

**SYNOPSIS**

The Petitioners are a male same sex couple. They are both Indian citizens. The Petitioners met in 2009 approximately on a dating application. After dating for a few weeks they started living together in a rented flat in June of 2009. Even then, they would visit Petitioner No. 1's parents every week and stay at their house for a few days. Since then, they have been living together except for three years during which the Petitioner No. 2 had to move to Bengaluru for his employment. Meanwhile, the Petitioner No. 1 stayed in Mumbai for his job and to look after his parents. However, even during those times, the Petitioners would fly every other month to spend a few days with each other.

Since they started dating, the Petitioners have been inextricably intertwined in each other's lives, families, friend groups and are even in each other's family's *WhatsApp* Groups and other social media. Throughout the course of their relationship, the Petitioners have been vocal advocates for queer rights individually and as a couple. Also, they have had the unequivocal support of their families who have also been vocal about their acceptance of their sons' relationship.

In September 2009, the Petitioners moved from the first flat where they were living together to another flat to make it more convenient for them to look after Petitioner No. 1's parents.

In 2015, the Petitioner No. 1 brought a new house in a different locality where his parents moved in with them and the cats. In August 2021, the Petitioners bought a second house, which is not too far from their current house so that the parents of the Petitioner No. 2 could move in with them. The parents of Petitioner No. 2 moved in with them in January 2022.

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In 2019, the Petitioners travelled to New York and on 2<sup>nd</sup> July 2019 they got legally married in a civil ceremony. In a symbolism of the acceptance of the relationship, the ceremony which was conducted by the city of New York was witnessed in person, by not just Petitioner No. 1's first cousin, who was the official witness, and the cousin's family, but also two of Petitioner No. 2's first cousins and one of the first cousin's spouse who flew down from Canada and San Francisco especially for the ceremony.

For the purposes of the US visa, the Petitioner No. 2 was recognised as the domestic partner of the first petitioner. This was not the first time that they had been recognised as domestic partners for the purposes of a visa. Earlier, on a 2013 trip to New Zealand, Petitioner No. 2 was recognised as a domestic partner of Petitioner No. 1 for the visa.

The Petitioners are in a happy relationship and have nurtured a deep bond of mutual love, respect and companionship for each other. However, the non-recognition of their legal marriage comes at great personal turmoil of having to explain to people that they are domestic partners, just like a man and a woman would be.

The Petitioners were also put through humiliating questions about their relationship while they were trying to open a joint savings account and while taking a joint loan to buy the house where Petitioner No. 2's parents moved in.

Several banks and financial institutions refused to even consider their home loan application jointly because they are unrelated by blood or in a marriage recognized by law in India. Because of this, the Petitioners had no recourse but to avail the home loan from a bank that charged them a higher home loan rate than the other banks.

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Banks are not the only place where the Petitioners have been subjected to questions about veracity of their relationship, and subjected to demeaning questions. The Petitioners have faced delays while trying to get a new life insurance policy on Petitioner No. 1's life with Petitioner No.2 as the nominee. The policy proposals were ultimately rejected/asked to be postponed, without stating that their relationship as the cause. But the Petitioners strongly suspect that it was the cause.

The Petitioners are filing this petition because every day, they have to live with the uncertainty whether they will be treated as each other's spouses by authorities and be allowed to make medical, legal or financial decisions.

The Petitioners believe and urge that there are a series of decisions of this court including but not limited to *NALSA v. Union of India*, *Navtej Singh Johar v. Union of India*, *Shakti Vahini v. Union of India* etc. whereby a non-recognition of same sex marriages is a violation of the petitioners' rights under Articles, 14, 15, 19 and 21.

It is further submitted that the Sections 6, 7, 8, 9 of the Special Marriage Act, 1954 are constitutionally invalid because not only do they force couples to come out to the world, and put them in danger of potential violence by not just unaccepting families but also from homophobic persons. This is also violative of the right to privacy which was recognised by this court to be a fundamental right by a bench of 9 Judges in *Puttaswamy(1)*.

Further, it is submitted that the Special Marriage Act ought to be read liberally to apply to marriages because the section talks about marriage between 'any two persons'. Discriminating between members of the

LGBTQIA+ community and their cisgender, heterosexual counterparts is an affront to fundamental rights enshrined in the Constitution.

