A Dream Deferred

SUPRIYO CHAKRABORTY AND ANR V UNION OF INDIA

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A Critical Introduction

What happens to a dream deferred?

Does it dry up
like a raisin in the sun?
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?

- Langston Hughes, Harlem

The 17th of October 2024 was a significant marker in the ongoing struggle for equal recognition of partnerships and relationships within the queer community. In a deeply disappointing decision, the Supreme Court of India denied marriage equality to the LGBTQIA+ community, even as it acknowledged the systemic oppression faced by queer individuals. The court's ruling, thus reflected a deeper contradiction: despite fully acknowledging the ongoing marginalization of LGBTQIA+ persons, it chose not to provide the legal remedy required to rectify the discriminatory exclusion from the institution of marriage. It was to quote Langston Hughes, *A dream deferred.* But the question of course is—will this dream of marriage equality, '*dry up like a raisin in the*

sun' or will it 'run like stinking meat' or 'will it explode?'

This is a question which is open ended and which the future will determine. But to answer this question of the future as to '*wither marriage equality?*' the past becomes of great relevance. Hannah Arendt the great German thinker, translated Alexis Tocqueville as saying that when "*the past has ceased to throw its light upon the future, the mind of man wanders in obscurity*". We hope that this booklet, by lighting up an aspect of the past, will enable us to imagine a more just collective future.

A closer look at the *Supriyo* litigation reveals that, relative to other cases, this matter was decided with notable speed, reminding one of the judicial clichés that justice hurried is justice buried! Thus, today we have a judgment delivered with speed but which weighs down on the community, serving as a reminder of the long journey still ahead.

Even as this booklet chooses to throw light on the sharply legal dimension of the struggle, it is important to remember that the legal is embedded in a wider social, historical and political context, which gives meaning to a legal battle.

The decriminalisation of LGBTQIA+ lives took seventeen years and it spanned a legal, social, cultural and political struggle. Waged almost in parallel to the battle in the courts was the battle for changing the hearts and minds of people through social movements, pride marches, use of media, street protest and the intimate, personal and deeply powerful strategy of coming out. If we contrast the struggle for marriage equality, it spanned a very short time from the initial filing of a petition in the Delhi High Court in 2020 to the final decision in 2024. The contrast again is that by the time the decriminalisation verdict came, there was a level of public education which had happened. Section 377 had begun to symbolize all that was wrong with our sexual universe, due to the activism on the ground. By contrast, the idea of marriage equality, had just begun to seed in the Indian social and

cultural landscape. In short, the petition for marriage equality did not have the benefit of a movement on the ground which would carry out the task of public education. While over seventeen years of the decriminalisation battle there were protests demanding a repeal of Section 377 in cities and towns across the length and breadth of India, marriage equality could not benefit from the same kind of a widespread campaign, which could have played a role in changing hearts and minds. The battle for marriage equality was a more court focussed and lawyer driven battle than the battle for decriminalisation.

That being said, what was unique about this litigation was unlike previous cases on LGBT rights, this case was live streamed by the Supreme Court; so, literally the battle for marriage equality was beamed into living rooms across the country. Court Produced Transcripts/Live Streaming Link of the Hearings can be found at Annexure A.

There were 19 plus petitioners who came from across the length and breadth of the country as well as from across the rainbow spectrum of sexualities. Details of all the petitioners are annexed as Annexure – B. Each petitioner had a story to tell as to why they were in court. As far as Utkarsh Saxena and his partner Ananya Kotia were concerned, the petition was a way of asserting their right to equality. As Utkarsh put it, 'It's the natural next step to seek the same equal rights that other citizens in society have — for us to be full and complete citizens and participants in this democracy in a constitutional republic.' For Akkai Padmashali who identifies as transgender, the petition was important as marriage was an important right for transgender people and the rigid binaries of gender in the marriage laws made marriage an exclusionary institution. A summary of the key arguments made in the Supreme Court are annexed as Annexure – C.

The level of lack of awareness of how deeply the question of marriage mattered across the diversity of the LGBTQI+

community was apparent in the repeated submissions of the Union of India that this was an elite issue. In fact, Rohin Bhatt makes an ironical reference to this point by titling his book on the case, the Urban elite v. Union of India.

