

SYNOPSIS

1. The Petitioners have been in a relationship for 21 years and were legally married in Australia in 2018. The Petitioners have been living and working in India for the last 13 years. They have an ■ year old daughter, ■ and a ■ year old son, ■. The Petitioners are Australian citizens and the Petitioner No. 2 has an Overseas Citizen of India (OCI) Card. The Petitioners seek OCI status for Petitioner No. 2 as she is the spouse of Petitioner No.1 under Section 7A(1)(d) the Citizenship Act, 1955 which provides that “spouses of foreign origin” of Overseas Citizens of India are eligible for grant of an OCI status as long as their marriage has subsisted for over 2 years. Petitioner No. 1 applied for the OCI card on 7.09.2021 by submitting all required documents to the Respondent No. ■. However, Respondent No. 2 denied the OCI card to the Petitioner No. 1 on the ground that the Petitioners are in a same-sex marriage, that is not recognised by Indian law.
2. For more than two decades, the Petitioners have been seeking legal recognition of their relationship. They have worked very hard to get such legal recognition, and have moved jobs and upended their lives to ensure that they can be together, because they love each other. Legal recognition allows the Petitioners dignity, permanency and status. Legal recognition of their family is now even more important now they have two children. A number of legal rights and privileges are available only to couples

whose marriages are legally recognized. Though the Petitioners' marriage is recognised under Australian law, since the law in India does not recognize same-sex marriages, the Petitioners and their children are being deprived of these rights and privileges. In the absence of legal recognition of the Petitioners' marriage in India, the Petitioners are unfairly and arbitrarily deprived of insurance, provident fund, joint bank accounts and several other such necessary facilities available to other married persons.

3. The law does not recognise both Petitioners as parents of their children because their marriage is not recognised. [REDACTED] birth certificate only mentions the name of her biological mother, the Petitioner No. 2. [REDACTED] birth certificate only mentions the name of his biological mother, the Petitioner No. 1. The law in India therefore also does not grant recognition to [REDACTED] and [REDACTED] as siblings. The Petitioner No. 1 and [REDACTED] have to regularly get their visa renewed despite Without such legal recognition, the Petitioners are worried about the future of their children and their family in India, which is the country of the Petitioner No. 2 Kamakshi Raghavan's birth and Petitioner No. 1 Mellisa Ferrier's choice.
4. Section 7-A(1)(d) of the Citizenship Act, 1955 provides as follows:

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

(1) The Central Government may, subject to such conditions, restrictions and manner as may be prescribed, on an application

made in this behalf, register as an Overseas Citizen of India Cardholder—

(...)

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

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

Given that the Petitioners have a valid marriage that has been subsisting for more than 2 years, Petitioner No. 1 fulfils the conditions under Section 7-A(1)(d) for registration of OCI. Respondent no. 2 denied the Petitioner No. 1 registration of OCI on the ground that the Petitioners are both female i.e. they are in a same-sex marriage. Section 7-A(1)(d) uses the word 'spouse' and does not distinguish marital partners on the basis of gender, sex or sexual orientation. Therefore, the denial of OCI card to Petitioner No. 1 is inconsistent with the Citizenship Act, 1955 and is based on a reading of law that is discriminatory and unequal.

5. The word "spouse" in Section 7-A is gender, sex and sexuality neutral. As such, there can be no discrimination against queer or

same sex marriage based on the text or even the purpose of Section 7-A of the Citizenship Act, 1955. This Hon'ble Court is called upon to end a discriminatory and exclusionary interpretation of the same.

6. Faced with a similar question, the Constitutional Court of South Africa, in the case of the Minister of *Home Affairs & Anr. vs. Fourie & Anr. with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae)* CCT 60/04, issued a direction for the words "or spouse" to be included in Section 30(1) of the Marriage Act in order to facilitate same sex marriages in their country.
7. The Madras High Court, in *Arun Kumar & Sreeja vs. The Inspector General of Registration, Chennai & Ors.* WP(MD)No.4125 of 2019 and WMP(MD)No.3220 of 2019 held that the term "bride" under the Hindu Marriage Act includes a transwoman. Thus, there is no reason for the Respondent to deny that "spouse" under the Citizenship Act, a secular legislation, includes same sex marriages in its ambit when a court in India has disallowed discrimination on the basis of gender or sexual orientation in a marriage under personal laws.
8. Article 14 and 21 of the Constitution of India are available to all persons. The Respondent No. 1 cannot deny an OCI card to Petitioner No. 1 merely on the ground that she is a spouse in a same-sex marriage. The Petitioners have the right to choose a marital partner of their choice within the fundamental right to

privacy, autonomy and dignity under Article 21 of the Constitution of India. Despite being marital partners, having two children together and having been in love for more than 20 years, the Petitioners are unable to exercise their rights as a marital couple and live a dignified family life. It is the duty of the state to safeguard the ability to take these decisions. The Petitioners' sexual orientation is an inalienable component of their identity.

9. The denial of OCI registration to Petitioner No. 1 by the Respondent No. 2 merely on the ground that she is in a same-sex or queer marriage with the Petitioner No. 1 is violative of Article 14 of the Constitution of India. There is no reasonable classification that can form the basis of the unequal treatment of the Petitioners. The Petitioners have been in a personal relationship for more than 20 years and in a marital relationship for 3 years. They live together, pursue professional and personal goals, raise children, take care of family, contribute to and live within society, just like a heterosexual couple.
10. This classification, being on the basis of sex, gender and sexual orientation does not have any intelligible differentia, neither does it have a rational nexus to the object sought to be achieved by the Citizenship Act, 1955. The Act allows common domicile for marital couples by enabling the registration of OCI card for spouses of existing OCI card holders.
11. The state is bound to uphold rights under the Indian Constitution such as that of dignity, equality and liberty. Regulation of marriage cannot be violative of autonomy of sexual identity that is

intrinsic to constitutional rights under Article 21 and 14. Given the judgements of the Hon'ble Supreme Court of India in *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1 recognising the sexual rights of queer partners, in *NALSA v. Union of India & Ors* (2014) 5 SCC 438 affirming the legal and constitutional rights of LGBTQIA+ persons, in *Justice K.S. Puttaswamy vs. Union of India* (2017) 10 SCC 1 recognising the inviolability of privacy rights of sexuality and marriage and in *Joseph Shine v. Union of India* (2019) 3 SCC 39, recognising the importance of sexual autonomy of marital partners and state non-interference in the private sphere of marital choice, there is no doubt that the law grants recognition to the rights of same-sex, queer and non-heterosexual marital partners.

12. The prohibition on recognition of same-sex and queer marriages, deprives the Petitioners of dignity, integrity and status under the law. As recognised by the United States Supreme Court in *United States v. Windsor*, 2013 SCC OnLine US SC 86 : 570 US ____ (2013), it humiliates children and families of same-sex couples, and has both mundane and profound effects on their lives, by denying them legal benefits and treating their marriage as less worthy. Despite the many difficult barriers they face as a same-sex couple, the Petitioners have been living a fulfilling life in India with their two children for the last 13 years. Their friends, families, colleagues and society treat them as any other family who lives, loves, grows, and contributes to society. They know that Indian society is dignified, respectful and inclusive. All they

seek from this Hon'ble Court is, what the Constitution of India already guarantees, the right to have their marriage recognised.

LIST OF DATES AND EVENTS

Date	Event
September 2000-June 2002	The Petitioners met in Australia and commenced their relationship. In February 2001, they commenced living together in Victoria, Australia.
June - July 2002	The Petitioners applied for a Working Holiday visa and moved to London.
August 2002	In September 2003, the Petitioner no. 2 moved to Switzerland to pursue her professional goals. Petitioner No. 1 also moved to Switzerland to join her partner despite the fact that it was difficult for her to find work there, as the Petitioners did not want to live separately.
22.11.2004-February 2005	To ensure that they could be with each other openly and their relationship be accorded due dignity, the Petitioners decided to move back to England. The Highly Skilled Migrant Programme (HSMP) was an immigration scheme in England from 2002 until 2008. The Petitioners succeeded in being accepted as a couple under this scheme.
06.08.2005-2006	The Petitioners registered their civil partnership under the Civil Partnership Act, 2004 which allowed same-sex couples to register their marriages as civil partnerships. Their family members flew from Australia to celebrate this recognition. This gave Petitioners access to the rights that they had long desired as a marital couple, such as pension and medical cover. They bought an apartment as a couple and resided happily together.
January 2007	The Petitioner No. 2's employer transferred her to work in Chennai, India, while the Petitioner No. 1 was still studying and working in the UK.

