IN THE SUPREME COURT OF INDIA
TRANSFER PETITION (CIVIL) NO. 3025 OF 2022

IN THE MATTER OF:

Mr. Joydeep Sengupta & Ors. ….PETITIONERS

VERSUS

Union of India & Ors. …RESPONDENTS

TRANSFER PETITION (CIVIL) NO. 3007 OF 2022

AND IN THE MATTER OF:

Mellissa Ferrier & Anr. …..PETITIONERS

VERSUS

Union of India and Ors. …..RESPONDENTS

SUBMISSIONS OF MS. KARUNA NUNDY IN REJOINDER 10th MAY 2023

Proposition 1: Chapter III of the Special Marriage Act, sections 15- 18, require the "Registration of Marriages Celebrated in Other Forms". These are gender neutral.

Proposition 2: To the extent the phrase "form or marriage" u/s 15 Chapter presupposes extant validity under law, the common law may be brought to bear to develop the contours of the right through stare decisis.

Proposition 3: Apprehensions of unforeseen consequences are unfounded as some forms of queer marriage already exist in law. And indeed the common law exists to address unforeseen consequences on a case by case basis.

I. Recognition under Special Marriage Act, 1954 (henceforth SMA)

a) At first instance, marriage may be registered under Chapter III, specifically section 15 of the SMA. s. 15 states,

> *15. Registration of marriages celebrated in other forms.—*
>
> *Any marriage **celebrated,** whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872 (3 of 1872) or under this Act, **may be registered** under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely*
> *(a) a **ceremony of marriage** has been performed **between the parties** and they have been living together **as husband and wife** ever since;*
> *(b) neither party has at the time of registration more than one spouse living;*

(c) neither party is an idiot or a lunatic at the time of registration;
(d) the ***parties have completed the age of twenty-one years*** *at the time of registration;*
(e) the ***parties are not within the degrees of prohibited relationship****:*
Provided that in the case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and
(f) the ***parties have been residing within the district of the Marriage Officer for a period of not less than thirty days*** *immediately preceding the date on which the application is made to him for registration of the marriage.*

b) The section pertains therefore not to the *solemnisation* of marriage under statute but to the registration of marriage of various communities where the practice is not otherwise codified. The marriage need only have been "celebrated" in any form. The reference to "parties" is gender neutral, they must have completed 21 years and not be within the degrees of prohibited relationship.

c) With regard to the requirement that the parties "have been living together *as* husband and wife" since the ceremony, it is submitted that Black's Law Dictionary, Fourth Edition, defines 'as' to mean "like, similar to, of the same kind, in the same manner, in the manner in which; with significance of in degree, to that extent, so far; it may also have the meaning of because, since, or it being the case that; in the character or under the name of." This applies to living together in a subsisting relationship of marital character between parties of any gender. Therefore, for registration of a marriage/ union celebrated between a non-heterosexual couple u/s 15, all that would be required would be that the couple in question had been living like a married couple. Such a proposition would not require the reading down or indeed the reading of words, into the Statute.

d) s18 of the SMA states that from the date of registration, the marriage will be deemed to be a marriage solemnized under the Act with all its attendant consequences. Therefore, the Special Marriage Act, 1954 makes no distinction between a marriage 'solemnised under s.4' or simply 'registered under s.15' to enable the couple to avail the material benefits of being married.

c) **Alternatively** this Hon'ble Court may recognise the principles that are in pari materia to the solemnisation of marriages under Chapter II and the law on this may be developed on a case by case basis by courts until the legislature makes law. This may be done on the following basis (as agreed upon broadly by most of the Petitioner counsels):

- Declare that reference to the word 'person' or 'spouse' under Section 4 of the Special Marriage Act includes a non-heterosexual person. Accordingly hold that any two non-heterosexual persons are entitled to get their marriage solemnized under the provisions of the Special Marriage Act.

- (a) The term husband/wife in the SMA [or any other allied law] will be read as 'spouse', except where the context otherwise requires.

