requires the States to affirm the freedom to marry of same-sex couples.

77. It is evident from the *travaux preparatoires* of Article 16, UDHR, on whose wording the right to marry provisions in the ICCPR, ECHR and ACHR are based, that the drafters incorporated the phrase "men and women" into these provisions in the interest of gender equality in marriage, not to enable the exclusion of same-sex couples from marriage. It was on the suggestion of the Commission on the Status of Women, the Commission on Human Rights' Drafting Committee changed the language of the right to marry in the UDHR from "everyone" to the specific "men and women" to highlight that women as well as men have the right to marry. Thus, the terms "men and women" were not intended to limit the right to marry only of women to get married to men and vice versa, but to promote equal access to the right for consenting adults, especially women. Further, the deliberations for the UDHR, ICCPR, ECHR and ACHR do not document any discussions of whether the right to marry provisions should be applicable to same-sex couples or not. A true copy of the article by Evan Wolfson, Jessica Tueller and Alissa Fromkin, "***The Freedom to Marry in Human Rights Law Worldwide: Ending the Exclusion of Same-Sex Couples from Marriage***" *Indiana International and Comparative Law*

Review Vol 32(1) 2022, is annexed herewith and marked as **Annexure P-27** (page 621 to 662)].

78. The Constitutional Court of South Africa too in the ***Minister of Home Affairs v. Fourie*** [(2006) 1 SA 524 (CC)], while considering a challenge to the marriage law being limited to the heterosexual couples, had noted that the reference to "men and women" in the international human rights law was "*descriptive of an assumed reality, rather than prescriptive of a normative structure of all time*". Those terms were intended to forbid child marriages, removal of racial, religious or nationality barriers to marriage, and to ensure that individuals freely entered into marriages, but not to exclude same-sex marriage.

79. In November, 2006, a group of distinguished human rights experts from all over the world drafted and developed at Yogyakarta, Indonesia, what came to be known as Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ('**Yogyakarta Principles'**). Principle 24 explicitly refers to the right to found a family, irrespective of sexual orientation or gender identity, and calls upon the States "*to take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners*"; and "*to take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners*". This Hon'ble Court in ***NALSA*** and ***Navtej Johar***

have reaffirmed the Yogyakarta Principles by incorporating the same for recognizing the human rights of sexual and gender minorities.

Human Rights Committee (HRC): Decisions and Concluding Observations

80. In the last few years, the Human Rights Committee ('**HRC**'), the body tasked with monitoring the implementation of the ICCPR, has urged the State parties to recognise marriage for same-sex couples, in order to fulfill their treaty obligations to eliminate discrimination based on sexual orientation, pursuant to Articles 2(1) and 26 of ICCPR. Way back in 2003, the HRC had noted in ***Young v. Australia*** [CCPR/C/78/D/941/2000, date of decision: 18.09.2003] that "*the Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation*" (para 10.4). This decision was reiterated in ***X v. Colombia*** [CCPR/C/89/D/1361/2005, date of decision: 18.05.2007].

81. In ***C v. Australia*** [CCPR/C/119/D/2216/2012, date of decision: 01.11.2017], the Complainant was precluded from accessing divorce proceedings in Australia, despite same-sex marriages registered under Canadian law were recognised in Australia. The HRC noted that the test was whether it had been shown that the differential treatment in the

complainant's access to divorce proceedings in Australia following her same-sex foreign marriage, with respect to persons who entered opposite sex foreign marriages meets the criteria of reasonable, objectivity and legitimacy of aim. The HRC further noted that "*the State party fails to provide a reasonable justification for why the reasons provided for recognizing the exceptions do not also apply to the author's foreign same-sex marriage. For example, the State party has failed to provide any explanation of why its stated reason for providing divorce proceedings for unrecognized foreign polygamous marriages does not apply equally to unrecognized foreign same-sex marriages. In the absence of more convincing explanations from the State party, the Committee considers that the differentiation of treatment based on the author's sexual orientation to which she is subjected regarding access to divorce proceedings is not based on reasonable and objective criteria and therefore constitutes discrimination under article 26 of the Covenant*" [para 8.4-8.6].

82. Again in 2017, the HRC in its ***Concluding Observations on the Sixth Periodic Report of Australia*** [CCPR/C/AUS/CO/6, date: 01.12.2017) called on the State to eliminate discrimination on the basis of sexual orientation in its marriage laws, while expressing concern about the explicit ban on same-sex marriage in the Marriage Act 1961, which resulted in discriminatory treatment of same-sex couples, including in matters relating to divorce of couples who married overseas. Consequently, the HRC has noted the discriminatory marriage laws in many countries, including Bulgaria, Hungary and Mauritius, and the exclusion of same-sex couples from marriage and family arrangements, and called upon the States to take all measures to eradicate discrimination against LGBTQIA+ persons with regard to marriage or civil partnerships. [See: ***Concluding Observations on the Fifth Periodic Report of Mauritius***

(CCPR/C/MUS/CO/5, date: 11.12.2017); ***Concluding Observations on the Sixth Periodic Report of Hungary*** (CCPR/C/HUN/CO/6, date: 09.05.2018); and ***Concluding Observations on the Fourth Periodic Report of Bulgaria*** (CCPR/C/BGR/CO/4, date: 15.11.2018)].

Regional Human Rights Instruments: ECHR and ACHR

83. Similar to the HRC, the ECtHR has gradually affirmed the issue of legal recognition of same-sex unions, while dealing with the margin of appreciation left to the States in enacting their domestic laws. In ***Schalk and Kopf v. Austria*** (Application No. 30141/2004, date: 22.11.2010), while the ECtHR held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship, it fell short of recognizing the right to marry of same-sex couples on the basis of a lack of an 'European consensus'.

84. In ***Vallianatos and Others v. Greece*** (Application No. 29381/2009, date: 07.11.2013), the ECtHR found violation of the Articles 8 (right to privacy) and 14 (prohibition of discrimination) by Greece for limiting legal partnerships only to opposite-sex couples, and held that same-sex couples could not be denied access to existing forms of legal recognition, albeit excluding marriage. In ***Oliari & Others v. Italy*** [Application No. 18766/2011, date: 21.07.2015, and in ***Orlandi & Others v. Italy*** [Application No. 26431/2012, date: 14.12.2017], the ECtHR narrowed the margin of appreciation available with the States and held that Italy had failed to fulfill their positive obligation under Article 8 to ensure that the applicants had a specific legal framework providing for the recognition and protection of their same-sex unions.