The Petitioners urge this court to reiterate that the right to marry a person is a fundamental right, and to declare that this right should extend to members of the LGBTQIA+ community.

### **LIST OF DATES AND EVENTS**

1950	Constitution of India comes into effect.
1954	The Special Marriage Act, 1954 is enacted.
1955	The Hindu Marriage Act, 1955 is enacted.
April 2009	The Petitioners met through a dating app and started dating.
June 2009	Petitioner No. 1 moved in with Petitioner No. 2 in his rented flat. They would visit the parents of Petitioner No. 1 regularly.
September 2009	The Petitioners moved from the Petitioner No. 2's rented flat to another one which was closer to the house of parents of the petitioner No. 1.
2015	The Petitioner No. 1 bought a house in a different locality and his parents moved in with him, Petitioner No. 2 and their cats.
December 2016-February 2020	The Petitioner No. 2 had to move to Bengaluru for his employment. During this time, the Petitioner No. 1 stayed back to look after his parents. They visited each other regularly.

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August 2021	The Petitioners bought a house jointly and the parents of the Petitioner No. 2 moved in with them in January 2022.
02.07.2019	The Petitioners got married in a civil ceremony in the city of New York, United States of America.
19.12.2022	Hence, the present petition

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

WRIT PETITION CIVIL No. \_\_\_\_\_ OF 2022

**(UNDER ARTICLE 32 OF CONSTITUTION OF INDIA)**

**IN THE MATTER OF:**

**1. NITIN KARANI,**

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**2. THOMAS JOSEPH,**

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*-Versus-*

**1. UNION OF INDIA,**

Through the Secretary,  
Ministry of Law and Justice,  
North Block, New Delhi, 110001.

... Respondent No.1

**2. STATE OF MAHARASHTRA,**

Through the Additional Chief Secretary,  
Department of Law and Justice,  
Mantralaya, Mumbai, 400020.

... Respondent No. 2

**WRIT PETITION UNDER ARTICLE 32 OF  
CONSTITUTION OF INDIA**

**TO**

**THE HON'BLE CHIEF JUSTICE OF INDIA  
AND HIS COMPANION JUDGES OF THE SUPREME COURT  
OF INDIA**

**THE HUMBLE PETITION OF THE  
PETITIONER ABOVE NAMED**

**MOST RESPECTFULLY SHOWETH:**

1. The present Petition has been filed seeking a declaration from this Hon'ble Court to the effect that the members of the LGBTQIA+ community have the same right to marriage as their cisgender and heterosexual counterparts have under the Special Marriage Act, 1954 and to declare sections 5, 6, 7, 8, 9, 10 and 14 of the Special Marriage Act, 1954 as constitutionally invalid, being violative of article 14, 15 and 21 of the Constitution of India.

**PARTICULARS OF THE PETITIONERS**

2. The Petitioner No. 1 is Nitin Karani, who is [REDACTED] years old. He is currently employed in the financial services industry since more than 18 years. He was formerly a journalist with various publications such as [REDACTED]. He is a vocal advocate for the LGBTQIA+ community and their rights, and has served as a trustee in two organisations who work for advancing queer rights. He is a Hindu by birth.

3. The Petitioner No. 2 is Thomas Joseph. He is ■■■ years old and is employed with an insurance provider since March 2022. Previously, he worked with educational institutions, non-governmental organisations and corporations. Though born as a Christian, he is an atheist.
4. Both the Petitioners are in a loving relationship since 2009 and currently reside in Mumbai. Both of them are citizens of India. A copy of the Identity Cards of the Petitioners is annexed herewith and marked as **ANNEXURE P-1 (Page No. 43-47)**

