IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFER PETITION (CIVIL) NO. 3025 OF 2022

IN THE MATTER OF:

Mr. Joydeep Sengupta & Ors. … PETITIONERS

VERSUS

Union of India & Ors. …RESPONDENTS

AND

TRANSFER PETITION (CIVIL) NO. 3007 OF 2022

AND IN THE MATTER OF:

Mellissa Ferrier & Anr. …..PETITIONERS

VERSUS

Union of India and Ors. …..RESPONDENTS

WRITTEN SUBMISSIONS DATED 26.2.2023

The present submissions are a summary of arguments to be presented by Karuna Nundy, Counsel for the Petitioners (2 hrs)

1. The Petitioners seek legal recognition for queer, non- heterosexual, and same-sex marriages under secular legislations for marriage including the Citizenship Act, 1955, the Foreign Marriage Act 1969 ("**FMA**") and the Special Marriage Act 1954 ("**SMA"**). In the process of rights-based transformation the Petitioners seek that their freedom to choose their spouse be upheld and their love be granted the dignity it is due, in law and in life.

I. THE RIGHT TO BE A 'SPOUSE' UNDER THE CITIZENSHIP ACT, 1955

2. Both Petitions seek a declaration that a spouse of foreign origin of an Indian Citizen or Overseas Citizen of India ('OCI') cardholder is entitled to apply for registration as an Overseas Citizen of India under Section 7A(1)(d) of the Citizenship Act, 1955 ("**Citizenship Act**") regardless of the gender, sex or sexual orientation of the applicant spouse. Section 7A(1)(d) of the Citizenship Act is ex facie neutral as to gender, sex and sexuality. [C-III, starts p. 455, pdf p. 461@p. 462, pdf p. 468]

> 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 7A 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.

II. MARRIAGE EQUALITY, QUEERNESS AND GENDER FLUIDITY IN MARRIAGE

3. Petition No. 1 (brought by Joydeep Sengupta et al.) seeks complete marriage equality, and a broader recognition of "Queer Marriage" that includes, but is not restricted to "same-sex" or "homo-sexual marriage", taking into consideration the spectrum of gender identities and sexualities that persons across this country identify with.

4. "Queer[1]" in *Joydeep Sengupta* (henceforth Petition No. 1) is used as an inclusive, umbrella term for people who identify as Gender fluid, Non-binary or Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Asexual, and other related identities (LGBTQIA+). Queer marriage is broader in scope than "Same Sex" Marriage because the latter does not cover marriage between two persons who don't conform to the fixed, socially prescribed categories of "male" and "female"'man' or 'woman' at the point of marriage, even if such gender was not assigned at birth.
5. The First Petition hence seeks that the phrases "person", "spouse" or similar terms that have been used in the Special Marriage Act, 1954, The Foreign Marriage Act, 1969 (and all other laws, rules and regulations related to marriage) ought to be interpreted in a gender, sex and sexuality neutral manner.
6. In this manner the law may:
    1) Recognize marriage between persons of any gender identity, sex or sexuality and
    2) transcend the requirement that a particular gender be cemented for all time at the point of marriage.

7. The Special Marriage Act, 1954

a. The Special Marriage Act, in Sections 12, 15, 22, 23, 25 and 27, which use the terms "husband" and "wife" when providing for the solemnization, registration and nullity of marriage, and Section 44, which provides the punishment for bigamy, the Petitioners pray that this Court read the relevant part of the provision as "husband or wife **or spouse**", with "or spouse" being implied terms in the legislation, interpreted by this Court to save the Special Marriage Act from unconstitutionality. Relevant parts of Section 12, 22 and 27 and how the

[1] The term 'queer' once pejoratively used to demean persons who engaged in 'deviant' sexual behavior or gender expressions, has been reclaimed by activists as a way of expressing pride in their devalued and marginalized identities, challenging majoritarian hetero-normativity. Later, it grew into a preferred umbrella term that held within it the diversity of experiences contained in lesbian, gay, bisexual, transgender, intersex and asexual, as well as other identities. These identities have all emerged within modern times, which the French philosopher Michel Foucault characterized as being marked by the constitution of sexuality as a core feature of human identity, and the proliferation of discourse about the same. Using the term "queer" instead of same-sex or homosexual in the context of marriage, knocks the divide out of the presumed sexual dimorphism of human bodies, i.e. that there are only two biological sexes. If human beings understand their bodies outside the binary of man and woman, male and female, then any approach to marriage must take into account this diversity.

Petitioners seek them to be interpreted, are reproduced below as examples: [C-III, starts p. 417, pdf p. 423 @p. 423, 425, 426, pdf p. 429, 431, 432]

> "12. Place and form of solemnization.—(1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed. (2) The marriage may be solemnized in any form which the parties may choose to adopt: Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties,—"I, (A), take the (B), to be my lawful **wife (or husband)**".(to be read as "...my lawful wife (or husband) (or spouse)")
>
> 22. Restitution of conjugal rights.—When either the **husband or the wife** has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. (...) (to be read as "When either spouse has, without reasonable excuse, withdrawn…")
>
> 27. Divorce.—(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the **husband or the wife** on the ground that the respondent—(...)" (to be read as "...court by either spouse")

b. The terms "Bride" and "Bridegroom" have been used in the Third and Fourth Schedule for the declarations by both parties and certification of marriage. It is submitted that both terms be read to include the word "spouse" in line with the above. [C-III, starts p. 417, pdf p. 423 @p. 439, 440 pdf p. 445, 446]

8. **The Foreign Marriage Act, 1969**

a. "Bride" and "Bridegroom" are used in Section 4 relating to the age of the parties at time of solemnisation and the Third and Fourth Schedule for the declarations by

both parties and certification of marriage. The same stipulations are given for both the "bride" and the "bridegroom" in the Third and Fourth Schedule. [C-III, starts p. 442, pdf p. 448 @p. 444, 453 pdf p. 450, 459]
The relevant part of Section 4 is:

> 4. Conditions relating to solemnization of foreign marriages.—A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:—
> (c) the **bridegroom** has completed the age of twenty-one years and the **bride** the age of eighteen years at the time of the marriage.

b. The terms "husband" and "wife" are used in Section 13 and 18 in relation to the solemnisation of marriage and provisions where matrimonial reliefs under the Special Marriage Act are available under the Foreign Marriage Act. The Petitioners pray that this Court read the relevant part of the provisions as "husband or wife **or spouse**" , with "or spouse" being implied terms in the legislation, interpreted by this Court to save the Foreign Marriage Act from unconstitutionality, in the same manner as discussed in relation to the SMA above. [C-III, starts p. 442, pdf p. 448 @p. 446, 447 pdf p. 452, 453]

9. Notably, both the Special Marriage Act, 1954 and the Foreign Marriage Act, 1969 have certain protective provisions that apply only to the wife. Under the Special Marriage Act, 1954, Section 27(1)(1A) and 31 provide special conditions for divorce by "wife", and Sections 36 and 37 only provide for alimony to be given to a "wife" by a "husband". [C-III, starts p. 417, pdf p. 423 @p. 427, 429, 430 pdf p. 433, 435, 436] Under the Foreign Marriage Act, Section 18(3)(a)(ii) and (b)(ii) conditions that will allow a court to decree dissolution and annulment respectively are laid down which refer exclusively to the wife. [C-III, starts p. 442, pdf p. 448 @p. 448, pdf p. 454]
10. This differential and heightened protections for women is enabled constitutionally by Article 15(1). "Sex" in Article 15(1) has now been interpreted to include gender and sexuality in a catena of judgements. **NALSA v. Union of India** [2014] 5 S.C.R 119 [2J] [C-IV, Vol. I, starts p.711/pdf.742 @p.761/pdf. 792, para 66] protects transgender people and non-heterosexual persons under Article 15(1) of the Constitution of India. Hence, the protective and enabling

characteristics of the legislation in which biological women have been protected may mirror that inclusion of transgender people and non-heterosexual persons.

III. PETITION NO.1: *Joydeep Sengupta and Ors vs Union of India and Ors.*

11. Petitioners 1 and 2 are a married same sex couple, with a baby named Maya. Their marriage has been dignified by recognition in three countries: the United States, France and Canada. They have a certificate of registration of marriage issued by the Office of the City Clerk of New York dated 6th August, 2012 and apostille certificate of the same date issued by the Special Deputy Secretary of State, New York. [Marriage Certificate -C-II, Vol.III, p. 770-773, pdf p. 780-783] They seek the same rights in India. Petitioner 1 is Joydeep Sengupta, a lawyer admitted to the Bars of New York, Paris and Ontario, Canada. He specialises in cross-border investigations, compliance and regulatory matters for some of the world's largest financial institutions and global corporations. He was an Indian citizen by birth, and is now an OCI. [OCI card - C-II, Vol. III, p. 778-780, pdf p. 788-790] Petitioner no. 2 is Blaine Stephens, his husband, is a well known economist who has advised among others, the Reserve Bank of India. [US Passport C-II, Vol. III, p. 781-787, pdf p. 791-797] Petitioner No.2 wishes to apply for OCI status under Section 7A(1)(d) of the Citizenship Act, as a spouse of an OCI Cardholder.
12. Mr. Stephens has deep roots in India, yet he must apply for temporary or business visas every time he visits. During the covid-19 pandemic, several times, Mr. Stephens and other foreigners were prohibited from entering the country. However, there were exemptions for OCI card holders. Since they aren't citizens of India, they approached Petitioner No.3, to file RTIs on the issue. Petitioner No.3 filed three RTIs, one with the MHA itself one with the MHA Foreigners Division and one with the MEA, Consular, Passport and Visa Division, all seeking the meaning of term "registered" marriage in Section 7A(1)(d) and the list of countries whose marriages are legally recognized by India. However, these RTIs were transferred back and forth by the Ministries, as a result of which the queries were never answered. [RTIs and replies C-II, Vol.III, p. 837-856, pdf p. 847-866]**.** The complex procedures remain as a hurdle, every time the Petitioners' family want to visit Mr. Sengupta's widowed mother, brother and other extended family in the country.
13. The Ministry of Home Affairs notification F. No. 26011/CC/05/2018-OCI dated 4th March 2021 [C-II, Vol.III, p. 795-796, pdf p. 805-806] will allow

lifelong multiple entry visa for Petitioner No. 2 if he also has an OCI card. Without Petitioner No.2's recognition as Petitioner No.1's marital partner, Petitioner No. 2 will not qualify for OCI status and cannot reach his husband, baby or family members in India at short notice in case of illness or other urgent need.