85. This was reiterated in ***Fedotova & Others v. Russia*** [Application No. 40792/2010, date: 13.07.2021], wherein the ECtHR held that it could not discern any risks for traditional marriage, where the formal acknowledgment of same-sex unions might involve, since it did not prevent the opposite sex couples from marrying each other or enjoying the benefits of marriage, thereby finding that Russia had violated Article 8 by failing to provide a legal framework for the recognition of same-sex unions.

86. In 2017, the IACtHR gave a landmark advisory opinion (OC-24/17, date: 24.11.2017), as requested by the Republic of Costa Rica on gender identity, and equality and non-discrimination of same-sex couples, whereby the IACtHR found that the freedom to marry without discrimination on the ground of sexual orientation is protected under the right to privacy and family life [Article 11(2) read with Article 17] as well as under the right to equality and non-discrimination (Articles 1 and 24). The Court further found the concept of family in ACHR to encompass the familial bonds formed by same-sex couples, including marriage itself. The IACtHR not only considered the provisions of ACHR, but also examined the existing international and regional human rights jurisprudence on the freedom to marry. This advisory opinion has been directly implemented in Chile, Costa Rica and Ecuador and is the basis for on-going litigation and advocacy in many Latin American countries.

Foreign Case laws: Canada, South Africa and USA

87. In ***Halpern v. Canada*** (AG) [65 O.R. (3d) 161 (2003), Court of Appeal for Ontario], the Court in a pathbreaking judgment held that "*the dignity of persons in same-sex relationships is violated by the exclusion of same-sex*

couples from the institution of marriage. Accordingly, we conclude that the common-law definition of marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others' violates Section 15(1) of the Charter" (para 108), and was unjustified under Section 1 of the Charter. Consequent to this decision, in July, 2005, the Parliament of Canada passed a law allowing same-sex couples to marry on an equal basis throughout the territory of Canada.

88. Within two years of ***Halpern*** *(supra)*, the Constitutional Court of South Africa in the ***Minister of Home Affairs v. Fourie*** [(2006) 1 SA 524 (CC)] struck down the common law and Section 30(1) of the Marriage Act, 1961 as being inconsistent with the right to equal protection of law [Section 9(1)] and the right to dignity (Section 10) to the extent they excluded same-sex couples from enjoying the same status, entitlements and responsibilities accorded to heterosexual couples through marriage. The Constitutional Court emphatically held that "*a law that creates institutions which enable heterosexual couples to declare their public commitment to each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for same-sex couples to achieve the same, discriminates unfairly against same-sex people*" (para 81).

89. In ***Obergefell v. Hodges*** [576 US 644 (2015) ('***Obergefell')***], the Supreme Court of the United States of America, while upholding the fundamental right of the same-sex couples to marry, struck down the State laws that excluded same-sex couples from civil marriage on the same terms and conditions as opposite sex couples. The Court categorically held that the U.S. Constitution did not prohibit same-sex couples from marriage under

the equal protection clause, as denying them the said liberty amounted to grave and continuing harm. Following ***Obergefell***, same-sex couples could marry in any of the 50 States of USA, irrespective of the State laws. Recently, in December, 2022, the United States Congress has passed a federal law called the ***Respect for Marriage Act,*** and was signed into law by President Joe Biden, which requires the federal government and all the States and territories to recognise the validity of same-sex and interracial civil marriages in the United States.

Trends in Asia: Nepal and Taiwan

90. It is often contended that the right of same-sex couples not to be discriminated in marriage or civil unions is guaranteed mostly in North America, Europe and now in Latin America, but the countries in Asia and Africa do not form part of that 'global consensus'. However, the clock is slowly turning in Asia too. In 2017, the Supreme Court of Nepal in ***Suman Panta v. Ministry of Home Affairs et. al.*** (Case No. 073-WO-1054, date of decision: 23.10.2017) upheld the right of a foreign national, who had married a Nepalese citizen in California, United States, to obtain a non-tourist visa as a dependent, though it was a same-sex marriage. The Court held that Ms. Panta, as a member of a sexual minority community, is entitled to the fundamental right to live a life with dignity and without discrimination under the Constitution of Nepal.

91. Again in 2017, the Constitutional Court of Taiwan declared the J.Y. Interpretation No. 748, which ruled that the prohibition of same-sex marriage in the Civil Code violated the Constitution. The Court held that the provisions of the Civil Code did not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together, thereby in violation of both

the people's freedom of marriage as protected by Article 22 and the people's right to equality as guaranteed by Article 7 of the Constitution.

92. Many of these decisions from foreign jurisdictions were affirmatively cited by this Hon'ble Court in ***Navtej Johar,*** wherein it was noted that comparative jurisprudence not only required the State not to discriminate but also called for the State to recognise rights and entitlements that bring true fulfillment to same-sex relationships. This Hon'ble Court thus noted that "*the overwhelming weight of international opinion and dramatic increase in the pace of recognition of fundamental rights of same sex couples reflects a growing consensus towards sexual orientation equality*" (para 563).

93. It is important to note that though the international law on marriage equality is primarily about the recognition of same-sex marriage, the diversity of sexuality and gender identities has been recognised in India. Under the *Transgender Persons (Protection of Rights) Act*, 2019, there exists a legal definition of 'transgender' in Section 2(k), which is a statutory definition now. Further, the Hon'ble High Court of Madras in ***Arun Kumar v. Inspector General of Registration, Chennai*** (AIR 2019 Mad 265) ('***Arun Kumar***'), while dealing with the validity of a marriage between a cis-man and a transgender woman, held that the term 'bride' in Section 5, Hindu Marriage Act, 1955 includes transgender woman also, thereby recognizing marriages solemnised by transgender persons.

94. The Petitioners have no other alternate, effective and efficacious remedy other than to approach this Hon'ble Court through the present Writ Petition under Article 32 of the Constitution of India on, *inter alia*, the following grounds, which are urged without prejudice to one another:

GROUNDS

A. BECAUSE the Petitioners are entitled to the fundamental right to marry, as it is intimately connected to the fundamental values of human dignity, equality and freedom as entrenched in the Constitution, which, as this Hon'ble Court has held, include the choice of a marital partner. It is well-settled that the Constitution protects the liberty and autonomy that inheres in each individual, including the ability to take decisions on one's personhood and identity. The choice of a partner, whether within or outside marriage, lies within the exclusive domain of the individual's privacy and autonomy, which is inviolable.