#### **FACTS OF THE PRESENT CASE**

5. The Petitioners met in 2009 on a dating application. After dating for a few weeks they started living together in a rented flat in June of 2009. Even then, they would visit Petitioner No. 1's parents every week and stay at their house for a few days. Since then, they have been living together except for three years during which the Petitioner No. 2 had to move to Bengaluru for his employment. The Petitioners visited each other regularly.
6. Since they started dating, the Petitioners have been inextricably intertwined in each other's lives, families, friend groups and are even in each other's family WhatsApp Groups. Throughout the course of their relationship, the Petitioners have been vocal advocates for queer rights individually and as a couple. Also, they have had the unequivocal support of their families who have also been vocal about their acceptance of their sons' relationship. Multiple news reports covering the story of the petitioners, and their relationships have found their place in magazines and newspapers. A copy of the Article titled Meet the Modern Indian Family dated 06.09.2018 is annexed herewith and



marked as **ANNEXURE P-2 (Page No. 48-54)**. A copy of the Article titled Gay Couple Got Married On July 2, Calls It a Happy Coincidence dated 13.07.2019 is annexed herewith and marked as **ANNEXURE P- 3 (Page No 55-56)**. A copy of the Article titled How Gay Indians Are Flying To New York and London to Get Married dated 12.10.2022 is annexed herewith and marked as **ANNEXURE 7.P-4 (Page No. 57-65)**.

In September 2009, the Petitioners moved from the first flat where they were living together to another flat to make it more convenient for them to look after Petitioner No. 1's parents.

8. In 2013-14 the Petitioners adopted two rescued kittens and rescued a third one too.
9. In August 2021, the Petitioners brought a second house, which is not too far from their current home so that the parents of Petitioner No. 2 could move in with them. The parents of the Petitioner No. 2 moved in with them in January 2022.
10. In 2019, the Petitioners travelled to New York and on 2<sup>nd</sup> July 2019 got married in a civil ceremony in New York. In a symbolism of the acceptance of the relationship, the ceremony which was conducted by the city of New York was witnessed in person by not just the Petitioner No. 1's first cousin, who was the official witness, and the cousin's family but also two of Petitioner No. 2's first cousins and one of the first cousin's spouse who flew down from Canada and San Francisco especially for the ceremony. A copy of the marriage licence of the present Petitioners is annexed herewith and marked as **ANNEXURE P-5 (Page No. 66-69)**.
11. For the purposes of the US visa, the Petitioner No. 2 was recognised as the domestic partner of the first Petitioner. This was not the first

time that they had been recognised as domestic partners for the purposes of a visa. Earlier, on a 2013 trip to New Zealand, Petitioner No. 2 was recognised as a domestic partner of Petitioner No. 1 for the visa.

12. It is submitted that various international instruments recognise the importance of marriage as a fundamental unit of the society and

**UDHR: UNIVERSAL DECLARATION OF HUMAN RIGHTS**

ARTICLE 2	<p>Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</p> <p>Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.</p>
ARTICLE 3	<p>Everyone has the right to life, liberty and security of person.</p>
ARTICLE 7	<p>All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.</p>
ARTICLE 12	<p>No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks</p>

	upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
ARTICLE 16	<p>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.</p> <p>Marriage shall be entered into only with the free and full consent of the intending spouses.</p> <p>The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.</p>
ARTICLE 19	Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**ICESSR: INTERNATIONAL COVENANT FOR ECONOMIC SOCIAL AND CULTURAL RIGHTS**

ARTICLE 2 (2)	The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
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**ICCPR: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

ARTICLE 2 (1)	Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
ARTICLE 17 (1)	No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation
ARTICLE 17 (2)	Everyone has the right to the protection of the law against such interference or attacks
ARTICLE 23 (1)	The family is the natural and fundamental group unit of society and is entitled to protection by society and the State
ARTICLE 23 (2)	The right of men and women of marriageable age to marry and to found a family shall be recognized.
ARTICLE 26	All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion,

	national or social origin, property, birth or other status
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**CONVENTION ON THE RIGHTS OF THE CHILD:**

Article 2 (1)	States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status
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***Foreign Marriage Act***

13. It is submitted that despite there being no statutory bar against same sex marriage under the Special Marriage Act, 1954, the valid marriage of the Petitioners, as has been performed, is not being registered in the State of Maharashtra or under the Foreign Marriages act.
14. This non-registration of the Petitioners has a cascading effect on the rights of not just the Petitioners, but also of the members of the LGBTQIA+ communities which are ordinarily available to the spouses of their cisgendered, heterosexual counterparts such as the right to make medical decisions on behalf of their spouses, right to open joint bank accounts, the right to have children, through adoption, surrogacy or other artificial reproductive techniques, rights to succession of properties intestate, the right to be considered as a 'near relative' for the purpose of organ donation, etc..