OR

(b) To the extent the provisions of the SMA or any other law for the time being in force are enacted for a 'wife' against a 'husband' in a heterosexual marriage or for a 'woman' against a 'man' in a gender specific context.

- Our table on workability submitted on 26.4.23 details our proposed reading of the SMA provisions [as a man or third gender person or woman or third-gender person, wherever appropriate.]
- With respect to Section 4(c), it will cover same-gender couples and those involving transgender persons. The words 'male' and 'female' in Section 4(c) to include any two persons who identify in the male gender (including trans-man) and/or in the female gender (including trans-woman). The word 'transgender person' refers to a person who does not identify either as 'male' or 'female'. Section 4(c) then reads as:

  (*c) the male has completed the age of twenty-one years, and the female or the transgender person the age of eighteen years.*
- The Court has not ruled on any matter of personal laws, including the issue of justiciability thereof. The provision of Section 21A will apply, however the consequences of the same on the personal laws will be considered on a case-by-case basis.
- To the extent that there is a *casus omissus* in matters, *inter alia,* of succession, non-secular adoption etc. We have no reason to doubt that Parliament will enact a comprehensive code to regulate the same in a non-discriminatory manner.
- In all other laws, rules and regulations, including the provisions of the Special Marriage Act other than those mentioned above, the principles laid down in this judgment will apply and their applicability and/or constitutionality will fall to be considered independently.

II. Marriage as a creature of common law

a) Parsi marriage laws were a creature of common law, prior to their codification. There is no religious source. During their emigration from Persia, their books were lost, creating a vacuum in law. [Ref: Compilation p.9, pdf. 11 Chapter 3, p. 136, *The Limits of English Law, Mitra Sharafi, Law and Identity in Colonial South Asia: Parsi Legal Culture*, 1772-1947 (New York: Cambridge University Press, 2014)]

b) Marriage & divorce between Parsis therefore, was regulated by English Ecclesiastical (or Christian) law as the "default for Zoroastrians living in presidency towns like Bombay" [Ref: Compilation p.12, pdf. 14, Chapter 3, p. 139, *Sharafi (ibid)*]

c) In *Cursetjee v. Perozeboy, Privy Council,* 1856 SCC OnLine PC 6 : (1854-57) 6 Moo IA 348, the Appellant husband objected to the ecclesiastical jurisdiction of the Court to decide the matrimonial dispute between a Parsi couple and to apply Christian law. [Ref: Compilation, p.16, pdf. 18]

d) There was, therefore, a legal vacuum and no appropriate law to regulate the marriage of Paris, though they too had an undisputed right to marry. The Privy Council in *Cursetjee v. Perozeboy, Privy Council,* 1856 SCC OnLine PC 6 : (1854-57) 6 Moo IA 348, suggested that the Supreme Court of Bombay (as it then was) deal with Parsi marriages in its civil jurisdiction, and not its 'ecclesiastical' jurisdiction, as the proceedings on the civil side might be adapted to the circumstances of each case as justice may require.

e) In this context, the Privy Council held, *"The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos; but the Ecclesiastical law has no such flexibility. Change it in its essential character, and it ceases to be Ecclesiastical law altogether.*
For the reasons we have stated, we think that a suit for the restitution of conjugal rights, strictly an Ecclesiastical proceeding, could not, consistently with the principles and rules of Ecclesiastical law, be applied to parties who profess the Parsee religion; ***but we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them. We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them, but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief;*** *but it must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as, for time out of mind, were incident to their own caste; nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages.* ***Such remedies we conceive that the Supreme Court on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow.*** *In suits commenced on the civil side, the peculiar difficulties which belong to the exercise of Ecclesiastical jurisdiction in some matrimonial cases would not arise.* ***Proceedings might be conducted on the civil side with such adaptation to the circumstances of the case as justice might require, though on the Ecclesiastical side such modification would be wholly irreconcilable with Ecclesiastical law."*** [Ref: Compilation, p.34-35, pdf. 36-37]

f) No *ex ante* decision on the specifics of Parsi marriage was made in this case but **the implicit assumption that Parsis had a right to marry was given effect to.**

g) The Court held that any vacuum in law was to be adequately addressed by appropriate modifications & adaptations. [Also ref: Compilation, p.40, pdf.42, Chapter 4, p. 172, Reconfiguring Male Privilege, Mitra Sharafi, Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772-1947 (New York: Cambridge University Press, 2014)]

h) Thereafter, the Bombay High Court in **Rachel Benjamin v. Benjamin Soloman Benjamin: (1926) Vol.28 Bom.LR 328,** by relying on, *inter alia,*