B. BECAUSE this Hon'ble Court has recognised the right to marry a person of one's own choice as integral to Article 21 of the Constitution, which cannot be taken away, except by a law that is substantively and procedurally fair, just and reasonable. The Constitution protects the ability of each individual to pursue a way of life, including in matters of dress, food, ideas, love and partnership, which are central to their identity and autonomy. Neither the State nor the society can intrude into that domain, except for a compelling State interest.

C. BECAUSE the SMA, 1954 has been enacted by the Parliament to enable any two Indians living wheresoever, and whether professing the same or different religions or no religion at all, can solemnise their marriage, provided the conditions for marriage under Section 4 are fulfilled. The crux of SMA, 1954 is to provide a civil form of marriage to all Indians, including the Petitioners, irrespective of faith/religion and caste, and to release individuals from the restrictions of religious law, custom and practice. The Petitioners seek the same civil and secular form of marriage, as provided

under SMA, 1954 with its concomitant rights, entitlements and status, as accorded to the heterosexual couples under SMA, 1954.

D. BECAUSE there exists no explicit prohibition on marriages involving LGBTQIA+ persons under SMA, 1954. Section 4(c), while referring to the minimum age of the parties as a condition for valid marriage, uses the terms "male" and "female". Further, the terms "wife" and "husband" are mentioned throughout the statute, including Section 2 (Definitions of 'full blood' and 'half blood'), Section 12 (Place and form of solemnization), Section 15 (Registration of marriages celebrated in other forms), Section 22 (Restitution of conjugal rights), Section 23 (Judicial Separation), Section 25 (Voidable Marriage) and Section 27 (Divorce), amongst others, while the Third Schedule under Section 11 uses the terms "bride" and "bridegroom". A bare perusal of the parliamentary debates, including the Report of the Joint Parliamentary Committee on the Special Marriage Bill, 1952, reveals that there was no discussion on same-sex marriage or to limit the institution of civil marriage only to the heterosexual couples. The lawmakers merely assumed that marriage involved only heterosexual individuals, and enacted the SMA, 1954 accordingly, but this does not indicate in any manner, whatsoever, that the definition and scope of marriage was determined for all times to come. As noted before, the institution of marriage has evolved over the centuries, with the patriarchal control over women's sexual and agency being reduced gradually, through several State interventions pursuant to demands from women. Similarly, the exclusion of LGBTQIA+ persons from the institution of marriage cannot be justified on the ground that civil marriage has always been heterosexual in nature. Just because civil marriage in India under SMA, 1954 has been limited to heterosexual couples does not mean that it is the only valid form of marriage forever, irrespective of evolving times and the

fundamental rights of the sexual and gender minorities, including the Petitioners. The secularization of the institution of marriage that began in the mid-19th century cannot stop when it comes to recognizing the rights of LGBTQIA+ persons.

E. BECAUSE the fundamental right to choice and autonomy in deciding one's own partner dehors one's religious, caste or community affiliation, lies at the heart of the SMA, 1954. To restrict the fundamental element of decisional autonomy in matters relating to marriage and partnership to heterosexual couples, to the exclusion of LGBTQIA+ persons, would do injustice to the object of the law, i.e., to enable consenting adults to enter into marriage, without regard to their personal or customary norms and rituals. This is exemplified in Section 12(2) that allows the parties to solemnize the marriage in any form which the parties may choose to adopt, provided that the mandatory declaration as mentioned in the proviso to Section 12(2), i.e., "*I (A), take the (B), to be my lawful wife (or husband)*" is stated by the parties in the presence of the Marriage Officer and the witnesses. This provision provides for as secular form of marriage as possible, with no requirement for a mandatory form of solemnization. If this freedom is allowed with regard to the solemnization of marriage, then there is no reason why this freedom cannot be extended to the parties involved, i.e., there is no reason why the right of marriage cannot be extended to LGBTQIA+ persons.

F. BECAUSE the exclusion of the Petitioners from the secular institution of civil marriage under SMA, 1954 is a gross violation of their fundamental right to equality and equal protection of laws under Article 14 of the Constitution. The Petitioners are entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as

well as equal civil and citizenship rights, as enjoyed by any heterosexual couple in India. It is well-settled that the law must operate equally on all persons under '*like circumstances'*. To deny the Petitioners access to the institution of civil marriage under SMA, 1954 solely on the ground of their sexual orientation amounts to discrimination, which is prohibited under Article 14.

G. BECAUSE it is well-settled that Article 14 envisages substantive equality, and not just formal equality. In ***Navtej Johar***, this Hon'ble Court held that "*Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endevour, and in every facet of human existence"* (para 409) It is further well-settled that substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal participation in society. The test for this Hon'ble Court is to determine whether the impugned provision contributes to the subordination of a disadvantaged group. The denial of the marriage rights and status to the Petitioners affects every aspect of their public and private lives in the most material and symbolic way and the Petitioners are made to feel "*lesser beings*", as if their love and relationship is not enough or equal to the heterosexual couples.

H. BECAUSE marriage is not just a piece of paper, but a status vis-à-vis society at large as well as a bundle of rights and entitlements that affect the individuals from "*cradle to grave*", and even after death. Marriage is the most public, law-governed and state regulated domain. The law perceives the spouses as life partners and jointly and severally responsible for the

maintenance of their joint matrimonial home and their children, if any. The rights and obligations associated with marriage are multifold, as marriage is the primary source of socio-economic benefits for the parties, including in matters relating to inheritance and succession, medical insurance, adoption, access to post-death claims, spousal privilege, authority to take medical decisions, survivors' rights and benefits, workers' compensation, income tax, and child custody, amongst others. Exclusion of the Petitioners from SMA, 1954 not just interferes with their fundamental right to marry, but also denies them the plethora of rights and entitlements, as noted above, that the State provides to the heterosexual married couples.

I. BECAUSE besides material harms, marriage represents one of the vital personal rights essential to the pursuit of happiness for individuals, especially for LGBTQIA+ persons. It provides a sense of security, fulfillment and an enduring bond between the individuals, who wish to marry. Though the Petitioners are no longer 'outlaws', and their intimate relationship is no longer illegitimate, following the momentous decision of this Hon'ble Court in ***Navtej Johar***, the Petitioners are still considered as 'outcasts' in State and public sphere, with no aspect of their relationship having legal recognition or acceptance. They are 'strangers' to each other in law, and are living in a legal void, which is a clear anathema to their fundamental rights and freedoms guaranteed in the Constitution. It is not enough to be able to live together or love each other without the fear of law or the knock of the police on their door. The Petitioners should have the right to celebrate their relationship, and their commitment to each other in public as recognised by law. They should not bear the burden of always proving their relationship or live in the fear of uncertainty if something happens to the other. On the other hand, the Petitioners ought to have access to marriage and its consequent benefits, if their relationship does not

last, and there is a need for state regulation of their separation, or divorce or devolution of property or rights to maintenance or custody of children. The Petitioners cannot be rendered as 'second class citizens' both in the realm of solemnization of marriage as well as dissolution of marriage.