14. Mario Da Penha, Petitioner No. 3, is an Indian citizen, a queer rights academic and activist, currently pursuing a PhD at Rutgers University, USA on the history of hijras in eighteenth and early nineteenth century western India. He is a founder of Anjuman, the first queer students' collective in Jawaharlal Nehru University, New Delhi in 2003. As a member of Voices Against 377, he was party to the legal challenge to Section 377 of the IPC, which led to the eventual decriminalisation of homosexuality in Navtej Singh Johar v. Union of India ('***Navtej Singh Johar***') [2018] 7 SCR 379 [5J]. Petitioner No. 3 identifies as queer. [Articles by Petitioner No. 3, C-II, Vol. III, p. 800-818, pdf p. 810-828]

15. The FMA applies only to marriages where at least one of the parties is an Indian citizen. Hence, it does not apply to the marriage of Petitioner nos. 1 and 2. As per the MHA, Foreigners Division, a registered marriage certificate of a marriage solemnised in a foreign country is on its own sufficient to enable an OCI card holder's spouse of foreign origin to apply for OCI status, as long as the Indian mission/post certifies/apostles the marriage certificate.

16. Without prejudice to the same, it is pertinent to note that Section 23 of the Foreign Marriage Act provides that the Central government may declare, vide notification in the official gazette that the marriages solemnised under the law in force in a foreign country shall be recognized by courts in India as valid if the law in such a foreign country contains provisions similar to those contained in the FMA. [C-III, p. 449, pdf p. 455] Further, under Section 17 of the FMA parties of whom at least one was a citizen of India can seek to have their marriage duly solemnised in a foreign country registered by the Marriage Officer. [C-III, p. 446, pdf p. 452] It is explicit however, as stated in section 17(2), that "No marriage shall be registered under the section unless at the time of registration it satisfies the conditions mentioned in section 4. Section 4 pertains to the solemnisation of a marriage by an Indian citizen before a Marriage Officer, where registration is sought at the first instance. One of the conditions for such marriages, under Section 4(1)(c) specifically requires the parties to be a 'bride' and a 'bridegroom', i.e., to be female and male. [C-III, p. 444, pdf p. 450]

17. All three Petitioners seek marriage equality.

IV. *PETITION NO. 2: Mellissa Ferrier and Anr. v. Union of India and Ors*

18. Mellissa Ferrier, Petitioner no.1 and Kamakshi Raghavan Petitioner no. 2 are a married, same-sex couple, who have been living together since the last 22 years. The Petitioners's marriage was registered in 2018 in Australia, they now live in Bengaluru, India. By way of the present petition, the Petitioners are seeking recognition of their matrimony in India to afford their relationship dignity and the legal rights that come with marriage.

19. Ms. Ferrier is an Australian citizen who moved from New South Wales to Melbourne in 1995. [Australian passport - C-II, Vol. III, p. 728, pdf p. 738] Ms. Raghavan was born an Indian citizen, and acquired Australian citizenship after she moved there in 1995 - she is now an OCI (Overseas Citizen of India) Card holder. [OCI card - C-II, Vol. III, p. 731-732, pdf p. 741-742]

20. The Petitioners met each other in the year 2000, and started living together in February, 2001, in Victoria, Australia. Subsequently, the Petitioners left Australia in June, 2002, and moved to London. In November 2004, the Civil Partnership Act, 2004 was passed by the Westminster Parliament, which allowed same-sex couples to register their marriages as civil partnerships. The Petitioners acquired the same in 2005. [Civil Partnership Certificate, C-II, Vol.III, p. 741, pdf p. 751]. The Petitioners subsequently purchased an apartment and lived in England till December, 2006. However, in January, 2007, Ms Raghavan moved back home to India and Ms. Ferrier followed the year after to be with her partner.

21. Ms. Ferrier, Petitioner No. 1 applied for many jobs but she did not have work authorization, and set up her own company, which allowed her to be self-employed and gave legitimacy to her stay in India. However, Petitioner No. 1 had to leave India every six months due to the fact that she was staying in India on a business visa. Eventually, Petitioner No. 1 got a work permit from a Mumbai based Company, however, even that required frequent work travel to Mumbai. In 2012, while expecting a child, the Petitioners moved to Bengaluru to be closer to the family of Ms. Raghavan.

22. In 2013, a baby girl i.e. Lara Amrutha Ferrier Raghavan, was born to the Petitioners. [Birth certificate - C-II, Vol.III, p. 753 pdf p. 763]. The Birth Certificate only records the name of Ms. Raghavan as the mother of Lara, and Lara's other mother, Mellissa Ferrier is not legally recognized as a parent. Ms. Ferrier then joined Wipro in 2014 in Bengaluru and took LGBTQ+ Global Lead. In 2016, the Petitioners had a second child through IUI process. Ms. Ferrier this time, gave birth to Arjun Robbie Ferrier Raghavan on 24.10.2016 [Birth certificate - C-II, Vol.III, p. 754 pdf p. 764]. It is noteworthy that the Birth Certificate only

records the name of Ms. Ferrier as the mother of Arjun, and Ms. Raghavan is not legally recognized as a parent.

23. In 2017, Australia legalised queer marriages via the amendment in the Marriage Act, 1961. On 23.12.2018, Petitioners got married in Victoria, Australia [Marriage Certificate - C-II, Vol.III, p. 760 pdf p. 770]

24. If Indian laws recognize the marriage of the Petitioners, Mellissa Ferrier and both children of Petitioners would be eligible for OCI, and would be able to stay and live together as family with all legal rights and privileges of being a family. Accordingly, Ms. Ferrier submitted her application for OCI as spouse of Ms. Raghavan (already an OCI Card holder) on 07.09.2021 [Application - C-II, Vol.III, p. 761-767 pdf p. 771-777] . However, on 17.09.2021, at the time of verification of documents before FRRO, Bangalore, she was informed that the above application would not be allowed since same-sex marriage is not recognized in India. No formal/ written rejection was granted to the Petitioner No. 1, but she was told orally that her marriage could not be recognised, and despite various follow ups, no response was received on the above OCI application. [Emails - C-II, Vol.III, p. 768-769 pdf p. 778-779]

25. That due to their marriage not being recognised the Petitioners face numerous disabilities such as ineligibility for becoming nominees as spouses for group insurance and provident fund, superannuation. The following benefits are not be available to queer or same sex spouses:

i) spousal privilege under Section 122 of the Evidence Act, 1872 protects married couples from being compelled to disclose communications between the spouses during the course of the marriage; [C-III, starts p. 2160/pdf.2166@ p. 2210, pdf. 2216]

(ii) under the CCS (Pension) Rules, 1972 the spouse is entitled to a family pension after the death of their spouse who was working as a civil servant [C-III, starts p. 680/pdf.686@ p. 710, pdf. 716, Rule 50(6)]

(iii) the Pradhan Mantri Shram Yogi Maandhan Yojana, passed under the Unorganized Workers' Social Security Act, 2008 is a voluntary pension scheme for unorganised workers that gives minimum assured pension of Rs. 3000/- after a subscriber attains 60 years of age. The scheme allows the spouse of the beneficiary to receive half the pension as family pension if the beneficiary passes away.

(iv) Section 39(7) of the Insurance Laws (Amendment) Act, 2015, accords nominees who are immediate family members such as spouse parents or children the status of beneficial nominee. If any of these persons are made a nominee, the death benefit will be paid to these persons and other legal heirs will have no claim

over the money. [C-III, starts p. 2504/pdf.2510@ p. 2524, pdf. 2530]
(v) Section 10A(4) of the Employees' Compensation Act, 1923 allows the Commissioner under the Act to inform the dependents of a deceased workman about the possibility of claiming compensation. Section 2(1)(d) of the Employees' Compensation Act, 1923 defines "dependent" to include the surviving spouse. [C-III, starts p. 865/pdf.871@ p.867, 878, pdf.873, 884]

26. Petitioner No. 1 is required to return to Australia every 5 years for renewal of her visa, and the Residence Permit (RP) is required to be renewed each year. Such impermanence in lifestyle affects the minor children of the Petitioners. If the Residence Permit of Petitioner No. 1 is rejected, she and their son i.e. Arjun, would have to depart India. Moreover, the process of renewal of the RP itself is an arduous experience, and humiliating, too, where the Petitioner No. 1 and the minor son i.e. Arjun, have to justify being part of a family with Petitioner No. 2 and their daughter Lara, and in fact, being part of a single family through same-sex relationship, which relationship is not given the sanctity of recognition in India, till date. It is noteworthy that the Petitioners have lived as partners and spouses, and with their children, have lived as a family and suffered losses and successes in life. However, despite the foregoing, the Petitioners are still denied the recognition of being a married couple in India, which not only puts enormous burden, but also disabilities, on their spousal life and the future of their family.