2008	In 2008, the Petitioner No. 2's father died. To spend more time with her family, the Petitioner No. 2 decided to stay in India .
End of 2008/early in 2009	<p>The Petitioner No. 1 finished her Masters in the UK and moved to India to join her partner, Petitioner No. 2 in India. They moved into an apartment in Besant Nagar, Chennai.</p> <p>The Petitioner No. 1 faced difficulties finding work authorisation, without which she could not stay in the country with the Petitioner No. 1.</p>
July 2009	The Petitioner No. 2 was obligated to keep leaving the country every six months, because she had a business visa. She finally got a work permit from a Mumbai based company. However, this required her to frequently travel to Mumbai.
2012	In 2012, the Petitioners considered parenthood together. The Petitioner No. 2 was artificially inseminated with a donor's sperm to conceive a child through the Intrauterine Insemination (IUI) method in India.
May 2012	The Petitioners moved closer to Petitioner No. 2's family while conceiving the baby; they moved to Bengaluru a few months prior to their daughter's birth.
February 2013	<p>The Petitioners' first baby, [REDACTED] was born. The Petitioner No. 1 decided to stop traveling between Mumbai and Bengaluru in order to help the Petitioner No. 2 raise Lara.</p> <p>It is pertinent to note that only Petitioner No. 2's name is in the birth certificate as she is the biological mother. The Petitioner No. 1 who is equally a mother to [REDACTED] is not legally recognised as her parent.</p>

2014	The Petitioner No. 1 joined Wipro as a HR Head, Sales, Practice, & Pre-Sales, Cloud & Infrastructure Services at Wipro Limited in Bengaluru and took on the LGBTQ+ Global Lead there. The Petitioners wanted [REDACTED] to have a sibling. This time, the Petitioner No. 1 went through the IUI process and got pregnant.
25.10.2016	<p>Their second child, [REDACTED] was born. It is important to note that only the Petitioner No. 1's name is on his birth certificate, as she is his biological mother. However, Petitioner No. 2 who is equally a mother to [REDACTED] is not legally recognised as his mother.</p> <p>Despite apprehensions regarding having a marriage that was not recognised as a 'marriage' under law and having a family that was not recognised as a 'family' under a law, the Petitioners were determined to build their life together.</p>
09.12.2017	Australia legalised queer marriages via an amendment in their Marriage Act 1961.
6.09.2018	The Hon'ble Supreme Court handed down its decision in <i>Navtej Singh Johar & Ors. v. Union of India</i> AIR 2018 SC 4321 reading down s. 377 of the Indian Penal Code, 1860 effectively abolishing the criminalisation of consensual same sex sexual relations.
23.12.2018	Being citizens of Australia, the Petitioners got married on 23 December 2018 in Victoria, Australia.
2021	Section 7A(1)(d) of the Citizenship Act 1955 allows a foreign born spouse of an Indian citizen or an Overseas Citizen of India to apply for the status of a Overseas Citizen of India as long as the marriage has been registered for more than 2 years. The Petitioners are determined to do everything they could to live together in India and avail all legal rights and privileges which are available to a legally married couple for themselves and their children. As such they decided to apply for an OCI card for Petitioner No. 1.

7.09.2021	The Petitioner No. 2 applied for the OCI card for Petitioner No. 1 by submitting all required documents on the Foreigners Regional Registration Office (FRRO) OCI-Portal of the Respondent No. 1.
17.09.2021	<p>The Petitioner No. 2 visited the Respondent No. 2, FRRO, Bangalore for verification of documents at 10:00 am. When the Respondent No. 2 officer examined the documents, he asked the Petitioner No. 2 if her spouse, Petitioner No. 1, is a woman. The FRRO Officer said that the application will not be allowed for the reason that same-sex marriage is not recognised by Indian law. The Petitioner No. 2 explained that she had been living in India for more than 13 years and had been with her wife for more than 20 years. The Respondent No. 2 officer took copies of the Petitioner No. 2's application, passports, marriage certificate, and current Residential Permit. The Petitioner No. 2 asked for a written rejection and the Respondent No. 2 officer asked to write an email to: ad-froblr@mha.gov.in and firoblr-ka@nic.in and that they would confirm the rejection on email.</p> <p>At 10:37 am, the Petitioner No. 2 wrote an email to the abovementioned email ids asking for confirmation of the rejection.</p>
20.09.2021 and 22.09.2021	The Petitioner No. 2 sent two follow up emails to the Respondent No. 2. The Petitioners have received no response.
November 2021	Hence the present Writ Petition.

IN THE HIGH COURT OF DELHI AT NEW DELHI
CIVIL EXTRAORDINARY JURISDICTION
WRIT PETITION (CIVIL) NO. _____ OF 2021

IN THE MATTER OF:

Melissa Ferrier & Anr.

..... Petitioners

Versus

Union of India & Ors.

..... Respondents

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

MOST RESPECTFULLY SHOWETH:

1. That the captioned Writ Petition has been filed by the Petitioners seeking legal recognition of **non-heterosexual, same-sex or queer marriages**, under the Citizenship Act, 1955. The Petitioners seek a writ, order or direction in the nature of a declaration to the effect that under section 7A(1)(d) of the Citizenship Act, 1955, a person eligible to apply for OCI by being a spouse of an Indian citizen or a spouse of an OCI cardholder whose marriage has been registered and has been subsisting for at least two years may be a spouse in a same sex marriage or a spouse in a non-heterosexual marriage and a writ, order or direction in the nature of prohibition to Respondent no. 2, restraining it from declaring a spouse of an OCI applying for an OCI

card to be ineligible for the same merely, on the ground that they are in a same-sex marriage or queer (non-heterosexual) marriage; and also restraining it from refusing to certify/apostille the registered marriage certificate of the Petitioner Nos. 1 and 2 on this ground.

2. The Respondent No. 1 is the Union of India through the Ministry of Home Affairs. The Foreigners Division of the Respondent No. 1 is the nodal authority re: Overseas Citizenship of India. The Respondent No. 2 is the Foreigners Regional Registration Office and is the concerned authority that decides the OCI application of Petitioner No. 1. The Respondent No. 3 is the Union of India through the Ministry of External Affairs, Consular, Passports and Visa Division which is the authority that holds charge over the consulates and embassies of the Government of India across the world and regulates the issuance of OCI cards.

3. FACTS

- (i) Mellissa Ferrier, the Petitioner No. 1 and Kamakshi Raghavan, the Petitioner No. 2 are a same-sex couple, legally married in Australia, who now live with their two children, [REDACTED] and [REDACTED] in Bengaluru, India. They have lived in India together for 13 years.
- (ii) The Petitioner No. 1 is an Australian citizen. She is 41 years old and works in HR Head, Sales, Practice, & Pre-Sales, Cloud & Infrastructure Services at Wipro Limited and is the LGBTQ+ Global Lead at Wipro, PCC (ICF).

A true copy of the passport of Petitioner No. 1 is annexed herewith as "**Annexure P-1**".

True copies of the Resident Permit and Visa of the Petitioner No. 1 are annexed herewith as "**Annexure P-2 (Colly)**".

- (iii) The Petitioner No. 2 is an Overseas Citizen of India (OCI) card holder. She is 46 years old and works as the Head of Petland India.

A true copy of the OCI card of the Petitioner No. 2 is annexed herewith as "**Annexure P-3**".

A true copy of extracts of the passport of Petitioner No. 2 is annexed herewith as "**Annexure P-4 (Colly)**".

- (iv) The Petitioners met at Brighton East Cricket Club, Australia while playing cricket. The Petitioner No. 2 had moved to Australia in March 1995 for higher studies and was working as an accountant. By the year 2000, the Petitioner No. 2 was a Permanent Resident of Australia. The Petitioner No. 1 is an Australian citizen, who had moved to Melbourne from New South Wales in 1995. She was in her 2nd year of studying psychology at the Australian Catholic University. By October 2000, they became good friends and by November 2000, they commenced their relationship.

- (v) By February 2001, the Petitioners were living together in Victoria, Australia.

A true copy of the recommendation letter dated 10.07.2002 from the Petitioners' landlord, [REDACTED] when living in Melbourne between February 2001 and June 2002 is annexed herewith as "Annexure P-5".

- (vi) The Petitioners applied for a Working Holiday visa and moved to London. They applied as individuals, as they could not apply as a couple at the time. They left Australia in June 2002.
- (vii) Before they left for London, the Petitioners visited India for a month. It was the Petitioner No. 1's first time in India. Since they were moving to the next big phase of their life, they wanted to spend some time in India, the Petitioner No. 2's home. It was the Petitioner No. 2's first queer relationship and she was still making peace with her sexual identity. The Petitioner No. 1 was introduced to Petitioner No. 2's family as a friend. Petitioner No. 2 was unsure if her family would accept her queer relationship.
- (viii) It was easier for the Petitioners to be open about their partnership in England. The Petitioners were working in London. The Petitioner No. 1 worked in the finance team at STA Travel. The Petitioner No. 2 was a financial accountant at General Mills.

A true copy of the Petitioners' tenancy agreement dated 13.8.2002 for the apartment they leased to live together in [REDACTED]

██████████ London is annexed herewith as "Annexure P-6".