### **The Foreign Marriages Act, 1969**

15. The Foreign Marriages Act, 1969 (hereinafter referred to as FMA) was enacted to regulate marriages of citizens of India outside India.
16. Section 4 of the Act categorically states that a marriage between “parties” may be solemnized under this Act, provided that at least one of the two parties is a citizen of India. A bare perusal of the act does not, in any way, legally bar the registration of marriage of a couple belonging to the LGBTQIA+ community validly married in a foreign jurisdiction.
17. Section 11 of the Act, which requires the foreign marriage to not be in contravention with local laws (laws of the country where the marriage is solemnized) reads as follows:

*17. Registration of foreign marriages.—*

*(1) Where—*

*(a) a Marriage Officer is satisfied that a marriage has been duly solemnized in a foreign country in accordance with the law of that country between parties of whom one at least was a citizen of India; and*

*(b) a party to the marriage informs the Marriage Officer in writing that he or she desires the marriage to be registered under the section, the Marriage Officer may, upon payment of the prescribed fee, register the marriage.*

*(2) No marriage shall be registered under this section unless at the time of registration it satisfies the conditions mentioned in section 4.*

*(3) The Marriage Officer may, for reasons to be recorded in writing, refuse to register a marriage under this section on the ground that in his opinion the marriage is inconsistent with international law or the comity of nations.*

*(4) Where a Marriage Officer refuses to register a marriage under this section the party applying for registration may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal;*

*and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.*

*(5) Registration of a marriage under this section shall be effected by the Marriage Officer by entering a certificate of the marriage in the prescribed form and in the prescribed manner in the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and by three witnesses.*

*(6) A marriage registered under this section shall, as from the date of registration, be deemed to have been solemnized under this Act.*

18. It is submitted that this section allows for registration of marriage when it has been duly solemnised in a foreign country in accordance with the law of that country, between two parties one of whom was a citizen of India, and that an application has to be made in writing to the Marriage Officer to be registered under S. 17(1) (a) and (b).
19. It is submitted that in *Obergefell v. Hodges*, the Supreme Court of the United States declared same-sex marriage legal in all 50 states. Therefore, the marriage of the Petitioners solemnized in the US is legal in the US.
20. It is submitted that the marriage of the petitioners which was solemnised in New York can be registered under the Special Marriage Act.

### ***Global Recognition of Same Sex Marriages***

21. Same sex marriage is legally performed and recognized (nationwide or in some parts) in 33 countries around the world.
22. The Petitioners are interested in getting their marriage recognized in India. The marriage solemnized in the US can be registered under the Foreign Marriages Act.

23. In the alternative to the aforesaid course, as the Petitioners belong to different religions, they can also get married under the Special Marriages Act (SMA). Given the procedure set out in the SMA about a public notice and objections, the Petitioners are not only apprehensive of reprisals from zealous persons in both the religious communities to which the Petitioners belong, but also, in following the procedure under the SMA, they have been advised by their lawyers that there is no point in attempting to register their marriage in India as the Respondents will simply refuse to register any marriage between non-heterosexual same sex couples.
  
24. In 1991, Nicholas Toonen, a homosexual man from Tasmania, sent a communication to the Human Rights Committee. At that time homosexual sex was criminalized in Tasmania. Toonen argued that this violated his right to privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR). He also argued that because the law discriminated against homosexuals on the basis of their sexuality, it violated Article 26 of the ICCPR. As a result of his complaint to the Human Rights Committee, Toonen lost his job as General Manager of the Tasmanian AIDS Council (Inc), because the Tasmanian Government threatened to withdraw the Council's funding unless Toonen was fired. The Human Rights Committee did not consider Toonen's communication until 1994, but it ultimately agreed that because of Tasmania's law, Australia was in breach of the obligations under the ICCPR. In response to the Commission's view, the Commonwealth Government passed a law overriding Tasmania's criminalization of homosexual sex.