J. BECAUSE the exclusion of the Petitioners from the secular institution of civil marriage under SMA, 1954 on the ground of sexual orientation is manifestly arbitrary, and irrational, and thus violates Article 14. It is well-settled that if a law is disproportionate, excessive or unreasonable or lacks an adequately determining principle, then this Hon'ble Court can strike it down as manifestly arbitrary under Article 14. An adequately determining principle is one that is in consonance with constitutional values and is not to be determined by majoritarian notions of morality. There exists no rational nexus with the classification between heterosexual couples and homosexual couples with respect to access to civil marriage under SMA, and the object of such classification. If the object of classification is either procreation or religious reasons, those objects are impermissible, and cannot allowed to discriminate against a class of Indian citizens in relation to access to the one of the most important institutions of the State and society.

K. BECAUSE the restriction on the Petitioners in being blanketly excluded from the secular institution of civil marriage under SMA, 1954 is disproportionate and thus violates Article 14. The doctrine of proportionality is well-established in the Indian jurisprudence, as a way to test the reasonableness of restrictions imposed on the fundamental rights by the State. It is settled law that proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the

purpose of the law, and only least restrictive measure is adopted. As noted before, the exclusion of the Petitioners from the secular institution of civil marriage under SMA, 1954 has no legitimate purpose or rationality, while undertaking the most restrictive measure of complete exclusion of all LGBTQIA+ persons from accessing the institution of marriage, which is impermissible in law.

L. BECAUSE it is well-settled that the term 'sex' in Articles 15(1) and 15(2) have been interpreted to include 'sexual orientation' and 'gender identity'. Accordingly, the State cannot discriminate against the Petitioners or any other LGBTQIA+ person on the ground of sexual orientation in relation to the institution of marriage. Section 4(c), SMA, 1954, discriminates against LGBTQIA+ persons, including the Petitioners, by limiting the institution of civil marriage only to heterosexual couples. Underlying this exclusion is a sex stereotype that marriage is essentially a union between a *cis man* and a *cis woman*, which is prohibited under Article 15(1).

M. BECAUSE this Hon'ble Court in multiple cases has struck down sex and gender stereotypes that animate many of the laws existing in the country today. It is well-settled that a law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates. Sexual autonomy constitutes an inviolable core of the dignity of ever individual and is at the heart of the individual's fundamental right to choice and the freedom to determine one's actions. In this context, the denial of the Petitioners from the secular institution of civil marriage is a denial of their sexual agency and autonomy, thereby further perpetuating stereotypical gender norms and bias, and thus violating the constitutional guarantee of non-discrimination under Article 15.

N. BECAUSE in the present case, unfair discrimination against the Petitioners does not flow from any express exclusion in the SMA, 1954 rather the law simply makes no provision for them to have their unions recognised and protected in the same way as it does for the heterosexual couples. Thus, the SMA, which creates institutions that enable heterosexual couples to marry each other and achieve the status, entitlements and responsibilities that flow from marriage, but does not provide any mechanism for LGBTQIA+ couples to achieve the same, unfairly discriminates against the LGBTQIA+ persons.

O. BECAUSE the Hon'ble Madras High Court in ***Arun Kumar*** has upheld the right of transgender persons to marriage by holding that the term 'bride' in Section 5, HMA includes transgender women. Similarly, the word 'wife' in SMA should include both *cis women* and *transgender women* as well as in the word 'bride' in the Third Schedule under Section 11.

P. BECAUSE the Petitioners are entitled to the fundamental right to found a family under Article 21. The Constitution protects diverse forms of families, based on the inherent claims of dignity and autonomy of individuals. Without formal recognition of their marriage, the Petitioners are often faced into being identified as friends or cousins, which deeply impairs their dignity as it has the effect of denying their relationship entirely. This Hon'ble Court in ***Deepika Singh v. Central Administrative Tribunal*** (2022 SCC OnLine SC 1088) emphatically noted that family units may manifest in myriad ways, including domestic, unmarried partnerships or queer relationships, and there is a need to grant legal recognition to atypical and non-traditional forms of relationships. This has been reiterated in ***X v. Principal Secretary, Health and Family Welfare Department, Government of NCT and Anr.*** (2022 SCC OnLine SC 1321).

However, the exclusion of LGBTQIA+ persons from civil marriage thus prevents the Petitioners from constituting a family, establishing, enjoying and benefiting from family life, and from entering into a legally protected relationship.

Q. BECAUSE this Hon'ble Court in ***Navtej Johar*** held that the fundamental right to privacy under Article 21 includes the right to sexual privacy, which is protected under the Constitution. It further held that "*the Constitution protects the fluidities of sexual experience. It leaves it to consenting adults to find fulfilment in their relationships, in a diversity of cultures, among plural ways of life and in infinite shades of love and longing*" (para 478). It is well-settled that the fundamental right to privacy under Article 21 creates a protected space against State interference, guaranteeing to an individual the freedom of thought, the freedom to believe in what is right, and the freedom of self-determination.

R. BECAUSE it is well-established that the Constitution guarantees the right to intimacy, i.e., an individual's prerogative to engage in sexual relations on their own terms, it is an exercise of the individual's agency, and includes the individual's right to the choice of partner as well as the freedom to decide on the nature of the relationship that the individual wishes to pursue. The Petitioners, being in a loving and fulfilling relationship for years, want to progress to the next stage of the relationship, i.e., the institution of marriage, and access the concomitant rights and benefits attached to the status of marriage. But for the exclusion of LGBTQIA+ unions from the SMA, 1954, the Petitioners would have solemnized the marriage by now and not approached this Hon'ble Court for something that heterosexual couples take for granted. By virtue of the said exclusion of LGBTQIA+ couples from the institution of marriage, the Petitioners are denied the

plethora of benefits that the State links with marriage, which results in grave and continuing harm.

S. BECAUSE by excluding the Petitioners from an important institution of the Indian society, i.e., marriage, the Petitioners are condemned to a life of perennial instability and uncertainty that many heterosexual couples would abhor. This blanket exclusion sends a clear message that queer couples and their relationships do not have the inherent dignity and are not worthy of the respect and recognition accorded to the heterosexual relationships. This constitutes a blatant affront to the dignity and personhood of the same-sex desiring persons. The Constitutional promise of equality, dignity and moral citizenship is denied to the Petitioners by restricting the secular institution of civil marriage under SMA, 1954 only to the heterosexual couples.