- (ix) The Petitioner No. 2's employer was shifting to Switzerland, and she was travelling back and forth from Switzerland. She then moved to Switzerland for her work. The Petitioner No. 1 moved with the Petitioner No. 2 to Switzerland, to join her partner. Switzerland had strict laws against queer relationships and it was not easy for them to live there as a queer couple.
- (x) They first stayed in Nyon, in the district of Canton of Vaud, which was French speaking. Petitioner No. 1 had to learn French for a few months and worked very hard to stay in Switzerland. The Petitioners did not want to be apart. Petitioner No. 1 was unable to find work but supported her family by becoming an exceptional cook and managing the household.
- (xi) Each district in Switzerland has a legislation on how to treat queer people. Nyon was strict, so they decided to go to Zurich which would be more progressive. The Petitioner No. 2 applied for a job at Gate Gourmet International, so they could move to Zurich. The Petitioners tried approaching a lawyer to get a dependent visa. Living together as a couple, without being recognised by law was becoming complicated and difficult, especially since Petitioner No. 1 was not able to get work.
- (xii) It was difficult for the Petitioners to live in Switzerland, which did not accept queer relationships. To ensure that they could live with each other openly and their relationship be

accorded due dignity, Petitioners decided to move to England in 2004. They applied for a HSMP visa to live in the United Kingdom. The Highly Skilled Migrant Programme (HSMP) was an immigration scheme from 2002 until 2008. Under this scheme, highly skilled people were allowed to immigrate into the United Kingdom to look for work opportunities.

A true copy of the Petitioners' HSMP visa approved on 22.11.2004 has been annexed herewith as "**Annexure P-7 (Colly)**".

- (xiii) Petitioners succeeded in applying as a couple under the scheme. They had to provide several documents to prove their relationship, as there was no way for them to attain legal recognition of their marriage. The Petitioner No. 1's parents wrote a letter attesting to their loving relationship.

A true copy of the letter dated 27.03.2004 written by Petitioner No. 1's mother attesting to their relationship is annexed herewith as "**Annexure P-8**".

██████████ working at the KSS Design Group was one of the first people the Petitioners became good friends with in London. She wrote a reference letter attesting to her friendship with the Petitioners and the Petitioners' loving and supportive relationship.

A true copy of letter dated 22.04.2004 by ██████████ is annexed herewith as "**Annexure P-9**".

- (xiv) Petitioner No. 1 moved to the United Kingdom where it was easier for her to find work. Petitioner No. 2 spent a few more months in Switzerland, then moved to London to be with Petitioner No. 1. She left her job at Gate Gourmet and started working as Group Accounting Manager at Pentland Brands Plc.
- (xv) The Civil Partnership Act, 2004 passed by the Westminster Parliament in November 2004 allowed same-sex couples to register their marriages as civil partnerships which gave them the same rights and liabilities as heterosexual marriages. This gave Petitioner's access to the rights that they had long desired as a marital couple, such as pension and medical cover. They were elated to have legal recognition of their union. Their family members also flew over from Australia for the registration of their civil partnership.

A true copy of the certificate of civil partnership dated 06.08.2005 issued by the Registration Office of the Greater London Authority is annexed herewith as "Annexure P-10".

- (xvi) Petitioners were living together and working in London. Petitioner No. 1 initially worked at Globeleq. Then after a year, she studied for her Diploma in Psychology and then Master's in Occupational Psychology. The Petitioner No. 2 was working with General Mills. They wanted to buy an apartment together and started looking at taking a loan as a couple.

A true copy of Petitioners' joint bank account statement from 5 August to 3 September 2005 issued by the HSBC Bank in London is annexed herewith as "Annexure P-11".

A true copy of Petitioners' tenancy agreement dated 12.08.2005 for an apartment in Flat 4, 105 -109A, Cornawallis Mews, Archway, London N19 4LQ is annexed herewith as "Annexure P-12".

- (xvii) The Petitioners continued living and working in London. They bought an apartment where they lived together until Dec 2006. This was Flat 19, Whitehall Mansions, Lidyard Road, London, N19 3TZ.

A true copy of Petitioners' gas bill dated 7.12.2006 from their apartment in Lidyard Road, London is annexed herewith as "Annexure P-13".

- (xviii) In January 2007, the Petitioner No. 2's employer required her to shift to India. It was supposed to be short term, for setting up a Pentland India entity, however, it got extended. Petitioner No. 1 was still studying and working in the UK. The Petitioners continued their relationship even while in different continents.

- (xix) In 2008, the Petitioner No. 2's father passed away and she decided to spend some time in India with her family. The Petitioner No. 1 finished her Masters in the UK and wanted to be with Petitioner No. 2. She decided to move to India to join

her partner. They moved to a house in Besant Nagar, Chennai in early 2009.

- (xx) The Petitioner No. 1 applied for many jobs, but she did not have work authorization. Since the Petitioners were keen on being together, the Petitioner No. 1 set up her own company for consultancy in India. This allowed her to employ herself and gave legitimacy to her stay in India.
- (xxi) The Petitioners got their first puppy, Dora, together in July 2009. The Petitioners were slowly settling in and trying to build a home together. In Chennai, though a lot of people knew the Petitioners as a well respected queer couple, Petitioner No. 2 had to keep leaving every six months, because she had a business visa. She finally got a work permit from a Mumbai based company. But this still required her to frequently travel to Mumbai.
- (xxii) If the law in India were to recognize the marriage of the Petitioners, the Petitioner No. 1 would be eligible for Overseas Citizenship of India (OCI). This would have also made it easier for her to get work in India. The Petitioners were determined to do everything they could to live together in India and avail all legal rights and privileges for themselves and their children, which are available to a legally married couple.
- (xxiii) As they were getting older and more settled in their lives, professionally and personally, the Petitioners considered parenthood together in 2012. Previously, when they were living

in London, they attempted to conceive a child through medical procedure. However, they were unsuccessful.

(xxiv) Since the Petitioner No. 2 was the elder among the Petitioners, she got artificially inseminated with a donor's sperm to conceive a child through the Intrauterine Insemination (IUI) method. They also got a second puppy during this time, who they named Milo. They were very happy to see their small family growing larger.

(xxv) They wanted to move close to the Petitioner No. 2's family while having their child. As the Petitioner No. 2 got pregnant, they moved to Bengaluru a few months prior to their daughter's birth.

(xxvi) The Petitioners' first child, [REDACTED] was born in 2013. Life was beautiful, they continued to work, be parents. The Petitioner No. 1 decided to stop traveling between Mumbai and Bengaluru in order to be with Petitioner No. 2 and take care of Lara. They lived in [REDACTED]

A true copy of [REDACTED] birth certificate issued on [REDACTED] mentioning her date of birth as [REDACTED] issued by the Chief Registrar of Births and Deaths of the Government of Karnataka is annexed herewith as "Annexure P-14".

It is pertinent to note that only the Petitioner No. 2's name is in the birth certificate, as she is the biological mother. Petitioner

No. 1 who is equally the mother of [REDACTED] is not legally recognised as her parent.

(xxvii) The Petitioner No. 1 then joined Wipro in 2014 in Bengaluru and took on the LGBTQ+ Global Lead. In 2016, they bought a property together in Australia for Petitioner No. 1's mother. Her mother was recently widowed, and they wanted a place in Australia.

(xxviii) The Petitioners wanted [REDACTED] to have a sibling. This time, the Petitioner No. 1 went through the IUI process and got pregnant, and [REDACTED] was born.

A true copy [REDACTED]'s birth certificate issued on [REDACTED] mentioning his date of birth as [REDACTED] issued by the Chief Registrar of Births and Deaths of the Government of Karnataka is annexed herewith as "Annexure P-15".

It is important to note that only the Petitioner No. 1's name is in the birth certificate, as she is the biological mother. However, the Petitioner No. 2 who is equally the mother of [REDACTED] is not legally recognised as [REDACTED] mother.

(xxix) In 2017, Australia legalised queer marriages via an amendment in their Marriage Act 1961. Given this landmark change that recognised and validated their love, they decided to get married in Australia. The Petitioner No. 1's side of the family and some of their friends still lived there. Although both Petitioners had

Australian passports, they couldn't organize tickets/visa on short notice, and tied the knot the next year.

- (xxx) With the Supreme Court's decision in *Navtej Singh Johar & Ors. v. Union of India* AIR 2018 SC 4321 the Petitioners could take some solace in the fact that they were not under threat of criminal action because of their relationship and love.

Hon'ble Justice Indu Malhotra in the decision stated "*History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution.*"

- (xxxi) Petitioners got married on 23 December 2018 in Victoria Australia.

Photographs from their wedding have been annexed herewith as "**Annexure P-16 (Colly)**".

A true copy of the marriage certificate with registration date 02.01.2019 issued by the Registry of Births, Deaths and Marriages in Melbourne, Victoria is annexed herewith as "**Annexure P-17**".

- (xxxii) They had a difficult few years after their wedding. The Petitioner No. 1's mother who was very supportive of their relationship and instrumental in organising their wedding,

sadly passed away in December 2019, a day before they were supposed to see her for their customary Christmas visit. Dora, their first dog passed away at the end of November 2019, and then they lost their second dog Milo in January 2020. Just when they thought that things could not get any worse, the Covid pandemic changed their lives, as it did for the rest of the world, in a whole new way.