25. Hence, the petitioners are filing the present writ petition before this Hon'ble Court for recognition of their marriage solemnised on 2<sup>nd</sup> July 2019 in New York in the inter alia on the following grounds:-

***The Right to Marry a Person of One's Choice is a Fundamental Right***

- I. Because even though the right to marry is not recognised as a fundamental right under the Indian Constitution, or any other statute in India, this Hon'ble Court has recognised it as a fundamental right through a variety of decisions. ***In Lata Singh v. State of U.P., (2006) 5 SCC 475*** the Supreme Court, while recognising the right of the petitioner to marry a person of her choice recognised that she was free to marry anyone of her choice. (See paragraph 14).
  
- II. Because ***In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014, Suo Motu Writ Petition (Criminal) No. 24 of 2014,*** this Hon'ble Court, in no unequivocal terms, held that,

*“The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the State's incapacity or inability to protect the Fundamental Rights of its citizens.”*  
(Paragraph 14).

- III. In ***Shafin Jahan v. Asokan K.M., (2018) 16 SCC 408 (Hadiya's case)***, this Hon'ble Court also held that,

*“52. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action*

*emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow. It has to be remembered that the realisation of a right is more important than the conferment of the right. Such actualisation indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.”*

IV. The concurring opinion of Justice Chandrachud (as His Lordship then was) also noted that :

- a. *“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.*

*b. \*\*\*\**

*c. 87. The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and*

*reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. The Constitution exists for believers as well as for agnostics. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners.”*

- V. The judgements cited hereinabove have unequivocally acknowledged the right of consenting adults to marry a partner of their choice, such rights have not been extended to same sex couples.
- VI. It is submitted that various High Courts have extended protection to same-sex partners from others interfering with their rights, in tacit acknowledgement of their relationship. It is thus submitted that the

Petitioners have a right to marry a partner of their choice, irrespective of their gender or sexual orientation.

***Article 14 Fundamental Right Equality and Non-Discrimination***

VII. Article 14 of the Indian Constitution corresponds to the Equal Protection Clause of the Fourteenth Amendment of the US Constitution (See *Chiranjit Lal Chowdhuri v. Union of India*, 1950 SCR 869). In *Obergefell v Hodges*, 576 U.S. 644 (2015) where the United States Supreme Court in a 5:4 decision held 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), the relevant paragraph whereof reads as under:

*“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.” (emphasis supplied)*

VIII. Because discrimination (Article 14) against LGBTQ+ persons and same sex couples is also against the ethos and principles enunciated in various international conventions, to which India is a signatory and have been detailed hereinabove. These include Universal Declaration Of Human Rights, International Covenant For Economic Social And Cultural Rights, International Covenant On Civil And Political Rights, Convention On The Right Of Child, etc. It is an established principle of law that insofar as there is no municipal law or an Act of Parliament contrary to India’s commitments to International

Covenants, the Courts may read them into Part III of the Constitution, so as to secure and safeguard the Fundamental Rights of the Citizens of the country. The said principle has been upheld by the Hon'ble Supreme Court in the judgment reported as *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241:

*i. 7. ... Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of Parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till Parliament enacts legislation to expressly provide measures needed to curb the evil."*

IX. The text of Section 9 (1) of the Constitution of South Africa is akin to that of Article 14 of the Constitution of India and accordingly the ratio of the judgment in *Minister of Home Affairs v. Fourie*, 2005 SCC OnLine ZACC 20 : (2006) 1 SA 524 (CC) wherein the

Constitutional Court of South Africa ruled unanimously that same-sex couples have a constitutional right to marry.

- X. Because the right to equality includes the right of same-sex couples to be acknowledged as equals and to be embraced with dignity by the law just as heterosexual couples are. The judgment delivered by Sachs, J in the aforesaid judgment held that:-

*“Section 9(1) of the Constitution provides:*

*‘9. Equality.—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.’*

*... Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment or stigmatisation. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the State. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law ...*

*It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relations with one another;*

*this being a decision entirely within their protected sphere of freedom and privacy ...*

XI. Because, the non-recognition of the right of LGBTQ+ persons to get married to individuals of the same sex as theirs is unreasonable and arbitrary and therefore a violation of their rights under Article 14 of the Constitution. This submission is buttressed by the decision of this Hon'ble Court in *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3, the relevant paragraph whereof reads as under:

ii. '85. ... *From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14....'*

***Non-Recognition of marriages between persons belonging to the LGBTQIA+ community is violative of their fundamental right under Article 14***

XII. Because Article 14 guarantees that the State shall not deny to any person equality before the law or its equal protection thereof within the territory of India insofar that it prohibits classification or differentiation that has no rational nexus with the object of the law sought to be achieved.