T. BECAUSE it is well-settled that human dignity is a constitutionally protected interest in itself, and is an integral aspect of privacy and freedom. The protection of family, marriage and sexual and gender identity are all integral to the dignity of the individual, and encompasses their ability to achieve their full potential, including their control over fundamental personal decisions. The Petitioners are well-aware that the legal recognition of their relationship, including the right to marry, is not going to undo the damage and harms caused by more than 150 years of criminalization of their identity and selves, but at least it would make their future better and more secure, than their current precarious reality. The Petitioner No. 1 is petrified of the future of her relationship with the Petitioner No. 2, and cannot accept the fact that their cherished relationship exists in a legal vacuum, constantly gasping for breath. These dignitary wounds will never be healed.

U. BECAUSE the oft-repeated phrase '*unapprehended felon*' to describe the effect of Section 377, IPC fails to capture the sheer devastating impact the law has had on the rights and health of LGBTQIA+ persons, with lives destroyed, bodies brutalized, and minds scarred forever. No act of decriminalization itself can compensate for the decades lost, bullying in childhood, loneliness and isolation suffered, and constant feeling of being considered '*less than human*'. The pain of being different, having no one to talk to, feeling dirty and guilty about oneself, coming to terms with one's sexuality after years, realising that homosexuality is both socially and legally disapproved, not being able to live freely, and having no legal recognition of LGBTQIA+ relationships, all these make LGBTQIA+ persons either resign to a closeted life or to embark on a life of struggle and violence, without any social, legal or institutional support. Only few have the courage or tenacity to go through the latter.

V. BECAUSE it is well-settled that the freedom of expression under Article 19(1)(a) includes the right to express one's sexual identity and to choose a sexual partner. While striking down Section 377, IPC, this Hon'ble Court in ***Navtej Johar*** held that "*Section 377 IPC also assumes the characteristic of unreasonableness, for it becomes a weapon in the hands of the majority to seclude, exploit and harass the LGBT community. It shrouds the lives of the LGBT community in criminality and constant fear mars their joy of life. They constantly face social prejudice, disdain and are subjected to the shame of being their natural selves. Thus, an archaic law which is incompatible with constitutional values cannot be allowed to be preserved"* (para 262).

W. BECAUSE the exclusion of the Petitioners from the secular institution of civil marriage under SMA, 1954 constitutes a grave violation of their fundamental right to speech and expression, which includes the right to express one's self-identified sexuality and to choose a partner. Despite the Petitioners being major, having no other spouse and not being in the prohibited relationships, not being able to marry solely on account of their sexual orientation goes against the teeth of the constitutional rights of privacy, self-identity, autonomy and personal integrity of the LGBTQIA+ persons guaranteed under Article 19(1)(a).

X. BECAUSE it is well-settled that LGBTQIA+ persons have a fundamental right to move freely throughout the territory of India under Article 19(1)(d) of the Constitution, subject to reasonable restrictions in the interest of general public or for the protection of the interests of any Scheduled Tribe as mentioned under Article 19(5). LGBTQIA+ persons, who have had to move away from their hometowns, are unnecessarily subject to harassment by police personnel purportedly acting on missing complaints. These individuals are forcibly taken back to their hometowns thereby infringing their right to live with dignity and their right to movement and settle anywhere in the territory of India. The instances of failure of the police to adhere to the procedure for inter-state arrest are common. The police personnel need to be appropriately sensitized to the specific circumstances and prevailing conditions that persons belonging to the LGBTQIA+ community face regarding their choice and identity, and this Hon'ble Court ought to direct the Respondent to formulate an inter-State protocol to protect the rights of LGBTQIA+ persons from false criminal complaints at the behest of their natal families.

Y. BECAUSE the content of the fundamental right to liberty and life under Article 21 is not just negative in nature, but it also includes the positive obligations on the part of the State to undertake all necessary legal and administrative measures needed for the protection of the fundamental rights of the individuals. The State cannot look the other way when the LGBTQIA+ couples like the Petitioners are struggling to go through their daily lives with dignity and freedom, where even a basic service like opening a joint bank account is denied to them.

Z. BECAUSE there is no legitimate State interest, much less a compelling one, in limiting the right to marry only to heterosexual couples, to the exclusion of LGBTQIA+ couples like the Petitioners. It is settled law that "marriage" does not have a constitutionally fixed meaning, but is inherently flexible to meet the changing realities of the Indian society. The history of marriage is one of both continuity and change, even when involving the heterosexual couples. Till the enactment of the Hindu Marriage Act in 1955, polygamy was allowed amongst Hindu men and no divorce was allowed. For centuries, the doctrine of *coverture* held ground, with its remnants found in the criminalization of adultery under Section 497, IPC till very recently till it was struck down as unconstitutional by this Hon'ble Court in *Joseph Shine v. Union of India* [(2019) 3 SCC 39].

AA. BECAUSE the Petitioners seek their fundamental right to marry under the secular law, i.e., the SMA, 1954 and not under the religious personal laws. The present petition does not engage the issue of religious rights and freedoms. The Petitioners are not seeking interference with the religious institution of marriage, but only with the secular aspect, i.e., the civil marriage as guaranteed under SMA, 1954.

BB. BECAUSE it is well-established that the fundamental right to health is an integral part of the right to life and liberty under Article 21, as it is understood to be indispensable to a life of dignity and well-being, and includes the right to emergency medical care and the right to maintenance and improvement of public health. It is further well-settled that for individuals to attain the highest standards of health, they must also have the right to exercise choice in their sexual lives and feel safe in expressing their sexual identity. Besides physical health, protection of mental health of the persons is a core element of the right to health. The Petitioners, having no legal recognition of their relationship, are deeply fearful of the future that is beset with uncertainty and fragility, thereby frequently suffering from anxiety and stress. Instead of focusing on their lives together and careers, the Petitioners are ravaged by the constant fear of their families the thoughts if anything were to happen to one of them, how would the other person navigate the current sphere of legal blankness that affects their relationship. Further, the Petitioners have no right to undertake medical decisions for each other, if, unfortunately, one of them becomes mentally incapacitated. This blatant legal exclusion from each others' lives in the times of crisis deeply impairs their right to mental integrity, and violates their right to health under Article 21.