During the hearings itself, Senior Advocate Raju Ramachandran convincingly addressed this point. He began by turning to what Justice Vivian Bose said in 1956, "*The Constitution is not for the exclusive benefit of governments and states... it also exists for the common man, for the poor and the humble... for the butcher, the baker and the candlestick maker.*"

He then went on to say that Petitioner Number 1, Kajal, is a Dalit woman, from the town of Muksar in Punjab and her partner, the second petitioner is Bhavna, an OBC from Bahadurgarh, Haryana. Bhavna works as an accountant in a company in Chandigarh and Kajal works in a bakery in Chandigarh as a baker. His clients were therefore the kind of people who Justice Bose had in mind according to Mr Ramachandran. Contending that this should put the assumption made in the government's affidavit that they are urban elite, to rest, he said their submission was "*careless, unnecessary and insensitive.*"

This brief insight into some of the stories of the petitioners, alerts us to the fact that a social history of the litigation has to narrate the stories of the petitioners. In the scholarship on US law, there is a greater tradition of the same. The anti-miscegenation decision in *Loving v Virginia*, in which Mildred and Richard Loving were arrested for daring to marry across the colour line, has been documented in Peter Wallenstein's, '*Tell the Court I love my wife*.' The seminal decriminalisation decision, *Lawrence v. Texas*, has its chronicler in Dale Carpenter's book, Flagrant Conduct. In India, we have the beginning of this kind of work with Rohit De's marvellous Peoples Constitution which tells the story of petitioners in the challenge to the anti-cow slaughter laws and the anti sex work laws. One hopes that the story of Supriyo,

Abhay, Akkai, Kajal and all the other petitioners will find voice through historical and archival work.

Notably, this judgment stands apart in its aftermath. Unlike previous landmark rulings, such as the re-criminalization of homosexuality in *Suresh Kumar Koushal*, this deferral of marriage equality did not lead to large-scale protests. While there was significant media coverage, there was a conspicuous absence of mobilization on the streets. This lack of widespread protests serves as a stark indication of the work that lies ahead – the need to consult, deliberate, and build a broader movement in solidarity with queer individuals across various intersections of identity – including region, language, caste, class, and religion – to make the right to union and partnership a tangible reality.

The judgment itself is not an easy one to parse, even for those well-versed in the law. It spans multiple opinions, raising crucial questions about the scope of constitutional rights and the role of the judiciary. What exactly do the judges agree upon, and where do they diverge? What were the main legal questions before the Court, and how were they adjudicated by the majority and minority opinions? What does it mean for the future of marriage equality in India? Most critically, where does the responsibility now lie to confirm this fundamental right to union?

This booklet seeks to break down the complexities of the judgment and provide a framework for understanding the decision. It navigates the various opinions authored by the justices, each of whom approached the case from different legal and philosophical standpoints. In total, four opinions were written by the five-judge Constitution Bench.

Chief Justice D.Y. Chandrachud, in his minority opinion, authored 247 pages advocating strongly for the recognition of civil unions. He argued that denying same-sex couples the right to marry or form unions violates fundamental rights under the Constitution. His stance was rooted in the principle of constitutional morality,

which calls for upholding individual rights over societal norms.

Justice S.K. Kaul, who joined the Chief Justice in the minority, wrote a 17-page opinion that expressed support for recognizing civil unions, but emphasized the need for legislative action rather than judicial intervention. His opinion reflected a cautious, incremental approach to social change.

Justice S.R. Bhat, writing for the majority along with Justice Hima Kohli, penned an 89-page opinion held that Special Marriage Act, 1954, could not be interpreted to include the right of LGBTQIA+ persons to marry; marriage equality is not constitutionally guaranteed and that changes to marriage laws must be enacted by parliament, not imposed by the judiciary.

Justice P.S. Narasimha, in his 13-page concurring opinion, agreed with the majority. He emphasized the importance of societal consensus and cautioned against judicial overreach in matters that should be decided by the legislature.

The five-judge Bench was unanimous in its view that there is no fundamental right to marry under the Indian Constitution, and that marriages between queer persons cannot be read into the Special Marriage Act, 1954. However, the Court made an important clarification that transgender persons in heterosexual relationships have the right to marry under the existing legal framework. A compilation of resources to contextualise the judgement as well as its critiques can be found at Annexure D.

The bench also split 3:2 on key issues. On the right to form civil unions, the majority held that no such right exists. Similarly, the Court was divided 3:2 on whether unmarried non-heterosexual couples have the right to adopt, with the majority ruling that the Union's guidelines barring such adoptions were legally valid.

This booklet will summarize the decision by focusing on several key themes:

1. Thematic Breakdown: An exploration of the key issues addressed by the judgment, including the rights to marriage, civil unions, and adoption.