Cursetjee (supra), held that the High Court has jurisdiction to adjudicate over matrimonial matters concerning Jews, and that the "law of the parties" would be applied in such cases. [Ref: Compilation p.50, pdf. 52]

i) The Law Commission Report No. 211 titled *Laws on Registration of Marriage and Divorce – A Proposal for Consolidation and Reform, 2008,* shows Bahai & Jewish marriages based on uncodified custom are valid when solemnized by religious officials of the community, which has a system of certification of marriages. There is however no system among either communities for the transmission of marriage records to any authority under control of the State. There is no legal requirement, or practice, of registering the Bahai or the Jewish marriages with the State registry. [Ref: Compilation, p.64, pdf. 66]

j) One of the recommendations that the Commission makes in this context, is that it should be made mandatory for the "officiating priest" of every marriage [including Jewish & Bahai religious leaders] to prepare and maintain proper records of all marriages in a prescribed form. [Ref: Compilation p.66-67, pdf. 68-69]

III. Supreme Court's Powers Under Art. 141 & 142:

a) Once this court recognises the right to marriage of queer persons, the law may develop through common law and stare decisis and when the legislature acts the statute may occupy the field. This Hon'ble Court in various judgements has exercised powers under Article 141 and 142 to declare law in the sphere of marriage where the legislature has not made law. This includes alternate remedies for divorce in Shilpa Sailesh v. Varun Sreenivasan 2023 SCC OnLine SC 544, guidelines for "preventive, remedial and punitive measures" for honor crime due to inter-caste marriages in Shakti Vahini v. Union of India, (2018) 7 SCC 192 and directions for executive orders by states and UTs for maintaining records of marriages.

b) In Shilpa Sailesh v. Varun Sreenivasan 2023 SCC OnLine SC 544, a constitution bench of this Hon'ble Court finding that under Article 142 [para 50] "***this Court can depart from the procedure as well as the substantive laws, as long as the decision is exercised based on considerations of fundamental general and specific public policy***" [Ref: Compilation p.141-142, pdf. 143-144] held that in proceedings for divorce under the Hindu Marriage Act, this Hon'ble Court can under Article 142 can waive the period and the procedure prescribed under Section 13-B of the Hindu Marriage Act for mutual divorce, quash and dispose of other/connected proceedings under the Domestic Violence Act, Section 125 of the Cr.P.C., or criminal prosecution primarily under Section 498-A and other provisions of the I.P.C. and decree dissolution of marriage on a finding of irretrievable breakdown of marriage. On powers under Article 142 this court held, [para 14] "…*As explained in Supreme Court Bar Association (supra), the exercise of power under Article 142(1) of the Constitution of India being curative in nature, this Court would not ordinarily pass an balanced approach, to hold that Article 142 being curative in nature and a constitutional power cannot be controlled by any statutory provision, but*

this power is not meant to be exercised ignoring the statutory provisions or directly in conflict with what is expressly provided in the statute. ***At the same-time, it observes, that this Court will not ordinarily discard a statutory provision governing the subject, except perhaps to balance the equities between the conflicting claims of the parties to "iron out the creases" in a 'cause or matter' before it***." [Ref: Compilation p.120, pdf. 122]

c) In Shakti Vahini v. Union of India, (2018) 7 SCC 192 (3J), this Hon'ble Court laid down guidelines for "preventive, remedial and punitive measures" "to meet the challenges of the agonising effect of honor crime". [C-IV, Vol. I, starts p.1134/pdf.165 @p. 1157/pdf.1188]