CC. BECAUSE it is well-settled that the Constitution envisages an open and democratic society where there is mutually respectful co-existence between *the secular and the sacred*. It is the responsibility of this Hon'ble Court to recognise the sphere which each inhabits, not to force the one into the sphere of the other. It is clearly evident that the legal recognition of the Petitioners' right to marry and to enjoy the same status, entitlements and responsibilities as heterosexual married couples under SMA,1954 is not inconsistent with the rights of religious groups. The constitutional claims

of the Petitioners cannot be negated by invoking the right to religious freedoms to discriminate against LGBTQIA+ couples.

DD. BECAUSE though SMA, 1954 has been enacted to facilitate inter-faith, inter-caste and choice based marriages, the procedural requirements of the statute, including the requirement of giving notice to the Marriage Registrar in the district in which one of the parties has been residing for a minimum period of 30 days under Section 5, publication of the said notice by the Marriage Officer at a conspicuous place in their office under Section 6, objection to marriage by any person, on the ostensible basis of contravention of one of the valid conditions of marriage, within 30 days from the publication of such notice under Section 7, and the power of inquiry into the objections by Marriage Officer within 30 days from the date of objection under Section 8, make it virtually impossible for anyone, let alone inter-faith, inter-caste or LGBTQIA+ couples escaping familial pressure/violence/backlash and often even police harassment, to solemnize marriage under SMA, 1954. As per the Second Schedule under Section 5 for the Notice of Intended Marriage, the parties have to disclose their residential address, including the permanent address, and length of residence, thereby making it near impossible for individuals to marry if they don't meet the domicile requirement of 30 days.

EE. BECAUSE the provision of the notice of intended marriage can be traced to the English laws dating back to 1753, vide the *Act for better preventing Clandestine Marriages*, 1753, which was intended to prevent 'runaway marriages' without parental consent, in order to protect 'family reputation', 'class lineage' and 'wealth'. A version of this provision then first came to be transplanted in India, vide *An Act for Marriages in India*, 1851, and then in the colonial version of the SMA, i.e., the SMA, 1872, which provided

for a domicile period of a minimum of 14 days before giving notice to the Marriage Registrar, and another 14 days' period within which objection to the said marriage could be made. In fact, when SMA, 1872 was being deliberated upon by the British colonial administration, the residence requirement was only 5 days as well as 14 days period for giving objection(s) before the Marriage Registrar in the proposed legislation. This extension from 5 days to 14 days in SMA, 1872 and then to 30 days in the SMA, 1954, both for domicile and for period within which objections could be given, makes it clear that these provisions are intended to provide ample time to the families to track down their children, consenting adults exercising their freedom to choose a partner, and to object to their marriages. However, the State justified these arbitrary and unwarranted procedures as preventive measures to prevent bigamous or child marriages, and not to interfere with the individuals' basic freedom to choose their partner, which can no longer be sustained.

FF. BECAUSE the requirement for domicile for a minimum of 30 days and the option of objecting to the marriage within 30 days from the publication of notice are not found in the codified personal laws like *Hindu Marriage Act*, 1955 or the *Parsi Marriage and Divorce Act*, 1936. If a person enters into a bigamous marriage or marries a minor or consent is vitiated, appropriate legal remedies are provided for under the respective personal laws as also under SMA, 1954. It is thus evident that the purported justifications for the domicile requirement of minimum 30 days and providing an opportunity to families/strangers, including orthodox religious, majoritarian or caste supremacist groups, are a ruse to prevent inter-faith, inter-caste and choice-based marriages. There is no rational nexus in classifying SMA, 1954 separately from *Hindu Marriage Act*, 1955 or the *Parsi Marriage and Divorce Act*, 1936. The impugned requirements actually impose

unconstitutional burdens on the couples who seek to solemnise their marriage under SMA, 1954, which are not imposed on the couples marrying under religious personal laws, thereby disincentivizing marriages under SMA. In fact, SMA, being the only secular law of marriage aimed to advance the '*rights of conscience'*, ought to facilitate civil marriages, without religious affiliation, through simple and swift procedures, instead of impeding the same.

GG. BECAUSE the Law Commission of India in its 242nd Report, namely "*Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition)*", has recommended the removal of the domicile restriction of 30 days (Section 5) as well as the period of 30 days from the date of giving notice to the registration of marriage (Section 7). The Law Commission noted the "*high-handed and unwarranted interference by the caste assemblies*" with inter-caste or inter-religious marriages, and proposed a draft legislation on the same lines.

HH. BECAUSE many High Courts have also noted the arbitrary interference with the individuals' fundamental rights to privacy and autonomy by the publication of notice of marriage, which is often even sent to the houses of the parties, thereby notifying their families and putting their lives in danger. In fact, different States are following different rules and practices, which are not borne from the Act, including sending the notice of marriage to the respective addresses of the parties and through the local Station House Officer (SHO) of the concerned jurisdiction for the purpose of verification of the residential address. This results in unwarranted disclosure of matrimonial plans, including jeopardizing their prospective marriage and even endangering their lives and liberty, owing to family opposition.

II. BECAUSE taking note of the unnecessary and wanton intrusion into the privacy and autonomy of the consenting adults, vide the notice, domicile and objection procedures, the Hon'ble High Court of Allahabad in ***Safiya Sultana*** read down the provisions of Section 6 and Section 7, SMA, 1954 as directory at the instance of the parties, and not mandatory that the Marriage Officer has to follow before the registration of marriage under SMA, 1954. The Hon'ble High Court held that "*there is no apparent reasonable purpose achieved by making the procedure to be more protective or obstructive under the Act of 1954, under which much less numbers of marriages are taking place than procedure under other personal laws, more particularly when this discrimination violates the fundamental rights of the class of persons adopting the Act of 1954 for their marriage*". It was further held that "*the requirement of publication of notice under Section 6 and inviting/entertaining objections under Section 7 can only be read as directory in nature, to be given effect only on request of parties to the intended marriage and not otherwise*" (paras 45-46).

JJ. BECAUSE this Hon'ble Court in several cases has noted the pervasive violence and harassment faced by the inter-caste and inter-faith couples who dare to exercise their freedom to choose their partner, often in the garb of protecting 'family honour', which has even resulted in gruesome killings of individuals. This Hon'ble Court has passed a number of directions providing for protection of young consenting adults from family violence, including setting up safe houses for couples facing family/caste/community opposition, registration of FIRs against offending family members and punitive action against police officials for dereliction of duty in failing to protect the adult consenting couples. In the last decade, the country has been torn apart by the majoritarian religious groups violently opposing inter-faith marriages, while many States are even

passing prohibiting inter-faith marriages in the garb of barring 'forced conversions'. In this regard, the provisions of Sections 5-8 of the SMA, 1954 have been weaponized by the family and orthodox groups to oppose inter-faith, inter-caste and choice-based marriages, and subjecting the parties to unimaginable harassment, including filing false criminal cases against them.