(xxxiii) If the law in India were to recognize the marriage of the Petitioners, Petitioner No. 1 and the children of the Petitioners would be eligible for Overseas Citizenship of India (OCI). The Petitioners are determined to do everything they could to live together in India and avail all legal rights and privileges which are available to a legally married couple for themselves and their children. The Petitioners, seeking OCI status for Petitioner No. 1 as the spouse of Petitioner No. 2 who is already an OCI card holder under Section 7A(1)(d) the Citizenship Act, 1955, applied for the OCI card by submitting all required documents on the Foreigners Regional Registration Office (FRRO) OCI-Portal on 7.09.2021.

A true copy of the Application for registration as an Overseas Citizen of India Cardholder under section 7A of the Citizenship Act, 1955 of the Petitioner No. 1 submitted to the Respondent no. 2 is annexed herewith as "Annexure P-18"

(xxxiv) On 17.09.2021, at 10.00 am, the Petitioner No. 1 visited the FRRO, Bangalore for verification of documents. When the FRRO officer examined the documents, they asked the

Petitioner No. 1 if her spouse is a woman. The FRRO Officer said that the application will not be allowed for the reason that same-sex marriage is not recognised by Indian law. The Petitioner No. 1 explained that she had been living in India for more than 13 years and had been with her wife for more than 20 years. The FRRO officer took copies of the Petitioner No. 1's application, passports, marriage certificate, and current Residential Permit. The Petitioner No. 1 asked for a written rejection and the FRRO officer asked to write an email to: ad-froblr@mha.gov.in and frroblr-ka@nic.in and that they would confirm the rejection on email. At 10:37 am, the Petitioner No. 1 wrote an email to the abovementioned email ids asking for confirmation of the rejection.

A true copy of the email dated 17.09.2021 is annexed herewith as "**Annexure P-19**".

(xxxv) On 20.09.2021 and 22.09.2021, the Petitioner No. 1 sent two follow up emails to the FRRO. The Petitioners received no response.

A true copy of the email he emails dated 20.09.2021 and 22.09.2021 are annexed herewith as "**Annexure P-20**".

(xxxvi) The Petitioners strongly believe that Indian culture espouses tolerance. They feel that their families and society have embraced their relationship and choices. The schools that their children go to have not only accepted both the Petitioners as the parents' children, they have made efforts to explain the

normalcy of a same sex relationship and having parents of the same sex to other children who were puzzled to hear about the Petitioners' children having two mothers.

(xxxvii) The Petitioners play an integral role in each other's lives as partners and spouses. The Petitioner No. 1 has often looked after the Petitioner No. 2's mother and nephews. They are both parents to [REDACTED] There was an incident when [REDACTED] fell down the stairs, was hurt and ran into the arms of the Petitioner No. 1 for solace, instead of her biological mother, the Petitioner No. 2. The Petitioners have celebrated festivals and birthdays together with their children as a family, as well as each other's parents and relatives. They are thus a normal family unit like any other.

(xxxviii) That even though the relationship of the Petitioners has been decriminalised in Indian law, their families and society have accepted them, there are a number of problems that the Petitioners are encountering in day to day life because their marriage isn't legally recognized in India. The Petitioner's realized the gravity of the problems associated with lack of legal recognition of their marriage during the second wave of the Covid pandemic. The Petitioner No. 2 cannot give the name of the Petitioner No. 1 as her nominee for life insurance policies or pension in India. The Petitioner No. 1 cannot avail a loan or take a credit card in India, since she is not an OCI cardholder, a direct result of the Respondent No. 2's refusal to admit her legal eligibility for OCI status. Similarly, the

Petitioner No. 1 cannot purchase a property in her own name unless she goes to the RBI, for the very same reason. The Petitioners cannot have joint bank accounts in India either.

(xxxix)

The Petitioners face significant anxiety and hardship in the renewal of Petitioner No. 1's Residence Permit (RP). Petitioner No. 1 also has to return to Australia every 5 years to renew her visa. Having to renew their RP each year does not offer the Petitioners and their children any stability or permanence as a family. They have to go through this process every year and live with the fear of rejection, despite the fact that they have lived as a family together in India for 13 years. If their RP is rejected, Petitioner No. 1 and the Petitioners' son [REDACTED] will have to depart India.

(xl)

Every 12 months Petitioner No. 1 and the Petitioners' son [REDACTED] (Petitioner no. 1's dependent) have to renew their RP through the Respondent No. 2. This is quite an arduous process which requires re-sharing of identity documents, salary documents, tax filing, letter of undertaking by Wipro that they will pay for any costs associated with the Petitioners in case of an health/other emergency, etc as well as justification that the Petitioners do not require to complete a Form C (guest registration) and tenancy agreement. Despite a letter explaining that a Form C is not required, each year the Petitioner No. 1 has to visit the Respondent No. 2 in person for renewal. During the visit, the Petitioner No. 1 goes through the humiliating process of explaining that the Petitioners' and their children are a

The Petitioners have utmost respect for Indian society and its laws. They have approached this Hon'ble Court for recognition and enforcement of the fundamental rights available to them, those which are guaranteed by the Constitution to all persons under Article 14 and 21. They contribute to the Indian economy by paying taxes. They have made efforts to contribute to Indian society as well. The Petitioners have over a period of time helped young children from poor families to get into schools, by paying their fees. They have regularly provided care packets to poor families during the covid lock down's. They run an animal welfare initiative , whereby 400+ stray dogs are fed every day of the year. They also run a shelter for old & sick dogs, and dogs that can't survive on the road. They intend to continue giving back to society, as they strongly feel that it is their duty to do so. It is the heartfelt desire of the Petitioners to be fully integrated into this very same Indian society. This Hon'ble court can facilitate their integration to a large extent by granting the reliefs sought by the Petitioners herein.

4. GROUNDS

PETITIONER NO. 1 FULFILS THE CONDITIONS UNDER SECTION 7-A(1)(D) OF THE CITIZENSHIP ACT, 1955 FOR REGISTRATION AS OCI

A. Because Petitioner No. 1 fulfils the conditions given in Section 7-A(1)(d) of the Citizenship Act, 1955 for registration as OCI. Petitioner No. 1 is the spouse of foreign origin of Overseas Citizen of India, the Petitioner No. 2. The Petitioner's marriage has been registered in Australia and has subsisted for more than two years. Section 7-A of the Citizenship Act, 1955 which prescribes the conditions under which overseas citizens of India may be registered was amended vide the Citizenship (Amendment) Act, 2015 w.e.f. 6.1.2015 to include *inter alia*:

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

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

(...)

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

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

B. Because while considering the OCI application of Petitioner No. 1, Section 7-A of the Citizenship Act has to be strictly construed, and if there is no dispute regarding the registration and subsistence of the marriage and the Petitioners, the Respondent No. 2 is bound to consider the Petitioner's application. Additional conditions such as heterosexuality of the marital partners that are not in Section 7-A cannot be imposed. In *Bahareh Bakshi v. Union of India*, W.P.(C) 10807/2020 this Hon'ble Court held that the imposition of the additional condition of requiring presence of both marital partners for the OCI application under Section 7-A(1)(d) cannot be imposed in the absence of such requirements in the law. Similarly in *Natalya Mamrenko v. Union of India and Ors* W.P.(C) 10015/2018, the application of the petitioner therein was not processed because her spouse was not available. This Hon'ble Court found that the application for OCI card cannot be denied as long as the conditions given in Section 7-A(1)(d), namely the registration and subsistence of marriage are fulfilled. In *Ndidi Endurance Ezech v. Union of India* W.P.(C) 10066/2018 & CM No. 39242/2018, this Hon'ble Court ruled that the fact that the petitioner therein who was applying for OCI card was an illegal migrant at the time of his marriage cannot be reason to deny his application for OCI card, as the conditions under Section 7-A(1)(d) were fulfilled given that the marriage was registered and subsisted for more than two years.

Because Section 7-A does not specify that only heterosexual spouses will be eligible for OCI cards. The denial of OCI card to Petitioner No. 2 on the basis of the fact that she is the same-sex and gender spouse of Petitioner No. 1 is unjustified by text of the statute. It is settled law that words cannot be imported into a statute to supply any alleged *casus omissus*. The word "spouse" in Section 7-A is gender, sex and sexuality neutral. Any such limitations placed on the statute, even if to correct a purported defect can only be remedied by the legislature and not by judicial interpretation.

C. Because full operation of the gender, sex and sexuality neutral term 'spouse' in Section 7-A of the Citizenship Act necessitates inclusion of same-sex and queer marital spouses and not just heterosexual spouses. The settled canon of interpretation *Verba cum effectu sunt accipienda*, requires that every word in a provision must be given full effect. These words cannot be meaningless, otherwise they would not be used. The surplusage canon of interpretation provides that a court should lean in favour of constructions that will render every word in the provision operative.