d) In Seema v. Ashwani Kumar (2005) 4 SCC 443 [1J] [para 4]*"During the hearing of this petition, it appeared to us that in the absence of records relating to dates of marriages and parties to the marriage, problems have come up which have far-reaching consequences. We, therefore, request learned Solicitor General to consider whether* ***government orders by way of executive instructions can be issued, on the basis of directions of this Court, to various States and Union Territories to authorise officials specifically to keep record of marriages so that they can be placed as evidence in different proceedings if the necessity arises.*** *Learned Solicitor General submitted that there may be necessity of a suitable legislation in this regard as the government orders/executive instructions may not suffer.* ***We are of the view that until a suitable legislation is made, the government orders/executive instructions can be made enforceable in terms of the orders of this Court. These may be implemented where there is no statutory prescription for recording/registering the marriage, and may be done as an additional measure when there is any such prescription****."* [Ref: Compilation p.148-149, pdf. 150-151]

e) In Rudul Sah v. State of Bihar, (1983) 4 SCC 141 [3J], this Hon'ble Court recognised the right of compensation under Article 21, which can be enforced under Article 32 even though the ordinary processes of court can also be invoked. On the basis of this ratio, constitutional courts across the countries have under the common law principle of stare decisis directed compensation. [para 10] "***In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated.*****"** Therefore, where there is a right, the right must be capable of being exercised. In the instant case, similar to Rudul Shah, such law may be recognised and developed under common law. [Ref: Compilation p.74, pdf. 76]

IV. Apprehensions of Unforeseen Consequences

a) Today, biological men can be married to biological men and biological women can be married to biological women without a societal collapse. [Arunkumar v. Inspector General of Registration 2019 SCC OnLine Mad 8779 [1J] C-IV, Vol. III, starts p.85/pdf.95 @p. 89/pdf. 99, para 16-17] Transgender people who were married prior to a declaration of their transition and their marriages

subsist under the statutory scheme of the The Transgender Persons (Protection of Rights) Act, 2019 and Transgender Persons (Protection of Rights) Rules, 2020.

b) In *Lakshmi Kant Pandey v. Union of India*, [(1984) 2 SCC 244], the Supreme Court laid down guidelines on inter-country adoptions. This is another sphere of law where there are religious customs and statutes. The Supreme Court [paras 1-3] acted on a letter petition complaining of questionable practices adopted by agencies which gave children in inter-country adoptions. The decision noted that there were two legislative attempts at passing an Adoption Bill which did not fructify; the first was *'The Adoption of Children Bill, 1972'* which had been introduced in the Rajya Sabha but was not passed and the second effort was made in 1980, when the *'Adoption of Children Bill'* was introduced in the Lok Sabha, but which remained pending. [Ref: Compilation p. 76-80, pdf. 78-82]

- This court referred to Articles 15(3), 34 and 39 which showed the [para 6] "*...great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country*". This court also stressed on the right to family of every child and the urgent need for their intervention to ensure that adoptions take place in a manner that centres the welfare of the child. [para 7,8] "*Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family…. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents..But while supporting inter-country adoption, it is necessary to bear in mind that the* ***primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents,*** *lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country*." [Ref: Compilation p. 81-82, pdf. 83-84]

- **The court considered hindu customs on adoption and noted that there was no statute for other religions** [para 7] *"...The practice of adoption has been prevalent in Hindu society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the Muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The adoption of Children Bill, 1972 sought to provide for a uniform law of adoption applicable to all communities including the Muslims but, as*

pointed out above, it was dropped owing to the strong opposition of the Muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the Muslim community…" [Ref: Compilation p. 83-84, pdf. 85-86]