V. UNION OF INDIA'S REPLY IN PETITION NO.1

27. The Respondent No. 1 Union of India filed a reply to Petition 1 referring to their reply to W.P. (C) No. 6371/2020 wherein they took the stand that marriage between two individuals of the same gender is neither recognized nor accepted in any uncodified personal laws or any codified statutory laws and that the question of such recognition must be decided by the legislature. Specific contentions on unconstitutionality of the impugned provisions have not been responded to by Respondent No. 1. Respondent No. 1 stated that allowing the registration of same-sex marriages will create family issues and have more ramifications than mere legal recognition and that this question must be decided by the legislature. [Reply to W.P. (C) No. 6371/2020 - C-II, Vol. I, starts p. 138, pdf p. 166]

VI. GROUNDS

A. THE RIGHT TO BE A 'SPOUSE' UNDER SECTION 7A (1)(d) OF THE CITIZENSHIP ACT, 1955

28. Section 7A(1)(d) of the Citizenship Act, 1955 entitles a spouse of foreign origin of an OCI Cardholder, (1) whose marriage has been registered; and (2) subsisting for at least two years to qualify for OCI status. [C-III, starts p. 455, pdf p. 461@p. 462, pdf p. 468] As per a notification F. No. 26011/Misc./47/2019-OCI dated 15.11.2019 with FAQs issued by the MHA, Foreigners Division, [C-II, starts p. 819, pdf p. 829 @p. 823, pdf p. 833] in the case of a marriage solemnised in a foreign country, the spouse of an OCI or Indian citizen applying for OCI may present the said marriage certificate for such a marriage, which must be apostilled or certified by the concerned Indian mission or post. The Petitioners' marriages satisfy all these conditions.

29. **Citizenship Act uses the word "spouse"**: Section 7A (1) (d) which allows spouses of OCI card-holders to be granted OCI cards, is gender, sex and sexuality neutral; as distinct from the FMA and SMA.

30. **The absence of any conditions qua gender/ sex/sexuality of the parties is a *casus omissus* in the statute. The Court cannot supply a *casus omissus* into a statute by judicial interpretation, except in circumstances of clear necessity**: All Indian statutes pertaining to registration of marriages, require either the marriage to be performed in India (the SMA), or atleast one party to be a citizen of India (the FMA).

31. Section 7A(1)(d) was enacted in 2015, i.e. after the enactment of the SMA, FMA, and other marriage laws, and deals with inter alia, marriages not covered under the FMA - i.e., for instance, a marriage between a non-citizen OCI card holder, and a foreigner, is solemnized and registered outside India under a foreign law. Thus, the omission of any conditions qua the gender/sex/sexuality of the parties in the marriage between the OCI card holder and spouse of foreign origin is a *casus omissus* that cannot be supplied by judicial interpretive process, and even a same sex spouse of such an OCI Cardholder must be eligible to apply for OCI status.

32. If the conditions under Section 7A(1)(d) are satisfied, additional grounds that are not based on any law or rule cannot be read in to deny any applicant OCI card: (1) In **Niddi Endurance Ezeh v. Union of India**, W.P.(C) 10066/2018 (Delhi High Court, 1J), the Petitioner's application for OCI card had been rejected because he was an illegal migrant at the time of the marriage. The Delhi High

Court held that since the conditions under Section 7A(1)(d) had been complied with the Respondent had to consider the application. [C-IV, Vol. III, starts p.455/pdf.465 @p.455-456/pdf. 465-466, para 2,4]

(2) In **Bahareh Bakshi v. Union of India**, 2021 SCC OnLine Del 3784 [1J], the Petitioner, an Iranian citizen, married to an Indian citizen was aggrieved by the refusal of respondent, FRRO, Bengaluru to consider her application for OCI. Respondent insisted on the physical/virtual presence of her estranged husband. [C-IV, Vol. III, starts p.114/pdf.124 @p.114/pdf. 124, para 1-2] The Delhi High Court held that the imposition of any requirement on OCI card applicants that are not in any rule or guideline cannot be permitted to operate. [C-IV, Vol. III, @p.114-116/pdf. 124-126, para 2-3,5]

(3) In **Natalya Mamrenko v Union of India** 2018 SCC OnLine Del 11503 [IJ], the Petitioner, an Uzbekistan citizen with a Person of Indian origin (PIO) card was married to an Indian citizen. The PIO scheme had been replaced with the OCI card under the Citizenship Act. Petitioner's application for OCI was rejected. Respondent said that this is because the whereabouts of her spouse were not known. [C-IV, Vol. III, starts p.395/pdf.405 @p.395-396/pdf. 405-406, para 5-7] The Delhi High Court held that the Petitioner satisfied all requirements, and without any material to believe that disqualifications under Section 7D(f) (marriage has been dissolved, adultery) were applicable to the case, the Respondent cannot withhold the OCI card from the Petitioner. [C-IV, Vol. III, @p.396/pdf. 406, para 11-12]

33. **The recognition of the foreign marriage between two non-citizens is a mere ministerial Act**: In the case of Section 7A(1)(d) of the Citizenship Act, there is no power to examine whether the marriage in question is in accordance with Indian law or not – and as long as the marriage is validly registered in the jurisdiction where it was performed and the other conditions of the provision are met, the foreign origin spouse is entitled to apply of OCI status.

34. The Israeli Supreme Court's decision in **Yossi Ben-Ari v. Director of Population Administration, Ministry of Interior,** [2006] (2) IsrLR 283 [7J.] [C-IV, Vol. IV, starts p.3463/pdf.3471 @p.3472/pdf. 3480, para 7; p.3482/pdf.3490, para 15; p. 3488-3489/pdf.3496-3497, para 23] is instructive as to the nature of certification of a marriage that validly took place in a foreign jurisdiction. The court held that where a couple has a marriage certificate from abroad, the Israeli registry official must register the marriage and that in effect its only a ministerial Act. The court did not rule upon the legal status of non-heterosexual marriages in Israel. However, it held that the purpose of the

population registry was to record statistics and the role of the registration official was to collect statistical material for the purpose of managing the registry and that the official was not competent to examine the validity of a marriage. Without prejudice to the submission that same-sex marriages should be granted legal recognition by Indian law, it is submitted that even in the present case, there is no reason for the state or its agencies to deny legal recognition of marriage to same sex couples who are legally married in foreign jurisdictions and have valid marriage certificates.

35. **Only the substantive law of the foreign jurisdiction is relevant:** Where a marriage has been solemnised in a foreign jurisdiction, the substantive law to be applied to such marriage or matrimonial disputes is the law of that jurisdiction. Hence, it is submitted that the requirement in Section 7A(1)(d) that the marriage of the spouse of the OCI cardholder be registered refers to legal registration in the jurisdiction the parties were married in, and the substantive law of that jurisdiction is the only relevant law in this regard.

36. **In Y Narasimha Rao v. Y Venkata Lakshmi** (1991) 3 SCC 451 [2J] [C-IV, Vol. II, starts p.8322/pdf.8334 @p.8333-8334/pdf. 8345-8346, para 20-21], this Court held that *"**20. 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**... 21. The parties do and ought to know their rights and obligations when they marry under a particular law.* In ***Surinder Kaur Sandhu v. Harbax Singh Sandhu,*** [2J] [1984] 3 S.C.R 422, [C-IV, Vol. II, starts p.7726/pdf.7738 @p.7730-7731/pdf. 7742-7743, para 10] this Court held that, "*...The modern theory of Conflict of Laws recognises and, in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case…That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offsprings of marriage."*

37. In Obergefell v. Hodges, Director, Ohio Department of Health 576 U.S. 644 (2015) [9J.] [C-IV, Vol. IV, starts p.2399/pdf.2407 @p. 2425/pdf.2433], the US Supreme Court held that held that the equal protection clause of the US Constitution, i.e. the 14th Amendment requires that a US State licence a marriage between a same-sex couple when the said marriage was lawfully performed and licensed out of that State even if that State did not allow same-sex marriages.

B. RECOGNITION UNDER THE FOREIGN MARRIAGE ACT OF MARRIAGES SOLEMNISED IN FOREIGN JURISDICTIONS

38. Section 7A(1)(d) specifically uses the word "spouse" which, if read in light of this Hon'ble Court's judgements, has a gender neutral/queer/inclusive meaning in law as detailed hereinabove. The provision allows OCI cards for spouses of OCI card-holders, as discussed in Ground A. Notably it also grants OCI cards to the "spouse of foreign origin of a citizen of India".