D. Because the denial of registration by the Respondent No. 2 is effectively on the basis of substantive law in India. However, the only requirement under Section 7A of the Citizenship Act, 1955 is that the marriage must be registered and subsisting for more than two years. Section 7A does not say that the marriage must be

registered in India or as per Indian law. Further, the Respondent No. 2 does not have the authority to determine the validity of a foreign marriage, such as that of the Petitioners. When determining the validity of a foreign marriage, the laws of the *lex loci* i.e. the location of the marriage are relevant. In *Y Narasimha Rao V. Y Venkata Lakshmi* 1991 SCC (3) 451, the Hon'ble Supreme Court held that,

"20. From the aforesaid discussion the following rule can be deduced for recognising foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows: (i) where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married; (ii) where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married; (iii) where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties."

In *Noor Juhan Begum v. Eugene Tiscenko* AIR 1941 Cal. 582, the Calcutta High Court was dealing with a marriage which had been registered in Rome, after which the plaintiff-wife had moved

to India. In the context of the recognition of the foreign marriage, the court held that,

"In [c]ertain principles of law relevant to the determination of this question are, in my opinion, firmly established in the realm of private international law: (1) The forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the lex loci contracts, that is, the law of the place where the marriage ceremony is performed; (2) on marriage the wife automatically acquires the domicile of her husband; (3) the status of spouses and their rights and obligations arising under the marriage contract are governed by the lex domicile, that is by the law of the country in which for the time being they are domiciled; (4) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract, and are governed by the lex domicile."

- F. Because constitutional courts should construe a statute in a manner that the interpretation is consistent with the Constitution. In the present case, the word "spouse" in Section 7-A(1)(d) should be interpreted in a manner consistent with Articles 14 and 21 of the Constitution of India and not exclude same-sex and queer spouses. The exclusion of same-sex and queer couples from "spouse" is violative of the right to sexual autonomy, right to dignity, right to choose a marital partner and right to life under Article 21. This also violates Article 14 of the Constitution of India because it treats heterosexual and queer couples in an unequal manner.

In *Kedar Nath v. State of Bihar* 1962 AIR 955, a constitutional bench of the Supreme Court of India used this principle of statutory interpretation to read Section 124A of the Indian Penal Code to be consistent with Article 19(1)(a) and 19(2) of the Constitution of India.

*"26. In view of the conflicting decisions of the Federal Court and of the Privy Council, referred to above, we have to determine whether and how far the provisions of ss. 124A and 505 of the Indian Penal Code have to be struck down as unconstitutional. If we accept the interpretation of the Federal Court as to the gist of criminality in an alleged crime of sedition, namely, incitement to disorder or tendency or likelihood of public disorder or reasonable apprehension thereof, the section may lie within the ambit of permissible legislative restrictions on the fundamental right of freedom of speech and expression. There can be no doubt that apart from the provisions of (2) of Art. 19, ss. 124A and 505 are clearly violative of Art. 19(1)(a) of the Constitution. But then we have to see how far the saving clause, namely, cl.(2) of Art. 19 protects the sections aforesaid. Now, as already pointed out, in terms of the amended cl. (2), quoted above, the expression "in the interest of...public order" are words of great amplitude and are much more comprehensive than the expression "for the maintenance of", as observed by this Court in the case of *Virendra v. The State of Punjab* (1). Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. If, on the other hand, we were to hold*

that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Art. 19(1)(a) read with cl (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. (...)"

- F. Because in *Yossi Ben-Ari v. Director of Population Administration, Ministry of Interior*, [2006] (6) IsrLR 283, the Israeli Supreme Court adjudicating over a similar case of recognition of a foreign same sex marriage, found that the registration official should register the marriage on the basis of the validity of the marriage certificate and not the validity of the marriage in Israel. The Petitioners in that case were five same-sex couples who are Israeli citizens. Their marriage was registered in Canada in accordance with Canadian laws. After returning to Israel, they applied to change their registration at the population registry from the status of bachelor to married but their application was refused. The Israeli Supreme Court held that since the marriage certificates submitted were lawful under Canadian law, the registration official should have registered the couple as married.

"17. (...) The population registry was not intended to decide the question of the existence or absence of legal frameworks; the registration official is not competent to determine whether there is a recognized 'legal framework' or merely a 'social framework with a certain legal significance'; the register provides statistical data with regard to personal events (such as birth, death, marriage and divorce), not legal constructions that have passed the discerning scrutiny of the registration official. It is not right that the legal struggle concerning personal status should take place in the field of registration."

THE USE OF THE WORD "SPOUSE" IN SECTION 7A(1)(d) INDICATES THAT IT CAN BE A MARITAL PARTNER OF ANY SEX OR SEXUAL ORIENTATION

G. Because the word "spouse" used in Section 7A(1)(d) means a marital partner of any sex or sexual orientation. The Constitutional Court of South Africa, in *Minister of Home Affairs & Anr. vs. Fourie & Anr.* with Doctors For Life International (first amicus curiae), John Jackson Smyth (second amicus curiae) and Marriage Alliance of South Africa (third amicus curiae) CCT 60/04 adjudicated upon Section 30(1), the provision for marriages (marriage formula) of the Marriage Act in South Africa, which excluded same sex couples from its fold. The court held that the common law definition of marriage was inconsistent with the Constitution and invalid to the extent that it did not permit same-sex couples to enjoy the status and benefits coupled with responsibilities that it accorded to heterosexual couples. The court

was of the view that this defect could be remedied by reading-in of the words "or spouse" after the words "or husband" in section 30(1) of the Marriage Act. The court thus declared that the omission of the words "or spouse" after the words "or husband" in Section 30(1) of the Marriage Act were inconsistent with the Constitution and the Marriage Act was invalid to the extent of this inconsistency. The Parliament of South Africa was given 12 months to remedy this defect and it was directed that if they failed to do so, Section 30(1) of the Marriage Act would forthwith be read as including the words "or spouse" after the words "or husband" as they appeared in the marriage formula. The relevant paras from the judgment are as follows:

"[120] It is clear that just as the Marriage Act denies equal protection and subjects same-sex couples to unfair discrimination by excluding them from its ambit, so and to the same extent does the common law definition of marriage fall short of constitutional requirements. It is necessary, therefore, to make a declaration to the effect that the common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it fails to provide to same-sex couples the status and benefits coupled with responsibilities which it accords to heterosexual couples. The question then arises whether, having made such declaration, the Court itself should develop the common law so as to remedy the consequences of the common law's under-inclusive character.

...

[135] What these cases highlight is the need to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable. In the present matter I have considered ordering with immediate effect reading-in of the words "or spouse" after the words "or husband" in section 30(1) of the Marriage Act. This would remedy the invalidity while at the same time leaving Parliament free, if it chose, to amend the law so as to provide an alternative statutory mechanism to enable same-sex couples to enjoy their constitutional rights as outlined in this judgment. For reasons which follow, however, I have come to the conclusion that correction by the Court itself should be delayed for an appropriate period so as to give Parliament itself the opportunity to correct the defect.

...

THE ORDER

...

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

- a) The application by the Lesbian and Gay Equality Project and Eighteen Others for direct access is granted.
- b) The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.
- c) The omission from section 30(1) of the Marriage Act 25 of 1961 after the words "or husband" of the words "or spouse" is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.
- d) The declarations of invalidity in paragraphs (b) and (c) are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.
- e) Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula.
- f) The Minister and Director-General of Home Affairs and the Minister of Justice and Constitutional

Development are ordered to pay the applicants' costs, including the costs of two counsel in the Constitutional Court."

Thus, it is clear from the judgment rendered by the Constitutional Court of South Africa that the term "spouse" includes a marital partner of the same sex. In fact the term "spouse" was directed to be included in Section 30(1) of the Marriage Act of South Africa for the very purpose of including same-sex couples within its ambit. It is thus clear that the term "spouse" in the Citizenship Act of India includes a marital partner of the same sex and the Respondent No. 2's denial of eligibility for OCI to the Petitioner No. 1 was unlawful.