- The Court noted that [para 9], prior to this judgment, in the absence of any law on adoption, foreign parents who desired to adopt an Indian child would make an application under the Guardians and Wards Act, 1890 to be appointed as the guardian of the child after which the foreign parents would have the right to take the child out of the country. To regulate this process, the High Courts of Bombay, Gujarat and Delhi had even put in place certain procedural rules which this court referred to and approved.
- **As there were no other statutes, the procedure adopted was based on the Hindu Adoption and Maintenance Act, 1956,** [para 9] **"***Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians & Wards Act 1890 for the purpose of facilitating such adoption.***"** [Ref: Compilation p.91, pdf. 93]
- Thereafter, procedure for adoption was prescribed by the legislature under the Juvenile Justice (Care and Protection of Children) Rules, 2007, Central Adoption Resource Authority - Guidelines Governing Adoption of Children, 2015 and Juvenile Justice (Care and Protection of Children) Act, 2015.

V. A Declaration of a right to marry, while valuable in itself, might remain in a vacuum

a) Lives are passing us by as we speak and non-heterosexual marriages are already happening. Incremental change has already begun – but if there is a declaration it cannot remain inchoate.

b) In Nepal, the directive order to the government by the Supreme Court to make necessary amendments in the legislation to accommodate same-sex couples was in 2007. [Sunil Babu Pant v. Nepal Government Writ No. 914 of the year 2064 BS (2007 AD) C-IV, Vol. IV, starts p.3200/pdf.3208 @p.3224/pdf.3232] The Committee formed by the Government under the directions of the Supreme Court gave its recommendations on the legal provisions that need amendment in 2014. The legislative changes contemplated have still not been carried out. [C-IV, Vol. VII, starts p.35/pdf.36 @p.63/pdf.63]

c) Alongside other constraints, a hurdle Indian courts face when seeking to employ devices other than striking down are a lack of institutional apparatus to effectuate declared rights. According to "Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom" (Oxford University Press, 2017) by Mr. Chintan Chandrachud:
"*In addition to the textual constraints noted above, the Indian Supreme Court's scope to employ devices that temper the exercise of the power to strike down legislation is also constrained by institutional factors. Even in cases where the*

Court has sought to prompt legislative change through some form of 'advice-giving', Parliament has either failed to respond, or taken an agonizing amount of time to respond, to the Court's advice. In Vishaka v. State of Rajasthan, a public interest litigation case, the Court issued a list of guidelines for the prevention of sexual harassment of women in the workplace. The Indian Supreme Court recognized that the primary responsibility of ensuring the safety of women lay with the legislature and the executive, and stated that its guidelines would remain in force only until Parliament enacted suitable legislation to plug the existing legislative vacuum. These seemingly stop-gap (and in hindsight, poorly implemented) guidelines remained in force for over 16 years, until Parliament finally enacted legislation on the subject.

Another example is State of MP v. Shyam Sunder Trivedi, where the Indian Supreme Court lamented the frequency of the torture and murder of suspected criminals in police custody, and urged the government and Parliament to consider implementing a Law Commission recommendation to transfer the evidential burden of proof on to the defendant police officer once it was established that bodily injury was caused to a person in police custody. In spite of reminders from the Bench, this recommendation has not been implemented

Unlike the declaration of incompatibility in the UK, informal 'nudges' to the legislature in India lack institutional grounding. A declaration of incompatibility is not just a freewheeling judicial assertion that primary legislation is inconsistent with Convention rights— it forms part of an institutional network set up under the HRA." [Ref: Compilation p.151-152, pdf. 153-154]

…

"*In contrast, the Indian Supreme Court's informal advice to change the law lacks the institutional bite given to the declaration of incompatibility by the Strasbourg Court and the JCHR. There is neither any comparable international mechanism in India, nor any monitoring body that systematically holds the government accountable for compliance with informal recommendations of the Indian Supreme Court. Courts are institutionally unequipped to monitor the government or Parliament's responses to judgments that find primary legislation to be inconsistent with human rights*." [Ref: Compilation p.153, pdf. 155]

- In this context, a declaration recognizing the right of persons in a same sex relationship to marry may not necessarily translate into the subject matter of legislative exercise by the Parliament. A declaration may simply remain a recommendation that does not effectuate all the rights and privileges guaranteed to same sex and trans persons under constitutional precepts.