39. This terminology is in contradistinction with the language of Section 4 of the FMA, the requirements of which need to be satisfied, in terms of Section 17(2) of the FMA, for registration of foreign marriages. Section 4 lays down the conditions necessary to be fulfilled for solemnisation of a foreign marriage before a Marriage Officer in a foreign country; one of such conditions specified under Section 4(c) requires that "*the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage…*" [C-III, s. 4 @p. 444, pdf p. 450; s.17 @p. 446, pdf p. 452]

40. The Petitioner submits that if would be manifestly arbitrary contrary to Article 14, for the law to accord a larger ambit/scope for registration of marriages to an OCI than to a citizen of the country married in a foreign jurisdiction, and to the extent of the inconsistency a harmonious construction of the FMA with the Citizenship Act is required. And further, as discussed below, the word "spouse" may be read into Section 4 of the FMA in order to save it from being struck down as unconstitutional under Articles 14,15, 19 and 21.

41. Indeed section 7A(1)(d) was inserted in the Citizenship Act, in January 2015 *subsequent* to the promulgation of the FMA [and its sec 4(c)] in 1969. It is well established that a subsequent statute/law may be pressed in aid in interpreting, in case of any doubt, the provisions of an earlier statute relating to the same subject. [***SirSilk India Ltd v Textiles Committee*** **[1988] Supp. 2 S.C.R 880,** [2J] [C-IV, Vol. II, starts p.6895/pdf.6907 @p.6915/pdf. 6927, para 28]

42. Here too **Yossi Ben Ari** (supra) and **Obergefell (supra)** are instructive as they pertain to registration of marriages solemnised in foreign jurisdictions, and effectively treat such registration as a ministerial act.

C. RECOGNITION OF QUEERNESS AND GENDER FLUIDITY IN MARRIAGE EQUALITY

43. **The normativity of cisgender identities and heterosexuality has been rejected by law, and there is legal recognition of gender identities and sexualities that exist on a spectrum** after the judgements of this Hon'ble Court in **NALSA** (supra) and **Navtej Singh Johar** (supra). [NALSA C-IV, Vol. I starts p. 711/pdf.742 @p. 781/pdf.812, para 135] [Navtej C-IV, Vol. I starts p. 783/pdf.814 @p.1021/pdf.1052, para 478] The denial of full citizenship rights, particularly the right to marriage goes against such legal recognition of identities outside the binary and heterosexuality. This Hon'ble Court has recognised the inherent rights of such marginalised identities and the denial of such rights will amount to treating them as third-class citizens.

44. Hence the present Petition No.1 seeks complete marriage equality, a broader recognition of "Queer Marriage" that includes but is not restricted to "same-sex" or "homo-sexual marriage" taking into consideration the spectrum of gender identities and sexualities .

45. This Court legally recognised gender minorities in **NALSA** (supra) and decriminalised the expression of intimacy between sexual minorities in **Navtej Singh Johar** (supra) In **NALSA**, affirmed by **Navtej Singh Johar** , this court held that "Transgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. [T]he term "transgender", in contemporary usage, has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female." [NALSA C-IV, Vol. I starts p. 711/pdf.742 @p. 735/pdf.736, para 13] [Navtej C-IV, Vol. I starts p. 783/pdf.814@p.926/pdf.957, para 268.1]

46. Following the lead of this Hon'ble Court in recognising the equal rights and dignity of the members of the queer community, constitutional courts across the country have recognised the fluidity of gender and provided relief to queer litigants. The Madras High Court in **Arunkumar v. Inspector General of Registration** 2019 SCC OnLine Mad 8779 : (2019) 4 Mad LJ 503 [1J] recognised that sex and gender are not one and the same when holding that a marriage solemnised between a male and a transwoman is a valid marriage under the Hindu Marriage Act, 1955 ("HMA"). The court expanded the expression "bride" in Section 5 of the Hindu Marriage Act, 1955 holding that the statute cannot have static meaning and must be interpreted in light of the existing legal system. The Ld. Single judge affirmed the right of marriage of a male and transgender person

to marry, under Articles 14, 19(1)(a), 21 and 25 of the Constitution. [C-IV, Vol. III, starts p.85/pdf.95 @p. 89/pdf. 99, para 16; p.92/pdf.102, para 28]

47. In ***Ganga Kumari v Rajasthan***, Writ Petition No. 14006/2016 [1J] the Rajasthan High Court directed the appointment to a female petitioner to the post of Constable because "*[she] has claimed herself to be a female and merely because she has been found to be a unisex - Hermaphrodite, it cannot be said that the petitioner's claim regarding gender was incorrect, as she has been found to be having characters of both the sexes. As a matter of fact the petitioner's claim in relation to her gender is correct, as she has been claiming herself to be a female and she has a right to decide, which gender she belongs to*." [C-IV, Vol. III, starts p.203/pdf.213 @p.212/pdf. 222] The Rajasthan High Court drawing from principles upheld in **NALSA** (supra) further held that, "*The contemporary term "transgender" arose in the mid 1990s from the grassroots community of gender-different people. In contemporary usage, transgender has become an "umbrella" term that is used to describe a wide range of identities and experiences, including but not limited to transsexual people: male and female cross-dressers (sometimes referred to as "transvestites," "drag queens" or "drag kings"); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotype gender norms."* [C-IV, Vol. III, starts p.203/pdf.213 @p.214/pdf. 224]

48. **<u>This Hon'ble Court has also emphasised the importance of legal recognition of all/non-traditional family units</u>:** In **Deepika Singh v. Central Administrative Tribunal** 2022 SCC OnLine SC 1088 [2J] [C-IV, Vol. I, starts p.53/pdf.84 @p.60-61/pdf. 91-92, para 26], this Hon'ble Court held "*The predominant understanding of the concept of a "family" both in the law and in society is that it consists of a single, unchanging unit with a mother and a father (who remain constant over time) and their children.* ***This assumption ignores both, the many circumstances which may lead to a change in one's familial structure, and the fact that many families do not conform to this expectation to begin with. Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. ..These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare***

legislation. *The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones*."

49. In **X v. Principal Secretary** 2022 SCC OnLine SC 1321 [3J] [C-IV, Vol. II, starts p.8286/pdf.8298 @p.8298-8299/pdf. 8310-8311, para 43-45] , this Hon'ble Court held "*The law must remain cognizant of the fact that changes in society have ushered in significant changes in family structures…Societal reality, as observed by this Court in Deepika Singh (supra), indicates the need to legally recognize non-traditional manifestations of familial relationships. Such legal recognition is necessary to enable individuals in nontraditional family structures to avail of the benefits under beneficial legislation, including the MTP Ac*t."

D. RIGHT OF LGBTQIA+ PERSONS TO CHOOSE THEIR MARITAL PARTNER

50. The right of LGBTQIA+ Persons to choose their own marital partner follows as a natural sequitur from this Hon'ble Courts decisions recognizing individual autonomy as regards sexual identity and orientation in **Navtej Singh Johar** (supra), **Justice K.S.Puttaswamy v. Union of India** [2017] 10 S.C.R. 569 [9J] as well the recognition of the right to choose one's marital partner in **Shafin Jahan v. Asokan K.M.** [2018] 4 S.C.R. 955 [3J] [Chandrachud J. (as he was then) C-IV, Vol. I, starts p.1094/pdf.1125 @p.1131/pdf.1162 para 86] and **Shakti Vahini v. Union of India** [2018] 3 S.C.R. 770 [3J] [C-IV, Vol. I, starts p.1134/pdf.1165 @p.1154/pdf.1185 para 45].

51. The right to privacy in **Justice K.S. Puttaswamy (supra)** was interpreted in **Navtej Singh Johar** (supra) [Dipak Misra CJI, Navtej C-IV, Vol. I starts p. 783/pdf.814@p.897/pdf.928, para 161], to protect the right to self-determination and autonomy in one's sexual orientation and sexual identity. This Hon'ble Court, in **Shafin Jahan v. Asokan K.M.** [2018] 4 S.C.R. 955 [3J] [Chandrachud J. (as he was then) C-IV, Vol. I, starts p. 1094/pdf.1125, @ p. 1131/pdf.1162, para 84], held that the right to marry a person of one's choice was within the exclusive of domain of each individual and was protected by a core zone of privacy that is inviolable under Article 21 of the Constitution of India. In **Shakti Vahini v. Union of India** [2018] 3 S.C.R. 770 [3J] [C-IV, Vol. I, starts p.1134/pdf.1165 @p.1154/pdf.1185 para 45], this Hon'ble Court held that the right to choose and marry a person of one's choice as a component of the right to dignity within Article 21 and that any infringement of this right would be a constitutional violation.

52. The opinion of Chandrachud, J. s (as he then was) in **Navtej Singh Johar** (supra) [Navtej C-IV, Vol. I starts p. 783/pdf.814@p.1072/pdf.1103, para 618.2] has recognized that members of the LGBTQIA+ Community are entitled to the full range of constitutional rights and liberties protected by the Constitution, choice of whom to partner with, not be discriminated against on the basis of sexual orientation, benefits of equal citizenship and equal protection of law. The right to legal recognition of marriage falls within these rights.