IT HAS BEEN HELD THAT EVEN THE TERM "BRIDE" IN THE HINDU MARRIAGE ACT CANNOT HAVE STATIC MEANING. MUST BE INTERPRETED AS PER EXISTING LEGAL SYSTEM AND INCLUDES TRANSWOMEN WITHIN ITS AMBIT

H. Because a marriage between a transwoman and a man has been legally recognized by a court in India and there is thus no basis for the Respondents' refusal to recognize the marriage of the Petitioners herein merely on grounds of their sexual orientation. In the case of *Arun Kumar & Sreeja vs. The Inspector General of Registration, Chennai & Ors. WP(MD)No.4125 of 2019 and WMP(MD)No.3220 of 2019*, the Hon'ble High Court of Madras, vide its order dated 22.04.2019 held that a marriage between a

man and transwoman, both professing the Hindu religion, was valid under the Hindu Marriage Act, 1955. The relevant paras of the judgment are as follows:

"8. Sex and gender are not one and the same. A person's sex is biologically determined at the time of birth. Not so in the case of gender. That is why after making an exhaustive reference to the human rights jurisprudence worldwide in this regard, the Hon'ble Supreme Court held that Article 14 of the Constitution of India which affirms that the State shall not deny to "any person" equality before the law or the equal protection of the laws within the territory of India would apply to transgenders also. Transgender persons who are neither male/female fall within the expression "person" and hence entitled to legal protection of laws in all spheres of State activity as enjoyed by any other citizen of this country. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India. (Vide Para Nos.61 and 62 of the NLSA case). Article 19(1)(a) and Article 21 were expansively intepreted so as to encompass one's gender identity also. The following observations are particularly relevant :

"72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected Under Article 19(1)(a) of the Constitution of India. A transgender's

personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community Under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

73..... Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans.

74. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

75....Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

...

10.The expression "bride" occurring in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or immutable meaning. As noted in Justice G.P.Singh's *Principles of Statutory Interpretation*, the court is free to apply the current meaning of a statute to present day conditions. A statute must be interpreted in the light of the legal system as it exists today. Article 16 of the Universal Declaration of Human Rights reads as under:

"Article 16.(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2)Marriage shall be entered into only with the free and full consent of the intending spouses.

(3)The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

In (2018) 16 SCC 368 (*Shafin Jahan vs. Asokan K.M. and Ors*), the right to marry a person of one's choice was held to be integral to Article 21 of the Constitution of India.

11. In (2017) 10 SCC 1 (*Justice K.S. Puttaswamy vs. Union of India*), the Hon'ble Supreme Court after referring to the legal position obtaining in USA, held as follows:

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

14. Both the petitioners herein profess Hindu Religion. Their right to practice Hindu Religion is recognised under Article 25 of the Constitution of India. The Hindu Marriage Act is a personal law of the Hindus. When the right of the transgender persons to marry has been upheld by the Hon'ble Supreme Court, in the very nature of things, they cannot be kept out of the purview of the Hindu Marriage Act. One can have a civil marriage. One can also have a sacramental marriage. The petitioners' marriage was solemnized in a

temple. Therefore, their fundamental right under Article 25 has also been infringed in this case.

15. Seen in the light of the march of law, the expression "bride" occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman. It would also include an intersex person/transgender person who identifies herself as a woman. The only consideration is how the person perceives herself.

24. The second petitioner appears to have been an intersex person at birth. In the affidavit filed in support of this writ petition, it has been mentioned that she was assigned as a female at birth. But, in the school records, the second petitioner has been described as a male by name Manthiramoorthy. In the Aadhar Card, her gender has been mentioned as "T" (Third Gender). A person who is in the Third Category is entitled to remain beyond the duality of male/female or opt to identify oneself as male or female. It is entirely the choice of the individual concerned.

25. Since this Court has held that the fundamental rights of the second petitioner guaranteed under Articles 14, 19(1)(a), 21 and 25 of the Constitution of India have been infringed, the orders impugned in this writ petition stand quashed and the third respondent is directed to register the marriage

solemnized between the petitioners on 31.10.2018 at Arulmighu Sankara Rameswara Temple, Tuticorin. The fourth respondent is directed to issue a G.O prohibiting the performance of sex reassignment surgery on intersex infants and children."

Thus, the Madras High Court held that non-recognition of the marriage between a transwoman to a man would be a violation of such a person's fundamental rights under Articles 14 and 21. The court held that the definition of bride under Section 5 of the Hindu Marriage Act cannot remain static and has to be interpreted in light of the current legal position. The court reiterated that discrimination on the grounds of gender or sexual orientation was in violation of the right to equality under Article 14. It is pertinent to note that the court upheld the validity of a marriage between a transwoman and a man under the Hindu Marriage Act, which is a personal law. There is thus no reason for the Respondent to deny the legal validity of the marriage of the Petitioners under the Citizenship Act, 1955, which is a secular legislation. Since the court held that the term "bride" was not restricted to a biological woman, there is no reason to believe that the term "spouse" will only include a marital partner in a heterosexual marriage. The order by the Madras High Court, read with landmark judgments such as *NALSA* and *Navtej Singh Johar* show that the courts no longer allow discrimination on the grounds of gender or sexual orientation in marriage or other areas of life. Thus, the term "spouse" under the Citizenship Act must be interpreted in light of these recent judgments. It is reiterated that the marriage of the

Petitioners is already legally registered in Australia and the literal meaning of the term "spouse" is not restricted to heterosexual marriages.

**PETITIONERS HAVE THE RIGHT TO DIGNITY, PRIVACY
AND INDIVIDUAL CHOICE UNDER ARTICLE 21**

- I. Because the right to life under Article 21 of the Indian Constitution includes the right of the Petitioners to marry the person of their choice. The Respondents cannot deprive the Petitioners of rights available to heterosexual marital partners on the basis of their choice to be with a same-sex or queer marital partner. The Hon'ble Supreme Court of India, in the case of *Shafin Jahan vs. Asokan K.M. and Ors* (2018) 16 SCC 368, held that neither the state nor the law can limit the ability of every person to decide on matters of marriage. The choice of a partner is within an intimate zone of privacy which is inviolable.

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

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

- J. Because the right to life under Article 21 of the Indian Constitution includes the right of the Petitioners to lead a dignified life with the partner of their choice. Despite being marital partners, having two children together and having been in love for more than 20 years, the Petitioners are unable to exercise their rights as a marital couple and live a dignified family life. The Petitioners are not recognised as the parents of their children. The Petitioners' children are not recognised as siblings of each other. In *Navtej*

Singh Johar v. Union of India (2018) 10 SCC 1, the Hon'ble Supreme Court said that the right to dignity and right of choosing one's partner fall within the ambit of Article 21 of the Constitution. The relevant paras of the judgment are as follows:

"640.2.2. Although dignity is an amorphous concept which is incapable of being defined, it is a core intrinsic value of every human being. Dignity is considered essential for a meaningful existence. The social ostracism against LGBT persons prevents them from partaking in all activities as full citizens, and in turn impedes them from realising their fullest potential as human beings.

(...)

640.2.4. Sexual orientation is innate to a human being. It is an important attribute of one's personality and identity. Homosexuality and bisexuality are natural variants of human sexuality, LGBT persons have little or no choice over their sexual orientation. LGBT persons, like other heterosexual persons, are entitled to their privacy, and the right to lead a dignified existence, without fear of persecution. They are entitled to complete autonomy over the most intimate decisions relating to their personal life, including the choice of their partners. Such choices must be protected under Article 21. The right to life and liberty would encompass the right to sexual autonomy, and freedom of expression."

K. Because non-recognition of the marriage of the Petitioners within Indian law effectively deprives them of autonomy and the right to make decisions for their lives. These rights of the Petitioners are also being curtailed by the denial of OCI status to the Petitioner No. 1 by Respondent No. 2. These rights fall within the ambit of Article 21 of the Constitution. In *Justice K.S. Puttaswamy vs. Union of India (2017) 10 SCC 1*, the Hon'ble Supreme Court observed that dignity is the core which unites the Fundamental Rights because the Fundamental Rights seek to achieve for each individual the dignity of existence. Life is worth living because of freedoms like love, partnership, marriage and family that allow individuals to live their lives. Further, it is the duty of the state to safeguard this ability to take these decisions. Respondent No. 2 cannot deny recognition of the Petitioners' marriage just because they chose to take the individual decision to marry someone of the same-sex.

"106. Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest

sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

107. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

(...)

271. Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilization. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which

concern every individual irrespective of social strata or economic well being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals."

- L. Because the Petitioners have the autonomy and privacy to their own identity and choice in private matters. This identity is part of their dignity, and the state should not deprive them of their rights because of their choice of sexual identity and marital partner. The Petitioners marriage and family is part of their identity, and non-recognition of their marriage for the reason of choice of sexual identity is against their constitutional right to privacy and autonomy. This interference is against the constitutional scheme, and against the very humanity of a person. In *Navej Singh Johar v. Union of India* (2018) 10 SCC 1, the judgment recognised these rights under Article 21 holding as under.