- XIII. Because the non-recognition of the right of LGBTQ+ persons to get married to individuals of the same sex as theirs classifies them on the basis of their sexual orientation and such classification is unreasonable, and manifestly arbitrary and therefore illegal.
- XIV. Because the non-recognition of the right of LGBTQIA+ persons to get married to individuals of the same sex as theirs is a violation of Article 14 insofar that the object sought to be achieved is invalid in the eyes of the law.
- XV. Because this Hon'ble Court, while placing reliance upon *E.P. Royappa (supra)*, further explained the scope and object of Article 14 in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 and held as under:

*iii. 7. ... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.*

XVI. Because the non-recognition of the right of LGBTQ+ persons to get married to individuals of the same sex as theirs reeks of manifest arbitrariness and strikes at the heart of Article 14 of the Constitution. A further elucidation in this regard may be drawn from the judgment of the Hon'ble Supreme Court reported as *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1, the relevant paragraph whereof reads as under:

*21. At this stage, it is important to advert to the tests for the violation of Article 14, both in its discriminatory aspect and its “manifestly arbitrary” aspect. It is settled by a catena of cases that Article 14 permits classification, provided such classification bears a rational relation to the object sought to be achieved. In an early judgment of this Court, State of Bombay v. F.N. Balsara, 1951 SCR 682 : AIR 1951 SC 318, Fazl Ali, J. summarised the law as follows: (SCR p. 708 : AIR p. 326, para 19)*

*“(1) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.*

*(2) The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.*

(3) *The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.*

(4) *The principle does not take away from the State the power of classifying persons for legitimate purposes.*

(5) *Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.*

(6) *If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.*

(7) *While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.”*

*“Proposition 7 is important for the present purpose. Also, it is well settled that Article 14 condemns discrimination not only by substantive law, but also by procedural law. (See **Budhan Choudhry v. State of Bihar**, (1955) 1 SCR 1045 : AIR 1955 SC 191).*

23. *Insofar as “manifest arbitrariness” is concerned, it is important to advert to the majority judgment of this Court in **ShayaraBano v. Union of India**, (2017) 9 SCC 1. The majority, in an exhaustive review of case law under Article 14, which dealt with legislation being struck down on the*

*ground that it is manifestly arbitrary, has observed: (SCC pp. 91-92 & 99, paras 87 & 101)*

*“87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell & Co., (1996) 3 SCC 709] when it said that a constitutional challenge can succeed on the ground that a law is “disproportionate, excessive or unreasonable”, yet such challenge would fail on the very ground of the law being “unreasonable, unnecessary or unwarranted”. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.*

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*101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641 stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of*

*challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.”*

***Under Article 15 the State cannot discriminate against persons on the grounds of gender, and any state action that discriminates against persons on the grounds of gender is liable to be struck down***

**XVII.** Because Article 15(1) of the Constitution of India reads, “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. In interpretation of this provision, courts have placed emphasis on the word “only” to imply that only discrimination on a single ground is suspect under Article 15, thus excluding intersectional discrimination from its scope.

**XVIII.** Because in *Naz Foundation v Union of India* and *NALSA vs Union of India*, the Supreme Court has accepted that “sex” under Article 15(1) of the Constitution is as much a matter of personal identification and has been interpreted to be gender.

**XIX.** That the right to marry a person of one's choice should not be limited to choosing a person of the opposite sex. The notions of gender and sexuality have evolved in the past few years, and the law must keep up with the time, as our constitution is a transformative constitutionalism.

*The right to marry a person of one's choice is an expression of one's sexuality and thus, protected by Articles 19 and 21 as interpreted in Navtej Singh Johar v. Union of India, and NALSA v. Union of India*

**XX.** Because the right to marry a person of one's choice is an integral part of the freedom of expression as held by the Supreme Court in *Navtej Johar* and *NALSA*. Consequently, the non-recognition of the right of LGBTQ+ persons to get married to individuals of the same sex as theirs is violative of their Freedom of Expression, as guaranteed to all citizens under Article 19(1)(a) of the Constitution qua those persons who are citizens of India, including the Petitioners herein.