KK. BECAUSE in a similar vein, when LGBTQIA+ persons leave abusive family situations and seek to live a life of freedom and dignity, they too face sustained backlash from the natal families, supported by the local police authority, on account of their sexuality or gender identity. Transmen and queer women, in particular, are subject to an extreme amount of scrutiny and body policing from an early age for failing to act according to purported female gender norms. Use of criminal law at the behest of private actors, including the natal families, by filing of false missing complaints or false cases of kidnapping against the partners of queer and transgender persons has a serious chilling effect on the exercise of freedoms. Many queer and transgender persons, including transgender men and lesbian couples, have had to approach the High Courts time and again either seeking police protection from natal family harassment or writ of habeas for release from illegal confinement.

LL. BECAUSE even if this Hon'ble Court grants legal recognition to the LGBTQIA+ persons to marry, the impugned provisions of SMA, 1954 such as the notice of intended marriage, along with the requirement of 30 days' domicile, under Section 5, publication of the notice by the Marriage Officer under Section 6, inviting objections to the marriage under Section 7 and the procedure for inquiry under Section 8 would ensure that the right to marry only remains on paper, with no effective way available to the

LGBTQIA+ persons, especially from vulnerable sections, to exercise the said right. Most natal families cannot even accept the sexual identity or gender identity of queer persons and keep on imposing stereotypical sexual or gender norms on them. Families relentlessly pursue them, if they somehow manage to leave their abusive homes, through filing false missing complaints and false criminal cases, with active support of the State machinery as well as extra-judicial actors. In this regard, if a queer couple is required to give notice of 30 days, reside for a minimum of 30 days in a district where they intend to marry, and face the prospect of families being given ample time to object to their relationship, then no queer person would ever dream of solemnizing a civil marriage, but would fall prey to touts promising purported valid marriage ceremony and certificate of registration. Hence, unless the Sections 5-8 of SMA, 1954 are struck down by this Hon'ble Court, the fundamental rights of persons to opt for a civil marriage would be, in fact, meaningless, and rendered a nullity.

MM. BECAUSE it is settled law that intimacies of marriage, including the choices which individuals make on whether or not to marry and whom to marry, lie outside the domain of the State. However, the provisions of notice, domicile and objections to marriage act as the biggest impediments to the exercise of such fundamental freedoms. This Hon'ble Court, being the guardian of fundamental rights and upholder of the constitutional freedoms, cannot look away, when the law mandates making the most personal decisions of individuals a battleground for majoritarian politics.

NN. BECAUSE most LGBTQIA+ persons have no access to state, social or family support, especially those who are most vulnerable. For them, marriage is the only avenue to access rights and gain societal acceptance,

otherwise they would spend their whole lives at the margins, bereft of any right or entitlements, and battling for bare survival. The entire legal framework for partner benefits revolves around the institution of marriage in India, which privileges only heterosexual marital relations, to the exclusion of all others. This legal regime thus makes it imperative that all consenting adults have access to the same, irrespective of sexual orientation and gender identity.

OO. BECAUSE it is well-known that marriage provides access to hundreds of government benefits with one simple certificate. The LGBTQIA+ persons from poor and marginalized communities, including Dalits, Muslims, persons with disability, and persons living with HIV, amongst others, would not have access to those socio-economic benefits, without the recognition of marriage. *It is, often not a choice for LGBTQIA+ persons to marry, but a very mode of survival*. Many LGBTQIA+ persons have limited access to legal advice or financial resources to protect their relationship and/or partner through other means like executing a will or a gift deed. In fact, many queer individuals do not have the wherewithal to even think about their future, let alone plan for a secure future, as their lives are ravaged are scarcity of resources, and fragility of status.

PP. BECAUSE it is often contended that marriage symbolizes the inherently procreative relationship between a man and a woman, and it should be protected as such. Accordingly, the objections to marriages involving LGBTQIA+ persons stems from the lack of procreative potential. It is well-settled that sexuality cannot be construed as something that the State has the prerogative to legitimize only in the form of rigid, marital procreational sex, or be defined narrowly as a means to procreation, but must be seen as integral to an individual's personality that is one of the most basic aspects

of self-determination, dignity and freedom. From a constitutional standpoint, procreation is not a valid basis for differential treatment, as is evident from heterosexual married couples who cannot or do not want to procreate or want to adopt. In any case, the LGBTQIA+ couples can choose to have children through other means, including adoption, surrogacy and donor insemination. Accordingly, the right to marry cannot be limited to heterosexual couples on the ground of procreation, and LGBTQIA+ couples are entitled to the same degree of dignity, concern and respect for their relationships.

QQ. BECAUSE the exclusion of LGBTQIA+ couples from the secular institution of civil marriage under SMA, 1954 forces them to enter into heterosexual marriages, out of parental pressure and against their wishes and desires. The fact that the legal institution of marriage is open only for heterosexual persons makes it almost impossible for many LGBTQIA+ persons to assert their rights of sexual identity and self-determination, and to counter parental pressure, because the alternative of diverse marriage involving LGBTQIA+ persons is absent in law and in societal imagination. Thus, the exclusion of marriages involving LGBTQIA+ persons has the devastating effect of leaving LGBTQIA+ persons like the Petitioners vulnerable to being coerced into heterosexual marriages, thereby violating their fundamental rights to identity, self-definition, physical and mental integrity and autonomy guaranteed under Article 21.

RR. BECAUSE Article 25 of the Constitution guarantees the freedom of conscience to all persons. Conscience is not necessarily limited to religious beliefs, but refers to the moral compass of a person with respect to her core beliefs. Accordingly, deeply and sincerely held beliefs derived from purely ethical sources can be termed as ‘conscience’, thereby entitled to protection

under Article 25. It is well-settled that there are areas other than religious beliefs, which form part of the individual's freedom of conscience such as political beliefs, sexual identity, etc. Accordingly, the freedom of conscience guaranteed under Article 25 extends to the entire consciousness of a human, including beliefs of her sexual identity, which, in fact, go to the core of each individual's sense of self, as well the intensely personal nature of her own sexual orientation. Thus, the exclusion of the Petitioners from the secular institution of civil marriage under SMA, 1954 grossly impairs their freedom of conscience that inheres in each individual, and the ability to take decisions on matters that are central to the pursuit of happiness.