"161. Within the compartment of privacy, individual autonomy has a significant space. Autonomy is individualistic. It is expressive of self-determination and such self-determination includes sexual orientation and declaration of sexual identity. Such an orientation or choice that reflects an individual's autonomy is innate to him/her. It is an inalienable part of his/her identity. The said identity under the constitutional scheme does not accept any interference as long as its expression is not against decency or morality. And the morality that is conceived of under the Constitution is constitutional morality. Under the autonomy principle, the individual has sovereignty over his/her body. He/she

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

M. Because J. Chandrachud of the Supreme Court, speaking for the majority in *K.S. Puttaswamy Vs. Union of India* held that elements such as family, marriage, procreation and sexual orientation are integral to the dignity of an individual. It was further held that the "inviolable right to determine how freedom should be exercised" was an essential facet of the right to privacy. Thus, the right to marry a person of the same sex falls within the right to privacy under Article 21 of the Constitution. The relevant para of the judgment is as follows:

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

determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence. The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us

that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha suffixed right of privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

N. Because, if two consenting adults seek to marry the state cannot interfere on the basis of their choice of sexual identity. In *Shakti Vahini v. Union of India* (2018) 7 SCC 192 and in *Shafin Jahan, v. Union of India* (2018) 16 SCC 368 the Hon'ble Supreme Court held that the right to choose a marital partner is an "intimate personal choice" which is in a the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. A division bench of the Allahabad High Court in *Salamat Ansari v. State of UP* CrI. Mis. Writ Petition No- 11367 of 2020 held that the state cannot have an objection to a personal relationship where two majors decide to be together.

5. *We do not see Priyanka Kharwar and Salamat as Hindu and Muslim, rather as two grown up individuals who out of their own free will and choice are living together peacefully and happily over a year. The Courts and the Constitutional Courts in particular are enjoined to uphold the life and liberty of an*

individual guaranteed under Article 21 of the Constitution of India. Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and personal liberty. Interference in a personal relationship, would constitute a serious encroachment into the right to freedom of choice of the two individuals. We fail to understand that if the law permits two persons even of the same sex to live together peacefully then neither any individual nor a family nor even State can have objection to relationship of two major individuals who out of their own free will are living together. Decision of an individual who is of the age of majority, to live with an individual of his/her choice is strictly a right of an individual and when this right is infringed it would constitute breach of his/her fundamental right to life and personal liberty as it includes right to freedom of choice, to choose a partner and right to live with dignity as enshrined in Article 21 of the Constitution of India."

- O. Because the Petitioners should be allowed to be recognised as marital partners to be able to live their life with the same dignity and liberties that heterosexual marital partners do in the country. Without this the Petitioners are stereotyped, treated as different or lesser, and their liberties are restricted. Petitioner No. 1 is denied the OCI card, the children of the Petitioners are not recognised as theirs, and several other barriers that their family faces in their everyday life because the state does not recognise their marriage. In *Jeeja Ghosh & Anr v Union of India* 2016 7 SCC 761, Hon'ble Justice AK Sikri of the Hon'ble Supreme Court of India spoke of the normative and constitutional role of human dignity.

"37...Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Even right to equality is interpreted based on the value of human dignity. Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. It is the purposive interpretation which has been adopted by this Court to give a content of the right to human dignity as the fulfillment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak (former Chief Justice of the Supreme Court of Israel) in the following manner: "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute

limiting a constitutional right." All the three goals of human dignity as a constitutional value are expanded by the author in a scholarly manner."

The Hon'ble Supreme Court of India in *Indian Young Lawyers Assn. v. State of Kerala* 2018 SCC OnLine SC 1690 observed the importance of human dignity requiring liberty from the dehumanising effect of stereotypes and being entitled to equality before the law.

"56. Human dignity postulates an equality between persons. The equality of all human beings entails being free from the restrictive and dehumanizing effect of stereotypes and being equally entitled to the protection of law. Our Constitution has willed that dignity, liberty and equality serve as a guiding light for individuals, the state and this Court. Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future – of a just, equal and dignified society. Intrinsic to these values is the anti-exclusion principle. Exclusion is destructive of dignity. To exclude a woman from the right of worship is fundamentally at odds with constitutional values."

P. Because in *United States v. Windsor*, 2013 SCC OnLine US SC 86 : 570 US ____ (2013), the United States Supreme Court held that §3 of the Defence of Marriage Act (DOMA) which amends the Dictionary Act in Title 1, §7, of the United States Code to exclude same-sex couples from the federal definition of "marriage" and "spouse" is unconstitutional. In this case, the Appellant could not qualify the marital exemption from the federal estate tax because the DOMA did not recognise her same-sex spouse. The Appellant argued that the DOMA violates the Fifth Amendment which guarantees equal protection of the law. The court held that the disabilities imposed by the government harmed the very same-sex community that the state is bound to protect. Same-sex couples are put in an unstable position of a second-tier marriage, which deprives them of dignity and status, and humiliates children that are being raised by same-sex couples. It also brings them overt harm, as same-sex couples and their families are deprived of health, education and financial benefits. The court concluded that the DOMA by treating same-sex marriages as less worthy, demeans couples in same-sex relationships and marriages and deprives them of the right to dignity and integrity under the Fifth Amendment.

J. Kennedy speaking for the majority (in p. 22-25) held that,

"DOMA's principal effect is to identify a subset of states sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights,

*enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of states sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. "*

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. (...) The federal

penal code makes it a crime to "assaul[t], kidna[p], or murde[r] . . . a member of the immediate family" of "a United States official, a United States judge, [or] a Federal law enforcement officer," 18 U. S. C. §115(a)(1)(A), with the intent to influence or retaliate against that official, §115(a)(1). Although a "spouse" qualifies as a member of the officer's "immediate family," §115(c)(2), DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. (...)

(...)

What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. (...) It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the

marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages."

**JURISPRUDENCE HAVING RECOGNIZED LEGITIMACY
OF SAME-SEX RELATIONSHIPS AND LIVE IN
RELATIONSHIPS HAS PROGRESSED TOWARDS
RECOGNITION OF THE RIGHT TO MARRIAGE**

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

- (i) Hon'ble Delhi High Court order dated 1.10.2018 in *Sadhana Sinsinwar & Anr. v. State & Ors* W.P. (Crl) 3005/2018.
- (ii) Hon'ble High Court of Punjab and Haryana order dated 22.07.2020 in *Paramjit Kaur & Anr. v. State of Punjab* C.R.W.P. No. 5024 of 2020.

- (iii) (Hon'ble High Court of Gujarat, Ahmedabad order dated 23.07.2020 in Vanitaben Damjibhai Solanki v. State of Gujarat in Special Criminal Application No. 3011 of 2020.
- (iv) Hon'ble Delhi High Court order dated 12.04.2019 in Bhawna & Ors v State W.P.(Crl) 1075/2019. 77 CC.
- (v) Hon'ble Orissa High Court order dated 24.8.2020 in Chinmayee Jena (@ Sonu Krishna Jena v State of Odisha & other. W.P.(Crl) 57/2020.

**PETITIONERS HAVE THE RIGHT TO BE TREATED
EQUAL TO HETEROSEXUAL PERSONS UNDER
ARTICLE 14**

- R. Because the Petitioners have the right to equality and cannot be discriminated against in applying for an OCI card for a spouse under Section 7-A(1)(d). The Petitioner No. 1 who has a valid marriage with the Petitioner No.2, has been living in India for more than 10 years now, has 2 children with the Petitioner No. 1 is not being issued an OCI card by the Respondent No. 2 only because she is in a same-sex or queer marriage with the Petitioner No. 1. This unequal and discriminatory treatment violates the right to equality of the Petitioners under Article 14.
- S. Because the children of the Petitioners are entitled to avail of the benefits of the recognition of the marriage of their parents. Denial of a OCI card to the Petitioner No. 1 on discriminatory and

arbitrary grounds is a violation of their right to be treated equally with the children of persons who have entered into heterosexual marriage.

T. Because there is no reasonable classification that can form the basis of such unequal treatment of the Petitioners. The difference between the Petitioners and any heterosexual couple is that the Petitioners are in a same-sex relationship i.e. both partners are of the same-sex and gender while in a heterosexual couple, both partners are of different-sexes and genders. The Petitioners have been in a personal relationship for more than 20 years and in a marital relationship for 3 years. They live together, pursue professional and personal goals, raise children, take care of family and contribute and be part of society just like any heterosexual couple. This classification, being on the basis of sex, gender and sexuality does not have any intelligible differentia with any rational object sought to be achieved.

U. Because heterosexuality cannot be a compulsory ground for marriage merely because the ability to procreate allegedly a *sine qua non* of marriage. In any case, same-sex and queer couples can have, and do have children. The current Petitioners have two children whose rights they also seek to secure by seeking OCI card for Petitioner No. 1. It should be in the state interest to ensure that they have all rights and legal entitlements.

V. Because a classification based on of sex, gender and sexuality does not contribute or deter from the state interest in regulation of marriage. The regulation of rights, entitlements and duties of

marital partners can apply to both heterosexual and queer marital partners. The sexual identity of the partners has no bearing and most importantly, should have no bearing on such regulation. In *Joseph Shine v. Union of India* (2019) 3 SCC 39, a Constitution Bench of the Hon'ble Supreme Court held that while the state has a legitimate interest in regulating marriage, the state is governed by norms of the Indian Constitution such as dignity, equality and liberty. Such regulation cannot be violative of autonomy of sexual identity that is intrinsic to constitutional rights under Article 21 and 14.