53. The Hon'ble High Court of Madras in a petition by a lesbian couple seeking protection from harassment, **Ms. S. Sushma & Anr. v. Commissioner of Police W.P. 7284/2021**[1J] [C-IV, Vol. III, starts p.610/pdf.620 @p.691-692/pdf.701-702, para 38]**,** held that "*under Article 21 of the Constitution LGBTQIA+ persons, like cis persons, are entitled to their privacy and have a right to lead a dignified existence, which includes their choice of sexual orientation, gender identity, gender presentation, gender expression and choice of partner thereo*f".

54. In **Navtej Singh Johar** (supra) [Navtej C-IV, Vol. I starts p. 783/pdf.814@p.1092/pdf.1123, para 644], Indu Malhotra, J. held that the criminalisation of sexual relations of the LGBTQIA+ community resulted in a denial of fundamental rights under Articles 14, 15 and 21, that the community has already suffered grave injustice for centuries, due to delay in providing redressal for the ignominy they have suffered, stemming from society's ignorance in understanding that homosexuality is after all, a natural condition.It is most respectfully submitted that this Hon'ble Court, by granting legal recognition to queer marriages would thus be taking a significant step towards remedying the injustice that LGBTQIA+ persons have long suffered.

E. MARRIAGE AS A RIGHT TO LIFE UNDER ARTICLE 21 OF THE CONSTITUTION OF INDIA

55. **The right to legal recognition of marriage is a necessary consequence of and part of the legal legitimacy already granted by courts of India to (i) sexual intimacy (ii) live-in relationships, and (iii) heterosexual marriages between queer partners:** The right to companionship and sexual intimacy of non-heterosexual persons under Article 21 was recognised by this Hon'ble Court in **Navtej Singh Johar** [then CJI Dipak Misra, C-IV, Vol. I starts p. 783/pdf.814@p.898/pdf.929, para 167]. Marriage is only the social and legal recognition of this companionship and sexual intimacy. Legal recognition of this relationship invites rights and liabilities for both parties. Indian courts have found

similar rights and liabilities to exist even in live-in relationships that in the nature of marriages, recognising that it is the social circumstances that make a marriage. To deny non-heterosexuals the right to marriage, but recognise their right to intimacy, prevents them from having families and allows such relationships to exist like marriages without rights and liabilities.

56. In order dated 12.6.2020 in **Madhubala v. State of Uttarakhand** 2020 SCC OnLine Utt 27 [1J] [C-IV, Vol. III, starts p.330/pdf.340 @p.330-331/pdf.340-341 para 3-6], the Hon'ble High Court of Uttarakhand recognised that an individual has the right to choose with whom they share companionship and a home. The Ld. Single judge held that consensual co-habitation between two individuals of the same gender identity is a right under Article 21 of the Constitution and it is the court's duty to protect the right to self-determination and freedom to choose their sexual orientation and partner. When live-in relationships in the nature of marriage are recognised and live-in relationships between queer partners have been recognised, the jurisprudence of the courts is leading towards the recognition of the right to marriage of non- heterosexual persons.

57. In **Chinmayee Jena @ Sonu Krishna Jena v State of Odisha** W.P. (Crl) 57/2020 [2J] [C-IV, Vol. III, starts p.122/pdf.132 @p.138/pdf.148, para 13], a transman and a woman sought protection from the court from interference with their live-in relationship. They argued that even if they are not allowed to enter in wedlock, they have the right to live together outside the wedlock. The Hon'ble Orissa High Court held that "*the petitioner has the right of self-determination of sex/gender and also he has the right to have a live-in relationship with a person of his choice even though such person may belong to the same gender as the petitioner.*"

58. Several other high courts have recognised the legitimacy of non-heterosexual relationships and marital partners after **Navtej Singh Johar** (supra) and have accorded them protection under habeas corpus jurisdiction. The following is a list of such cases for reference:- (i) Hon'ble Delhi High Court order dated 1.10.2018 in **Sadhana Sinsinwar & Anr. v. State & Ors** W.P. (Crl) 3005/2018 [1J] [C-IV, Vol. III, starts p.800/pdf.810 @p.800-801/pdf.810-811] (ii) Hon'ble High Court of Punjab and Haryana order dated 20.07.2020 in **Paramjit Kaur & Anr. v. State of Punjab** 2020 SCC OnLine P&H 994 [IJ] [C-IV, Vol. III, starts p.483/pdf.493 @p.483/pdf.493, paras 7-8]. (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. [1J] [C-IV, Vol. III, starts p.878/pdf.888 @p.878/pdf.888, para 3]

59. **<u>The right to make choices re: intimate matters of life like marital partner and family life are protected by the right to privacy and right to dignity under Article 21</u>:** The right to life guaranteed under Article 21 includes the right to privacy and dignity which allows an individual sovereignty over their own body. As observed by Chandrachud, J. (as he was then) in **Justice K.S. Puttaswamy** (supra) [C-IV, Vol. I starts p. 63/pdf.94@p.546/pdf.577, para 271] family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. The intimate choice of an individual to enter into marriage with a queer or non-heterosexual partner is within their right to privacy and right to live with dignity. Nariman, J. in **Navtej Singh Johar** (supra) [Navtej C-IV, Vol. I starts p. 783/pdf.814@p.967/pdf.998, para 350] citing this Hon'ble Court's judgement in **Justice K.S. Puttaswamy** (supra) recognised the right to make intimate choices within the right to privacy and right to live with dignity.

60. The right to marry of queer or non-heterosexual persons as recognised as part of the law in the United States in **Obergefell** (supra) was cited in the judgement of the Hon'ble Supreme Court in **Justice K.S. Puttaswamy** (supra) [C-IV, Vol. I starts p. 63/pdf.94@p.510/pdf.541, para 194] holding that "*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, Sotamayor 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***."""

61. This Hon'ble Court in **NALSA** (supra) [C-IV, Vol. I starts p. 711/pdf.742 @p. 764/pdf.795, para 75] referred to its judgement in **Anuj Garg v. Hotel Association of India** [2007] 12 S.C.R. 991 [2J] [C-IV, Vol. II, starts p.338/pdf.350 @p.352/pdf.364, para 34-35], wherein the court had held that personal autonomy includes both the negative right to not be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in.

62. **<u>Changes in the social institution of marriage must be reflected in law:</u>** Marriage as a social institution has developed over time and heteronormative, cisgender and patriarchal norms that uphold only heterosexual marriages as valid marriages are outside the purview of the Constitution. In **Joseph Shine v. Union of India** (2019) 3 SCC 39 [5J.], a constitution bench of this Hon'ble Court

recognised the change in the social institution of marriage and opined that law regulating this institution must reflect the right to privacy and dignity of citizens under the Constitution [Chandrachud, J. (as he was then) [C-IV, Vol. II, starts p.2952/pdf.2964 @p.2974/pdf.3086, para 200]

63. A.K Sikri, J., quoting Aharon Barak (former Chief Justice of the Supreme Court of Israel), in the case of **Jeeja Ghosh & Anr v. Union of India** [2016] 4 S.C.R. 638 [2J] observed that the constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites human rights into one whole. Human dignity as a constitutional factor is the factor that unites the human rights into one whole. Going on, he opined that Human dignity is a constitutional value and a constitutional goal. [C-IV, Vol. II, starts p.2884/pdf.2896 @p.2914/pdf.2926, para 37]

64. Interference in a personal relationship would constitute a serious encroachment into the right to freedom of choice of two individuals, as has been held by the Hon'ble Allahabad High Court in **Salamat Ansari v. State of UP** 2020 SCC OnLine All 1382: (2021) 1 All LJ 453 [2J]. Relying on the Hon'ble Supreme Court's decision in **Shafin Jahan** (supra) and **Justice K.S. Puttaswamy** (supra) it held that an individual on attaining majority is statutorily conferred a right to choose a partner, which if denied would not only affect his/her human right but also his/her right to life and personal liberty, guaranteed under Article 21 of the Constitution of India [C-IV, Vol. III, starts p.841/pdf.851 @p.842-843/pdf.852-853, paras 9-10; @p.845-846/pdf.855-856, paras 13-14].

F. MARRIAGE AS A RIGHT TO FREE EXPRESSION UNDER ARTICLE 19 (1)(a)

65. **Article 19(1)**: In **Navtej Singh Johar** (supra) [C-IV, Vol. I starts p. 783/pdf.814@p.927/pdf.958, para 268.7] this Hon'ble Court recognised that the expression of an individual's sexuality or sexual orientation or right to choose a partner is protected under Article 19(1)(a) and discrimination on the basis of sexual orientation will violate Article 19(1)(a).

66. Non-heterosexuals persons have the right to express their intimacies, companionship and personality to the world and the law through marriage and restriction of such right would fall foul of Article 19(1)(a). The choice of a marital partner is an expression of choice and exercise of freedom under Article 19(1)(a). In **NALSA** (supra) [C-IV, Vol. I starts p. 711/pdf.742 @p. 763/pdf.794, para 72], the Hon'ble Supreme Court recognised that an individual's gender identity is a

reflection of their personality and is part of Article 19(1)(a). In **Shakti Vahini** (supra) [3J] [C-IV, Vol. I, starts p.1134/pdf.1165 @p.1153/pdf.1184, para 43] and **Asha Ranjan v. State of Bihar** [2017] 1 S.C.R. 945 [2J] [C-IV, Vol. I starts p. 1/pdf.32@p.38/pdf.69, para 61] this Hon'ble Court has recognised that the right to choose who to marry is protected under Article 19 and cannot be restricted due to group thinking or class honour.