SS. BECAUSE our Constitution is a living and breathing document, being the repository of rights, a celebration of myriad freedoms and liberties, and envisages a society where the ideals of equality, dignity and freedom triumph over entrenched prejudices and injustices. It is well-settled that the fundamental rights enshrined in Part III have to be construed in a wide and liberal manner, and not in a narrow and pedantic fashion, in order to ensure that the Constitution does not get fossilized, but remains flexible enough to meet the newly emerging problems and challenges.

TT. BECAUSE the Constitution is governed by the constitutional morality, and not by public or popular morality. No law can deny the Petitioners their entitlement to a full and equal citizenship. It is well-settled that this Hon'ble Court must act as a counter-majoritarian institution, which is responsible for protecting the constitutional rights, irrespective of the majority opinion. The existing regime under SMA, 1954 violates the constitutional guarantees of liberty, dignity, autonomy and equality. It denudes the Petitioners the constitutional right to lead fulfilling lives in the

pursuit of their happiness. It is well-settled that the choice of a partner, the desire for personal intimacy and need to find love and fulfillment in intimate relations are central to the constitutional morality, which this Hon'ble Court ought to uphold in the present petition.

UU. BECAUSE the Constitution of India is foremost a document of immense transformative potential, tasked with promoting and entrenching social justice and societal change. The Constitution represents a radical rupture with our past based on discrimination and exclusion and move towards a society based on equality and respect for all. To penalise the Petitioners for who they are and to deny their relationship an equal status, rights and entitlements is profoundly disrespectful of their basic human dignity and freedom, and leaves them outside of the transformative power of the Constitution.

VV. BECAUSE it is well-settled that the Preamble of the Constitution portrays the foundational principles: justice, liberty, equality and fraternity. This Hon'ble Court in ***Indian Young Lawyers Association & Ors. v. State of Kerala*** [(2019) 11 SCC 1], while referring to the seminal significance of the Preamble, held that "*while recognizing and protecting individual liberty, the Preamble underscores the importance of equality, both in terms of status and opportunity. Above all, it seeks to promote among all citizens fraternity, which would assure the dignity of the individual*" (para 201). India, as a constitutional democratic country, cannot progress in its quest for social, economic, political and cultural justice if fraternity as a constitutional tenet is not entrenched in our national consciousness. To discriminate against an entire class of persons in granting them access to the secular institution of civil marriage under SMA, 1954 with its concomitant status, rights and privileges, and to deny LGBTQIA+ couples

equal protection of law with respect to marriage is a violent repudiation of the foundational principle of fraternity in the Constitution.

WW. BECAUSE the Petitioners are entitled to the constitutional promise of secularism that is entrenched in the democratic republic of India. The fact that the SMA, 1954 was enacted by the Parliament to facilitate inter-faith, inter-caste and choice-based marriages, irrespective of religious affiliation, makes it foremost a secular law on marriage and divorce, which cannot discriminate against individuals based on their sexual orientation. A secular State cannot treat its citizens unfairly and unequally based on ostensible religious objections. Under SMA, 1954 marriage is based on secular principles and ethos, which cannot be diluted in the garb of protection of religious personal laws. The Indian State has given legal recognition to marriage, with the Parliament and State legislatures having built a myriad of rights and obligations around the institution of marriage. This recognition and the rights associated with the institution of marriage cannot be denied to the Petitioners by the State, otherwise it would be unconstitutional and ought to be struck down by this Hon'ble Court.

XX. BECAUSE the international human rights law and comparative jurisprudence from USA, South Africa, Canada and European Union, not only requires the State not to discriminate but also called for the State to recognise rights and entitlements that bring true fulfillment to queer relationships. The Constitutional Courts of South Africa, USA, Taiwan and many Latin American countries have struck down discriminatory marriage laws that excluded same-sex couples, and upheld the equal right of the LGBTQIA+ couples to marry.

YY. BECAUSE for the Petitioners, this Hon'ble Court remains their only support in the face of the violation of their fundamental rights, with a silent State casting their disapproving authority on the choices of the former, motivated by their own patriarchal, heteronormative and transphobic ideas. This Hon'ble Court has to step in, and protect the LGBTQIA+ persons who exercise their rights to live with freedom and dignity, and as per their own truth.

95. That the Petitioners craves the liberty of this Hon'ble Court to add, alter, modify or amend the grounds during the pendency of this Writ Petition, if necessary.

96. That the Petitioners have not filed any similar Writ Petition before this Hon'ble Court or any other Court/s involving the subject matter of the present Petition or the reliefs prayed herein.

97. That the Petitioners do not presently have any effective remedies in respect of the subject-matter of the present petition. The Petitioners' grievances are subsisting.

98. That the Petitioners do not have any other alternative or efficacious remedy than to invoke their Fundamental Right under Article 32 of the Constitution of India seeking enforcement of Fundamental Rights under the Constitution of India.

99. That this Hon'ble Court has the jurisdiction to entertain and adjudicate the present petition.

100. That the present Petition is bona fide and in the interest of justice.

PRAYER

It is, therefore, in the interest of justice and in the facts and circumstances of the case, most humbly and respectfully prayed that this Hon'ble Court may graciously be pleased to:

a. Issue an appropriate writ, order or direction declaring that Section 4(c) of the Special Marriage Act, 1954, to the extent it excludes LGBTQIA+ couples, is unconstitutional;

b. Issue an appropriate writ, order or direction declaring that the words "wife" and "husband" in the Special Marriage Act, 1954, would be substituted by the word "party", to the extent of its application to marriage that is solemnized where at least one of the parties to the marriage is an LGBTQIA+ person;

c. Issue an appropriate writ, order or direction declaring that Sections 5, 6, 7 and 8 of the Special Marriage Act, 1954 are unconstitutional;

d. Issue an appropriate writ, order or direction declaring that all rights, entitlements and benefits associated with the solemnisation and registration of marriage under the Special Marriage Act, 1954 would be applicable to LGBTQIA+ persons;

e. Issue an appropriate writ, order or direction to the Respondent to adopt a protocol to be followed by all States, district and police authorities concerning the cases involving adult and consenting LGBTQIA+ persons, married or unmarried, who require protection from their families; and

f. Pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

AND FOR THIS ACT OF KINDNESS THE PETITIONERS SHALL, AS IN DUTY BOUND, EVER HUMBLY PRAY

Drawn by:
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Drawn on: 16.01.2023
Filed on: 18.01.2023