"61. The state undoubtedly has a legitimate interest in regulating many aspects of marriage. That is the foundation on which the state does regulate rights, entitlements and duties, primarily bearing on its civil nature. Breach by one of the spouses of a legal norm may constitute a ground for dissolution or annulment. When the state enacts and enforces such legislation, it does so on the postulate that marriage as a social institution has a significant bearing on the social fabric. But in doing so, the state is equally governed by the norms of a liberal Constitution which emphasise dignity, equality and liberty as its cardinal values. The legitimate aims of the state may, it must be recognized, extend to imposing penal sanctions for certain acts within the framework of marriage. Physical and emotional abuse and domestic violence are illustrations of the need for legislative intervention. The Indian state has legitimately intervened in other situations such as by enacting anti dowry legislation or by creating offences dealing with the harassment of women for dowry within a

marital relationship. The reason why this constitutes a legitimate recourse to the sovereign authority of the state to criminalize conduct is because the acts which the state proscribes are deleterious to human dignity. In criminalizing certain types of wrongdoing against women, the state intervenes to protect the fundamental rights of every woman to live with dignity. Consequently, it is important to underscore that this judgment does not question the authority and even the duty of the state to protect the fundamental rights of women from being trampled upon in unequal societal structures. Adultery as an offence does not fit that paradigm. In criminalizing certain acts, Section 497 has proceeded on a hypothesis which is deeply offensive to the dignity of women. It is grounded in paternalism, solicitous of patriarchal values and subjugates the woman to a position where the law disregards her sexuality. The sexuality of a woman is part of her inviolable core. Neither the state nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalizing adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21"

W. Because the alleged absence of legal frameworks for regulation of same-sex and queer marriages or incompatibility of same-sex and queer marriages with any existing laws cannot be used to deny constitutional rights to the Petitioners. In *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, the Union of India had argued that the recognition of sexual rights of queer persons will have ancillary effects on other laws. The Hon'ble Supreme Court of India found that the question of consequences on other laws were not relevant to the adjudication of the constitutionality of Section 377 of the Indian Penal Code.

"37. The respondent has also contended that in the event Section 377 IPC so far as 'consensual acts of adults in private' is declared unconstitutional, other ancillary issues or rights which have not been referred to this Bench for adjudication may not be dealt with by this Bench as in that case, the Union of India expresses the wish to file detailed affidavit in reply, for consideration of other issues and rights would have far reaching and wide ramifications under various other laws and will also have consequences which are neither contemplated in the reference nor required to be answered by this Hon'ble Bench."

X. Because such classification, in view of both legal and social acceptance of queer couples in present times, is unreasonable. Even if such classification was acceptable previously, it cannot be acceptable now. In *Anuj Garg and others v. Hotel Association of India and others* (2008) 3 SCC 1, the Hon'ble Supreme Court

held that classification which may have been treated as valid at the time of its adoption may cease to be so on account of changing social norms. The judgments of the Hon'ble Supreme Court of India in *Navtej Singh Johar v. Union of India* in 2018 and *NALSA v. Union of India*, in 2014 affirmed the rights of LGBTQIA+ citizens in India. Recently in *Arun Kumar & Sreeja v. The Inspector General of Registration WP (MD) No.4125 of 2019 and WMP (MD) No. 3220 of 2019*, the Madhuri Bench vide order dated 22.04.2019, held that a marriage between a man and a transwoman, both professing the Hindu religion was valid under the Hindu Marriage Act, 1955. Given that the courts of law in the country have consistently held in favour of realisation of all rights of LGBTQIA+ persons in India, laws not recognising marriages between LGBTQIA+ persons cannot have valid classification.

- Y. Because the differentia does not have a rational relation to the object sought to be achieved by the statute. The relevant part of the Statement of Object and Reasons of the Citizenship (Amendment) Act, 2015, is as follows:

"(...)

2. The Citizenship Act has been amended, from time to time, *inter alia*, making enabling provisions for registration of Overseas Citizen of India Cardholder, conferment of certain rights on such citizens, renunciation of overseas citizenship and cancellation of registration as Overseas Citizen of India Cardholder."

The Act seeks to enable the registration of OCI, under which spouses of existing OCI card holders are given OCI cards. A valid marriage, subsisting for two years, is the pre-condition for such registration under Section 7-A(1)(d) of the Citizenship Act. This provision allows the possibility of common domicile for a married couple. Whether the marriage is heterosexual, or queer has no bearing on the validity of the marriage and the issuance of the OCI card. Therefore, the differentia does not have a rational relation to the object sought to be achieved by the statute and the restriction is violative of Article 14.

- Z. Because the unequal treatment of heterosexual and non-heterosexual couples is arbitrary. In *Maneka Gandhi v. Union of India* (1978) 1 SCC 248 the Hon'ble Supreme Court held that equality under Article 14 is antithetic to arbitrariness. If an act is arbitrary, it is unequal both according to constitutional law and political logic and will violate Article 14. As the law recognises that queer people can love, have sexual relations, and possess the same constitutional rights any other persons, legal restrictions on the recognition of queer and same-sex marriage are prima facie arbitrary. In *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, the then CJI Dipak Mishra recognised the need to treat individuals belonging to the LGBT community equally with the same human, fundamental and constitutional rights that other persons have.

"255. The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since

these rights in here in individuals as natural and human rights. We must remember that equality is the edifice on which the entire non-discrimination jurisprudence rests. Respect for individual choice is the very essence of liberty under law and, thus, criminalizing carnal intercourse under Section 377 IPC is irrational, indefensible and manifestly arbitrary."

AA. Because constitutional morality and not social morality governs the enforcement of fundamental rights. Constitutional morality should be applied by courts as the custodian of fundamental rights to give effect to rights of minorities. In *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1, the Hon'ble Supreme Court held that the Court must "not indulge in taking upon itself the guardianship of changing societal mores" observing,

"81. Another argument raised on behalf of the intervenors is that change in society, if any, can be reflected by amending laws by the elected representatives of the people. Thus, it would be open to the Parliament to carve out an exception from Section 377, but this Court should not indulge in taking upon itself the guardianship of changing societal mores. Such an argument must be emphatically rejected. The very purpose of the fundamental rights chapter in the Constitution of India is to withdraw the subject of liberty and dignity of the individual and place such subject beyond the reach of majoritarian governments so that constitutional morality can be applied by this Court to give effect to the rights, among others, of 'discrete and insular' minorities. One such minority has knocked on the doors of this Court as this Court is the custodian of the

fundamental rights of citizens. These fundamental rights do not depend upon the outcome of elections. And, it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality. The fundamental rights chapter is like the north star in the universe of constitutionalism in India. Constitutional morality always trumps any imposition of a particular view of social morality by shifting and different majoritarian regimes."

5. It is for the aforementioned reasons that the non-recognition of same sex or non-heterosexual or queer persons marriages in India is manifestly unjust and a violation of the fundamental rights of the Petitioners under Articles 14 and 21 which are available to all persons including foreigners.
6. That the Petitioners seek leave of this Hon'ble Court to raise additional grounds during the course of the proceedings.
7. The Petitioners have not filed any other petition praying for a similar relief before this court or any other court apart from the present petition/lis.
8. The Petitioners submit that they have no alternative, efficacious remedy under the law except to approach this Hon'ble Court by way of the present Writ Petition under Article 226 of the Constitution of India.

9. The balance of convenience and/or inconvenience entirely lies in favour of passing of orders as prayed for herein.
10. This Petition is made *bona fide* and in the interest of justice and unless orders as prayed for herein are passed, the Petitioner will suffer irreparable loss, prejudice and injury.

PRAYER

In the light of the facts and circumstances mentioned hereinabove, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to:

- a) Declare that the phrase "spouse" in Section 7A(1)(d) of the Citizenship Act, 1955 is gender neutral and does not discriminate between heterosexual or queer marriage in the matter of granting spouses of foreign origin an Overseas Citizens of India card.
- b) Hold that the provisions of Section 7A(1)(d) of the Citizenship Act 1955 are applicable without discrimination to all spouses of foreign origin, regardless of sex or sexual orientation, as long the spouses meet the eligibility criteria of a registered marriage subsisting for two years.
- c) Direct Respondent no. 2 to process the application dated 7.09.2021 of Petitioner No. 1 under Section 7A(1)(d) of the Citizenship Act by recognising her as the legal spouse of Petitioner No. 2; and to

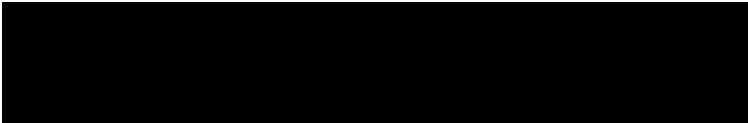
certify/apostille the registered marriage certificate of the Petitioner
Nos. 1 and 2 on this basis.

- d) Pass such other further orders as this Hon'ble Court may deem just
and proper in the facts and circumstances of the case.

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

PETITIONERS

Through


(RAHUL NARAYAN SHASHWAT GOEL
& MUSKAN TIBREWALA)
Advocates for the Petitioners

Date: 22.11.2021

Place: New Delhi