67. **The violation is not saved by Article 19(2)**: The restrictions on non-heterosexual marriages, denying the right to marriage only on the basis of their gender identity or sexual orientation is excessive and arbitrary. In **Navtej Singh Johar** (supra) [then CJI, Dipak Misra, C-IV, Vol. I starts p. 783/pdf.814@p.924/pdf.955, para 261-262] this Hon'ble Court found that Section 377 of the Indian Penal Code 1860 was violative of Article 19(1)(a) as it was an unreasonable restriction on sexual intercourse between consenting adults and did not harm public decency or morality. In **S. Khushboo v. Kanniammal** (2010) 5 SCC 600 [3J] [C-IV, Vol. II starts p. 6078/pdf.6090 @p. 6097-6098/pdf.6109-6110, para 45-47], this Hon'ble Court held that while decency and morality may be grounds on which reasonable restrictions can be imposed, this should not be beyond a rational or logical limit and must be tolerant of unpopular social views.

68. **A queer person's right to marry an individual of their choice is a freedom that they must be allowed to exercise under Article 19 read with Article 21**. J. Chandrachud (as he then was), speaking for the majority in **Justice K.S. Puttaswamy** (supra) [C-IV, Vol. I, starts p.63/pdf.94 @p.560/pdf.591 para 298] held that the right to privacy under Article 21 read with Article 19 allows them the inviolable right to determine how this freedom is exercised.

G. RIGHT TO MARRIAGE UNDER ARTICLES 14 AND 15

69. **Unequal treatment of heterosexual and non-heterosexual couples is violative of Article 14:** In **Navtej Singh Johar** (supra) [C-IV, Vol. I starts p. 783/pdf.814@ p.922/pdf.953, para 255] then CJI Dipak Mishra recognised the need to treat individuals belonging to the LGBT community equally with the same human, fundamental and constitutional rights as other citizens.

70. In **NALSA** (supra) [C-IV, Vol. I starts p. 711/pdf.742 @p. 766/pdf.797, para 83], this Hon'ble Court concluded that "*discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction*

or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution".

71. **There is no reasonable classification due to which non- heterosexual persons can be treated differently in relation to marriage**: There is no constitutionally permissible intelligible differentia which can justify treating non-heterosexuals and heterosexuals differently for the right to marriage.

72. The only distinguishing factor between queer marriages and heterosexual marriages is the ability for both parties in a heterosexual couple to reproduce. However, all heterosexual marriages are valid regardless of the ability to have biological children, nor does having the ability to have biological children act as a qualification for registration of a marriage. In **NALSA** (supra) [C-IV, Vol. I starts p. 711/pdf.742 @p. 764/pdf.795, para 76], this Hon'ble Court accorded legal recognition to transgender persons who are neither men or women and may or may not have reproductive capacities. This Hon'ble Court also recognised that such persons have issues with marriage and adoption and held that it was essential for the state to accord them full civil and citizenship rights (which includes the right to marriage).

73. Further, if any alleged majoritarian support of heterosexual marriage and opposition to queer marriage is cited as a classification- the "test of popular acceptance" that was used by this Court in Suresh Kumar Kaushal v. Naz Foundation (2014) 1 SCC 1 was rejected by this Hon'ble Court in **Puttaswamy** (supra) [Chandrachud J., (as he was then) C-IV, Vol. I starts p. 63/pdf.94@p.483/pdf.514, para 144] and **Navtej Singh Johar** (supra) [C-IV, Vol. I starts p. 783/pdf.814@p.1014/pdf.1045, para 464].

74. The non-existence of frameworks for regulation (inheritance divorce, maintenance etc.) cannot act as a bar to legal recognition and accordance of constitutionally mandated rights. In **Navtej Singh Johar** (supra) [C-IV, Vol. I starts p. 783/pdf.814@p.872/pdf.903, para 75], it was argued that there will be a cascading effect on other laws such as marriage laws, divorce laws, sexual crimes and open a floodgate of social issues. Despite this, the right of LGBTQIA+ persons to have sexual relationships was recognised and Section 377, IPC was decriminalised. In **NALSA** (supra) [C-IV, Vol. I starts p. 711/pdf.742 @p. 757/pdf.788, para 53] persons who did not come within the current framework of law were given space under the law and all consequent civil rights. "*Indian Law, on the whole, only recognizes the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and*

welfare legislations. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas...a constitutional Court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights"

75. **Manifest Arbitrariness under Article 14:** In **Shayara Bano v. Union of India** [2017] 9 S.C.R. 797 [5J], this Court held that "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." [C-IV, Vol. II starts p. 6391/pdf. 6403 @p. 6489/pdf. 6501, para 101] A constitution bench of this Hon'ble Court in **Joseph Shine** (supra) held that provisions of law that postulate a notion of marriage that subverts equality is manifestly arbitrary and bad in law [Per Chandrachud, J, (as he was then) C-IV, Vol. II, starts p.2952/pdf.2964 @p.3063pdf.3075, para 168-169] In the same judgement, this Hon'ble Court held that if the purported rationale of the provision has outlived its purpose and/or doesn't square with constitutional morality, the same would be manifestly arbitrary. [Per Nariman, J, SCR p. 858, SCR para 23] There is no adequate determining principle to rejecting the right of marriage to queer couples.

76. Further, the denial of equal marriage rights is arbitrary because it privileges the institution of marriage over the privacy, dignity and autonomy of queer persons as protected by Article 21. In **Joseph Sine** (supra) this court held that even the familial structures are not private spaces where constitutional rights can be violated. [SCR p. 907, SCR para 50]

77. **Denial of the right to marriage is discrimination under Article 15(1)**: "Sex" under Article 15 includes gender and sexual orientation [**Navtej Singh Johar** (supra) [Chandrachud, J. (as he was then) C-IV, Vol. I starts p. 783/pdf.814@ p.1004/pdf.1035, para 438; Indu Malhotra J. p.1081/pdf.1112, para 638.2] Discrimination against non-heterosexuals is discrimination on the basis of gender, sex and sexual orientation and is violative of Article 15(1).

H. RIGHT OF QUEER PERSONS NOT TO SUFFER DISABILITIES UNDER ARTICLE 15(2) DUE TO THE DENIAL OF THE RIGHT TO MARRIAGE

78. Without legal recognition of their marriage, queer persons are also denied access to commercial establishments and public spaces and there is a violation of their rights under Article 15(2). They do not have the entitlements of a marital partner in privately accessed necessities and activities like insurance, hospitalisation and booking of hotels.

79. For example Section 39(7) of the Insurance Laws (Amendment) Act, 2015, accords nominees who are immediate family members such as spouse, parents or children the status of beneficial nominee. If any of these persons are made a nominee, the death benefit will be paid to these persons and other legal heirs will have no claim over the money. [C-III, starts p. 2504/pdf.2510@ p. 2524, pdf. 2530] Similarly, Section 10A(4) of the Employees' Compensation Act, 1923 allows the Commissioner under the Act to inform the dependents of a deceased workman about the possibility of claiming compensation. Section 2(1)(d) of the Employees' Compensation Act, 1923 defines "dependent" to include the surviving spouse. [C-III, starts p. 865/pdf.871@ p.867, 878, pdf.873, 884]

80. Further, discrimination of queer couples by private establishments providing services should be held violative of rights under Article 15(2) of the Constitution. In **Indian Medical Association v Union of India** (2011) 7 SCC 179 [2J] [C-IV, Vol. II starts p. 2324/pdf.2336 @p.2404-2405/pdf.2416-2417, para 186-189], this Hon'ble Court on an examination of Constituent Assembly debates held that "shops" under Article 15(2) should be interpreted broadly to not just refer to physical shops, but also any provision of goods or services in the market. The Supreme Court further held that the private sector cannot conduct services in a manner that is discriminatory. Article 15(2) can be interpreted to mean that such establishments do not have to just refrain from discrimination, but also make sure that their rules of access do not perpetuate social disadvantages.

81. In **Vishaka v. State of Rajasthan** (1997) 6 SCC 241 [3J] [C-IV, Vol. II starts p. 8256/pdf.8268 @p. 8266/pdf.8278, para 16], private and public employers were held to the constitutional obligation of providing a framework for protection against sexual harassment. The state was recognised to have the constitutional duty to protect individuals from sexual harassment in the workplace and due to the void of legislation, the Supreme Court issued guidelines for both private and public workplaces.