**XXI.** Because the non-recognition of the Right to Same Sex Marriage deprives couples belonging to LGBTQIA+ community of social recognition of their unions and therefore amounts to them being treated as an inferior class of citizens. It is submitted that this right to form intimate associations is a part of the freedom to form intimate associations under Article 19(1)(c) of the constitution of India.

**XXII.** Article 21 of the Constitution includes a right to live with dignity, and the right to marry a person of one's choice is an integral part of it. Reliance in this regard is placed on the decision of the Hon'ble Supreme in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, wherein Justice Chandrachud observed:

iv. “613. *The choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal, straddling age and time. In protecting consensual intimacies, the Constitution adopts a simple principle : the State has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.*”

**XXIII.** Because the non-recognition of the Right to Same Sex Marriage leads to the infringement of the Right to Privacy of LGBTQ+ persons, which is an essential feature of Article 21 of the Constitution of India. Expounding upon the importance of Right to Privacy as fundamental to the human rights, the Hon’ble Supreme Court in the decision reported as ***K.S. Puttaswamy (Privacy-9J.) v. Union of India***, (2017) 10 SCC 1 stated as under:

*“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 intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation 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 to 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.”*

XXIV. Because, the Fundamental Rights under the Indian Constitution are similar to the Bill of Rights in the US Constitution [See *Arup Bhuyan v. the State of Assam*, (2011) 3 SCC 377] and that the substance of Due Process Clause of the Fourteenth Amendment of the US Constitution has been read into Articles 14 and 21 of the Indian Constitution [See *Sunil Batra v. Delhi Admn.*, (1979) 4 SCC 494] and *Maneka Gandhi v. Union of India* 1978 SCR (2) 621.

XXV. Reliance is also placed on the Hon'ble Supreme Court's decisions reported in *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360, *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, (1984) 2 SCC 534, and *Vellore Citizens' Welfare Forum v. Union of India*, (1996) 5 SCC 647.

#### *Intimate association*

XXVI. Because the rights under Article 19(1)(c), include not just the right to form expressive associations, but also the right to form intimate associations such as marriages and relationships. This jurisprudence is well accepted in the United States. It is submitted that the right of intimate association should be afforded constitutional status and should be treated as a fundamental right entitled to the most exacting degree of constitutional protection. It is further submitted that in five cases across the United States, upholding the right of intimate association, a number of claims were presented asserting that there were compelling reasons that justified restricting the right of intimate

association through criminal laws prohibiting sodomy. In all of the cases, these claims were rejected.

XXVII. Because, the courts in the United States that have recognized a fundamental right of intimate association have uniformly concluded that the enforcement of majoritarian notions of morality does not constitute a compelling state interest strong enough to override the right of individuals to engage in consensual sexual activity. It is submitted that this logic should also extend to marriage.

***Right to Marry and the need for evolution of Marriage as an Institution***

XXVIII. Because the non-recognition of the right to marry leads to LGBTIAQ+ persons being denied various rights and privileges enjoyed by heterosexual couples under the institution of marriage such as adoption of children in their capacity as a couple, being each other's legally recognized next of kin, in matters of inheritance, acquiring citizenship by way of marriage, etc.

XXIX. Because there cannot be a State-approved way to be intimate and love another person, nor should it be promoted at the expense of other loving relationships that the State does not like. The tools of the State should not be abused to foist the deeply held beliefs of those in power onto others.

XXX. Because a purely civil legal privilege is available to one set of people, but not to another set. Since marriage ensures rights and places duties arising from a certain status defined by the law as that of husband or

wife or spouse, that status should be available to all citizens, irrespective of their gender identity or sexual orientation.

XXXI. Because the concept of “marriage” has evolved over time and has become more inclusive instead of merely being a union only between heterosexual persons. The Indian Constitution, being a living and a transformative document, must recognise same sex marriages.