82. The Hon'ble Supreme Court, in **Indian Young Lawyers Assn. v. State of Kerala** [2018] 9 S.C.R 561 [5J] held that equality of all human beings entails being free from the restrictive and dehumanising effect of stereotypes and being entitled equally to the protection of the law. [C-IV, Vol. II starts p. 2424/pdf.2436

@p. 2615/pdf. 2627, para 300]

I. INTERPRETING THE WORD "BRIDE" AND "BRIDEGROOM" AND "MAN" AND "WOMAN" IN THE FMA AND SMA

83. In **NALSA** (supra) this Hon'ble Court directed the Central and State Governments to grant legal recognition of transgender persons including "third gender" persons: "*It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on*." [C-IV, Vol. I starts p. 711/pdf.742 @p. 777/pdf.808, para 119]

84. This Parliament then enacted the **Transgender Persons (Protection of Rights) Act, 2019** and the **Transgender Persons (Protection of Rights) Rules, 2020**. The object of the 2019 Act is to "provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto." Section 2(k) of the Act defines a "transgender person" as "a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta." The form for the Transgender Identity card under the 2020 Rules even envisages the details for the "spouse" of a transgender person. [Act - C-III, starts p. 3193/pdf.3199 object@ p. 3195/pdf.3201 s.2(k) @p. 3196/pdf.3202] [Rules - C-III, starts p. 3217/pdf.3223, form @p. 3224/pdf. 3220]

85. Following the lead of this Hon'ble Court in recognising the equal rights and dignity of the members of the queer community, courts across the country have recognised the fluidity of gender and provided relief to queer litigants. The Madras High Court in **Arunkumar v. Inspector General of Registration** [1J] (supra) recognised that sex and gender are not one and the same when holding that a marriage solemnised between a male and a transwoman is a valid marriage. It further held, "*Beyond the man-woman binary, there are as many as 58 gender variants. Of course, we use the expression "transgender" as an umbrella term.*" [C-IV, Vol. III, starts p.85/pdf.95 @p. 89/pdf. 99, para 16-17; p.92/pdf.102, para

28]. The Andhra Pradesh High Court in **Matam Gangabhavani v. State of Andhra Pradesh** 2022 SCC OnLine AP 200 [1J] [C-IV, Vol. III, starts p.338/pdf.348 @p. 355-356/pdf. 365-366, paras 75-76], Rajasthan High Court in Order dated 13.11.2017 in **Ganga Kumari v Rajasthan**, Writ Petition No. 14006/2016 [1J] [C-IV, Vol. III, starts p.203/pdf.213 @p.216/pdf. 226] et al. have all stepped in to direct the government to provide recognition for transgender persons in fields such as education and employment because despite legal recognition, transgender persons still do not enjoy full citizenship rights.

86. Marriage is one such citizenship right where courts such as in **Arunkumar** (supra) have had to step in, because marriage statutes do not specifically provide for marriage of transgender persons.

87. In **Independent Thought** v. **Union of India** [2J] (2017) 10 SCC 800, this Court invalidated the marital rape exception as applicable to married girls between the ages of 15 and 18 on grounds of:

1) unconstitutionality [C-IV, Vol. II, starts p.2197/pdf.2209 @p. 2217/pdf. 2229, para 1; @p. 2283/pdf.2295, para 197] and;

2) harmonious construction of Exception 2 to Section 375 IPC with the Protection of Children from Sexual Offences Act, 2012 the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Prohibition of Child Marriage Act, 2006 [C-IV, Vol. II, @p. 2251/pdf.2263, para 105; @p. 2283/pdf.2295, para 197]

88. This Hon'ble Court has settled jurisprudence on reading down provisions of an Act, to save it from unconstitutionality. In **Corp. of Calcutta** v **Liberty Cinema**, [1965] 2 S.C.R. 477 [5J], this court read the narrow construction of the word "fees" to mean "tax" to save section 548 of the Calcutta Municipal Act, 1951 from unconstitutionality. [C-IV, Vol. II, starts p.1171/pdf.1183 @p.1173-1174/pdf.1185-1186, para 7-10] Similarly, in **Express Newspapers Ltd** v. **Union of India**, AIR 1958 SC 578 [5J], 'the criteria of the capacity of the industry to pay' was held to be an essential condition for fixation of wages and was interpreted to be part of the criteria given under section 9(i) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. [C-IV, Vol. II, starts p.1741/pdf.1753 @p.1818-19/pdf.1830-31, para 44-45] In **Githa Hariharan** v. **Reserve Bank of India,** [1999] 1 S.C.R. 669 [3J], this court held that the words "after" in section 6 Hindu Minority and Guardianship Act of 1956 to have the meaning "in the absence of" to subserve the needs of the statute. [C-IV, Vol. II, starts p.1892/pdf.1904 @p. 1898-1899/pdf.1910-1911, para 7-10; @p.1910/pdf.1922, para 45-46] Through purposive interpretation this Court has also widened the applicability of statutes, such as in **X** v. **Principal Secretary**

2022 SCC OnLine SC 1321 [3J] where it held that Rule 3B of the Medical Termination of Pregnancy Rules, 2003 would also apply to unmarried women. [C-IV, Vol. II, starts p.8286/pdf.8298 @p.8314-8315/pdf.8326-8327, paras 120-121]

89. It is trite that it should not be lightly assumed that what the Parliament has given with one hand, it took away with the other. [**Central Bank of India v Ravindra**, (2002) 1 SCC 367 [5J] [C-IV, Vol. II, starts p.675/pdf.687 @p.704-705/pdf.716-717, para 42]. The rule of harmonious construction used to give effect to different provisions of the same enactment has also been applied when different statutes conflict with each other. This Court in **Jugal Kishore v. State of Maharashtra** (1989) Supp (1) SCC 589 [2J] emphasised the need to a constructive approach to interpretation to avoid contradiction in different acts: "*Unless the Acts [Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961 and the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958], with the intention of implementing various socio-economic plans, are read in such complementary manner, the operation of the different Acts in the same field would create contradiction and would become impossible. It is, therefore, necessary to take a constructive attitude in interpreting provisions of these types and determine the main aim of the particular Act in question for adjudication before the court*." [C-IV, Vol. II, starts p.3104/pdf.3116 @p.3107/pdf.3119, para 8]

90. This was also done in **Independent Thought (supra)**, where this Court held, "*Long ago, it was said by Lord Denning that when a defect appears, a judge cannot fold his hands and blame the draftsman but must also consider the social conditions….Viewed from any perspective, there seems to be no reason to arbitrarily discriminate against a girl child who is married between 15 and 18 years of age. On the contrary, there is every reason to give a harmonious and purposive construction to the pro-child statutes to preserve and protect the human rights of the married girl child*." [C-IV, Vol. II, starts p.2197/pdf.2209 @p. 2250-2251/pdf.2262-2263, para 101, 105]

91. In the same manner, to harmonise the legal rights of transgender community and sexual minorities recognised by this court, various high courts and the legislature in the Transgender Persons (Protection of Rights) Act, 2019, this Court may interpret the relevant provisions of the SMA and the FMA to specifically include transgender persons in the following way:-

1) This court may interpret Sections 12, 15, 22, 23, 25 and 27 of the SMA which use the terms "husband" and "wife" when providing for the solemnization, registration and nullity of marriage, and Section 44, which provides the

punishment for bigamy, as "husband or wife **or spouse**", with "or spouse" being implied terms in the legislation, interpreted by this Court to save the SMA from unconstitutionality. The terms "Bride" and "Bridegroom" that have been used in the Third and Fourth Schedule of the FMA for the declarations by both parties and certification of marriage be read to include the word "spouse" in line with the above.

2) The terms "husband" and "wife" are used in Section 13 and 18 of the Foreign Marriage Act in relation to the solemnisation of marriage and provisions where matrimonial reliefs under the Special Marriage Act are available under the Foreign Marriage Act. This Court read the relevant part of the provisions as "husband or wife **or spouse**", with "or spouse" being implied terms in the legislation, interpreted by this Court to save the Foreign Marriage Act from unconstitutionality, in the same manner as discussed in relation to the SMA above.

J. FOREIGN JUDGEMENTS ON MARRIAGE EQUALITY

92. This Hon'ble Court in **NALSA** (supra) relied upon various foreign judgements and international conventions to highlight that the principle of guarantee to equality and non-discrimination on the basis of gender is gaining prominence in international law and thus may be applied in India. [C-IV, Vol. I starts p. 711/pdf.742 @p.745/pdf.776, para 28; @p.757/pdf. 788, para 51-52]

93. As stated earlier, the Supreme Court of the United States, in the case of **Obergefell vs. Hodges** 576 U.S. 644 (2015) granted legal recognition to same sex marriages. Thus, now all states in the US are now required to issue marriage licenses to same sex couples and recognize same sex marriage validly performed in other jurisdictions. While doing so, it upheld several relevant principles which can be applied in the context of India. Important principles upheld in the judgement are:

(i) the right to personal choice regarding marriage is inherent in the concept of individual autonomy and the right to privacy with respect to this matter must be recognized as it is for other family matters [C-IV, Vol. IV, starts p.2399/pdf.2407 @p. 2415/pdf.2423, 3rd para] (ii) a legally recognized marriage was the source for various other rights and privileges and that non-recognition of same-sex marriages was resulted in denial of these rights to that community [@p. 2417/pdf.2425, last para]; (iii) in Lawrence v. Texas 539 U.S. 558 (2003), the court had drawn upon principles of liberty and equality to decriminalise private sexual conduct between

gays and lesbians. The same rationale will apply to same-sex marriages and that the challenged laws abridged the central precepts of equality and that the right to marry is a fundamental right inherent in the liberty of the person [C-IV, Vol. IV, @p. 2417/pdf.2423, 2nd para]; (iv) the Due Process and Equal protection clauses of the fourteenth amendment to the US Constitution invalidate the state laws under challenge to the extent that they excluded same-sex couples from civil marriage on the same terms and conditions as opposite sex couples [C-IV, Vol. IV, @p. 2425/pdf.2433, last para]; (v) the dynamic of the American constitutional system was such that individuals need not await legislative action before asserting a fundamental right and that an individual could invoke a right to constitutional protection when he or she was harmed, even if the broader public disagreed and even if the legislature refused to act [C-IV, Vol. IV, @p. 2427/pdf.2435, 2nd para].

94. The Constitutional Court of South Africa, in the case of **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 [9J.], declared that the common law definition of marriage was inconsistent with the Constitution and invalid to the extent that it did not permit queer couples to enjoy the status and the benefits coupled with responsibilities available to heterosexual couples. The court further declared that the omission of the words "or spouse" after the words "or husband" in Section 30(1) of the Marriage Act, in South Africa was inconsistent with the Constitution [C-IV, Vol. IV, starts p.1999/pdf.2007,@p. 2050/2058, para 82]. The Marriage Act was declared invalid to the extent of this inconsistency. The court directed the Parliament of South Africa to frame necessary legislation to grant legal recognition to non heterosexual marriages. It suspended the declaration of invalidity for a period of 12 months and held that if the Parliament would 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. [@p.2098/pdf.2106, para 161; @p.2100/pdf.2018, Order para 2] The Supreme Court, in the case of **Navtej Singh Johar** (supra) [Chandrachud, J. (as he was then) [C-IV, Vol. I starts p. 783/pdf.814@ p.1049/pdf.1080, para 550] relied upon a decision of the Supreme Court of Nepal in the case of **Sunil Babu Pant vs. Nepal Government** Writ No. 914 of the year 2064 BS (2007 AD) [2J.], wherein it was held, in the context of samesex marriages that one adult had the right to enter into marital relations with another adult wilfully. The Supreme Court of Nepal directed the Nepalese government to enact new legislation or amend existing legislation to ensure that

persons of all sexual orientations and gender identities could enjoy equal rights [C-IV, Vol. IV, starts p.3200/pdf.3208,@p. 3223-24/pdf 3231-32].

95. The Supreme Court of India, in the case of **Navtej Singh Johar** (supra) [Chandrachud, J. (as he was then) C-IV, Vol. I starts p. 783/pdf.814@ p.1050/pdf.1081, para 551], also cited a decision of the European Court of Human Rights in the case of **Oliari v. Italy** 276 [2015] ECHR 716 277 [7J. Chamber], wherein it was affirmed that same-sex couples "are in need of legal recognition and protection of their relationship" . The ECtHR concluded that gay couples are equally capable of entering into stable and committed relationships in the same way as heterosexual couples [C-IV, Vol.IV, starts p.2502/pdf.2510 @p.2553/pdf.2561, para 165] The ECtHR examined the domestic context in Italy, and noted a clear gap between the "social reality of the applicants", who openly live their relationship, and the law, which fails to formally recognize same-sex partnerships [@p. 2556/pdf.2564, para 173]. The ECtHR held that in the absence of any evidence of a prevailing community interest in preventing legal recognition of same-sex partnerships, Italian authorities "have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions"[@p. 2558/pdf.2566, para 185].

96. Indu Malhotra J. in her judgement in **Navtej Singh Johar** (supra) [C-IV, Vol. I starts p. 783/pdf.814@ p.1075/pdf.1106, para 631] recognized the global trend towards the right to marry : *"631. The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights. In 2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its Annual State Sponsored Homophobia Report that 124 countries no longer penalise homosexuality. The change in laws in these countries was given effect to, either through legislative amendments to the statutory enactments, or by way of court judgments. Relationships between same-sex couples have been increasingly accorded protection by States across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several countries have enacted enabling legislations which protect LGBT persons from discrimination, and allow them to adopt children...."*

97. The United States Supreme Court, in **United States v. Windsor** 570 U.S. 744 (2013) [9J.] while examining the effect of S.3 of the Defence of Marriage Act in excluding same-sex couples from the federal definition of "marriage" and

"spouse" held the same to be unconstitutional. Observing that the exclusion places same sex couples in an untenable position of being in a second-tier marriage. It further observed that this differentiation demeans the couple, whose moral and sexual choices the Constitution protects [C-IV, Vol IV, starts p. 3235/pdf. 3243, @p.3260/pdf3268 last para].

K. INTERNATIONAL LAW AND MARRIAGE EQUALITY

98. Several international law instruments recommend that states legally recognize marriage equality and not deny civil rights on the basis of sexual orientation.

99. The United Nations General Assembly (UNGA) released a **"Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/HRC/35/36"** dated 19th April, 2017 which stated, "21. Other provisions (e.g. article 7 of the **Universal Declaration of Human Rights** and article 26 of the **International Covenant on Civil and Political Rights)** reaffirm the right to equality before the law and equal protection of the law without discrimination. [C-II, Vol. I, starts p. 484/pdf. 512, @p. 491/pdf. 519] The stricture against discrimination was deliberated upon by the Human Rights Committee in regard to a seminal case, **Toonen v Australia**, that concerned the presence of a local law that prohibited same-sex relations. The Committee found that the local law in question violated article 17 of the Covenant in regard to the right to privacy, and that the reference to "sex" in article 2(1) (as well as in art. 26) covered sexual orientation." [C-IV, Vol.IV, starts p.3225/pdf.3233 @p.3232/pdf.3240, para 8.6-8.7]

100. The Inter American Court of Human Rights ("IACtHR"), upon being requested by the Republic of Costa Rica gave Advisory Opinion Oc-24/17 Of November 24, 2017, titled "**Gender Identity, And Equality And Non-Discrimination Of Same-Sex Couples State Obligations Concerning Change Of Name, Gender Identity, And Rights Derived From A Relationship Between Same-Sex Couples (Interpretation And Scope Of Articles 1(1), 3, 7, 11(2), 13, 17, 18 And 24, In Relation To Article 1, Of The American Convention On Human Rights)**" and concluded : "*7. The State must recognize and ensure all the rights derived from a family relationship between same-sex couples in accordance with the provisions of Articles 11(2) and 17(1) of the American Convention, as established in paragraphs 200 to 218." "8. Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to*

marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples, as established in paragraphs 200 to 228." [C-IV, Vol. IV, p. 1393/pdf.1401, @p. 1475/pdf.1483, para 7-8]

L. THE TRANSFORMATIVE CONSTITUTION OF INDIA

101. The nature of our constitution is transformative and rights thereunder aim to develop with society and change as society changes. The right to marry for queer persons, which was not recognised before, should be recognised now. This transformative constitutionalism allows the Constitution to be a living document that breathes rights into communities which have been previously social and legally marginalised. The Constitution must be interpreted in a manner to protect rights of all individuals regardless of their gender identity or sexual orientation.

102. This Hon'ble Court, in the case of **Navtej Singh Johar** (supra), discussed the concept of "transformative constitutionalism" and relied upon a number of its own previous judgements to hold that the Constitution is an "organic charter of progressive rights" [Chandrachud, J. (as he was then) starts p. 1071/pdf.1102, para 615-617; Dipak Misra, CJI (as he was then) C-IV, Vol. I@ p.879/pdf.910, para 92-122, 268.3]

103. In **NALSA** (supra) this Hon'ble Court recognised the social and cultural identities of the Hijra, Arvani and Jogappa communities. [C-IV, Vol. I starts p. 711/pdf.742 @p. 781/pdf.812, para 135] These communities have their own established institutions of family, household and kinship that are not based on marriage, but rather on their own institutionalised practices. Several other queer communities are based on relationships of love, belonging and shared experiences that reject the traditional cisgender heterosexual patriarchal family. Conceptions of family and kinship under law, hence should recognise communities of people who may vary in their personal identities but live together in a shared experience of queerness and love to not participate in the compulsory heteronormative family. The practices and relationships of queer people deserve to be recognised, as much as heterosexual relationships are, in society and in law. By the same token, voluntary relationships of marriage between same sex and queer persons must be recognised under Articles 14, 15, 19 and 21.

104. Our courts have time and again cast a positive obligation upon states to take active measures to protect and ensure the fulfilment of the right to life and

personal liberty under Article 21. In **Vishaka vs. State of Rajasthan** AIR 1997 6 SCC 241, this Hon'ble Court went a step further and held that since domestic law on sexual harassment of women at the workplace was absent, effective measures with respect to the same were to be put in place and implemented to protect fundamental rights [C-IV, Vol. II starts p. 8256/pdf.8268 @p. 8266/pdf.8278, para 16]. Similarly, in **Ms. S. Sushma & Anr. v. Commissioner of Police** (supra), the Hon'ble High Court of Madras issued a slew of guidelines/directions to the police, Union Government, State Governments as well as certain ministries/departments to protect same-sex couples from discrimination, harassment and to provide them support [C-IV, Vol. III, starts p.610/pdf.620 @p.697-699/pdf.707-709, para 43]

105. Constitutional courts must protect constitutional morality and disregard social morality. It is the duty of the courts to ensure that queer persons, however small in number or disregarded by society, are given the full protection of rights under the Constitution. In **Navtej Singh Johar** (supra) the then CJI Dipak Mishra held that in the garb of social morality, members of the queer community cannot be denied their fundamental rights. [C-IV, Vol. I starts p. 783/pdf.814 @p.889/pdf.920, para 132-133]