***XXXII. Provisions of the Special Marriage Act are Unconstitutional***

XXXIII. Because The Special Marriage Act was enacted in 1954 to allow citizens of India to solemnize inter-faith and inter-caste marriages without the need to renounce their religion. It is submitted that the Petitioners belong to different faiths and will need to get married under the Special Marriage Act.

XXXIV. Because Section 6(1) provides for the recording of notice given under Section 5 and entering of a true copy of it in the Marriage Notice Book. The second part of this clause provides that such book shall be open for inspection to any person desirous of inspecting the same.

XXXV. Because it is submitted that under S. 6(2) the notice of intended marriage provided by the couple under S. 5 must be kept in a conspicuous place in the Marriage Officer's office.

XXXVI. Because it is well known that queer persons often do not come out of the closet for fear of retribution on account of their sexuality. As a result, such a notice will force them to come out, and put them in harm's way, and there is a legitimate threat of violence from not just their families, who may not be accepting, but also from other persons.

This is not just a violation of their right to life but also a violation of the right to privacy of the queer couple.

XXXVII. Because it is further submitted that Section 7 of the Act provides for raising of objection by “any” person to the marriage notice of intending couples on the grounds specified in Section 4 of the Act. Further S. 8 and S. 9 of the Special marriage act provide that the Marriage Officer must inquire into any objections received to the marriage under S. 7. The Officer can uphold the objection and refuse to solemnize the marriage, and that while doing so, the Marriage Officer will have all the powers of a civil court when trying a suit.

XXXVIII. It is submitted that the procedure under Sections 5 to 9 in that it makes the intended marriage public and allows the raising and upholding of objections would lead to an invasion of the Petitioners’ and other LGQBTQI+ persons’ privacy inordinately and turn their relationship into a public spectacle. It is submitted that this will heighten the dangers that will be posed to queer couples, and are therefore violative of their rights under Articles 14, 15, 19, and 21 of the Constitution.

XXXIX. These violate the right to equality and against discrimination on the basis of religion under Articles 14 and 15 because same sex couples who marry into the same religion shall not be subject to such scrutiny or the violation of their rights to privacy.

XL. In the alternative and without prejudice to the aforesaid, the Respondents may be directed to register their marriage under the Foreign Marriage Act.

26. The Petitioners reside in India. The entire cause of action has arisen in India. This Honble Court has the jurisdiction to entertain and try this Petition.
27. That the Petitioners have not filed any other petition in respect of the subject matter of the present petition or seeking same reliefs in this Hon'ble Court or any other High Court in the country
28. The Petitioners shall rely on documents annexed to this Petition.

### **PRAYERS**

In view of the facts and circumstances of this case, it is prayed that this Hon'ble Court may graciously be pleased to grant the following:-

- a) For a declaration, or any other appropriate writ, order, or direction, declaring that right to marry a person of one's choice, irrespective of their religion, gender, sexual orientation or any other factor is a fundamental part of Articles 14, 15, 19 and 21 of the Constitution.
- b) For a declaration that the members of the LGBTQIA+ community have the same right to marriage as their cisgender and heterosexual counterparts have under the Special Marriage Act, 1954 and to declare sections 5, 6, 7, 8, 9, 10 and 14 of the Special Marriage Act, 1954 as constitutionally invalid and being violative of article 14, 15 and 21 of the Constitution of India;
- c) In the alternative to and without prejudice to prayers (a) and (b) declaration to the Respondents to register the Petitioners' marriage solemnized in the New York, USA on 2<sup>nd</sup> July 2019 under the Foreign Marriages Act;

- d) For an appropriate writ order or direction directing the Respondents to permit to register their marriage under the Special Marriages Act;
- e) For costs of this Petition;
- f) To pass such other orders and further orders as this Hon'ble Court may deem fit and necessary on the facts and in the circumstances of the case.

**AND FOR THIS ACT OF KINDNESS THE PETITIONER SHALL EVER PRAY AS IS DUTY BOUND.**

**Drawn By:**

Rohin Bhatt, Advocate

**Settled by:**

Anand Grover, Senior Advocate

**FILED BY:**



**(NUPUR KUMAR)**

Advocate for the Petitioners

DRAWN ON: 08.12.2022

FILED ON: 19.12.2022