2. Majority and Minority Opinions: A detailed explanation of the opinions authored by each judge, their reasoning, and their legal implications. A majority judgement is what most judges agree with. On positions of law where judges disagree, they write a dissenting opinion which forms the minority opinion. This booklet thematically details each issue of law decided by the Supreme Court with the divisions of majority and minority opinion to understand these nuances.

3. Legal Complexity: A guide on how to read the judgment and understand the intricacies of constitutional law, majority and minority opinions, and their impact on future cases.

In sum, a year after the *Supriyo* decision was pronounced, this booklet seeks to galvanize conversation and action towards a future where marriage equality is no more a dream deferred.

Timeline

2nd July 2009	Judgement in *Naz Foundation v. Govt. of NCT of Delhi*, delivered reading down Section 377 of the Indian Penal Code to exclude sexual conduct between consenting adults in private by the Delhi High Court.
11th December 2013	Supreme court in the First Special Leave Petition reverses *Naz* and upholds the constitutionality of Section 377 and effectively recriminalizing LGBTQIA+ lives.
20th January 2014	Review Petitions filed by the Union of India, Naz Foundation, Voices Against 377 and other petitioners rejected.
3rd March 2014	Curative Petition Filed.
15th April 2014	In *NALSA v Union of India*, the Court recognises the constitutional rights of transgender persons.
6th September 2018	Judgement is pronounced in *Navtej Singh Johar v Union of India*, reading down Section 377 of the Indian Penal Code.
27th January 2020	Nikesh P.P. & Sonu M.S filed a petition seeking legal recognition of their marriage in High Court of Kerala.

14th September 2020 – 30th November 2021	8 Petitions over a period of 1+ year were filed in the Delhi High Court by the following Petitioners: Abhijit Iyer Mitra, Gopi Shankar M, Giti Thadani & G. Oorvasi, Vaibhav Jain & Parag Vijay Mehta, Dr Kavita Arora & Ankita Khanna, Udit Sood, Saattvic, Lakshmi Manoharan & Gagandeep Paul, Joydeep Sengupta, Russell Blaine Stephens & Mario Leslie D'penha, Mellissa Ferrier & Kamakshi Raghavan, Nibedita Dutta & Pooja Srivastava, and Zainab J. Patel.
14th November 2022	The petition for marriage equality i.e., *Supriyo Chakraborty v. Union of India* is filed in Supreme Court of India. A series of petitions for marriage equality are filed by: Parth Phiroze Mehrotra & Uday Raj Anand, Sameer Samudra & Amit Gokhale, Utkarsh Saxena & Ananya Kotia, Zainab Patel, Kajal & Bhawna, Amburi Roy & Aparna Saha, Akkai Padmashali, Vyjayanti Vasanta Mogli, and Umesh P., Rituparna Borah, Chayanika Shah, Minakshi Sanyal, Maya Sharma, and 5 anonymous others, Harish Iyer, Arun Kumar
6th January 2023	9 similar cases detailed above are also transferred to the Court and consolidated with *Supriyo*.
13th March 2023	*Supriyo* is transferred to a five-judge Constitution Bench of the Supreme Court
18th April 2023 – 11th May 2023	Hearings begin in the *Supriyo* case

17th October 2023	Judgement is pronounced in *Supriyo Chakraborty v. Union of India* denying marriage equality.
16th April 2024	Central Government constitutes High Committee headed by the Cabinet Secretary to examine various issues regarding the queer community as directed by the Supreme Court.

Where All Five Judges Agree

The judgement is at times complex and confusing when read as a whole. This is especially due to the fact that with the 5 judge bench, there are both points of agreement and disagreement. It is therefore of utility to parse out exactly where the judges are in agreement. There are five aspects that the judges are in agreement with:

a. There is no fundamental right to marry,

b. Special Marriages Act, 1954 is unconstitutional,

c. Foreign Marriages Act, 1969 is unconstitutional,

d. Transgender Persons have a right to marry if they are in a heterosexual relationship and such a marriage will be validly recognized by the law,

e. Queerness is neither an urban nor an elite concept.

1. There is no Fundamental Right to Marry

1.1 Justice D. Y. Chandrachud

While deciding the whether the right to marry is a fundamental right or not, Justice D.Y. Chandrachud began by analysing the judgment of the United States Supreme Court in Obergefell

V. Hodges. The US Supreme Court held that the Fourteenth Amendment of the Constitution of the United States imposes a positive obligation on the State to license a marriage between two people of the same sex, referring to that, the judge states as follows:

> *178. The issue before the US Supreme Court was not whether the Constitution recognises the right to marry but whether the Fourteenth Amendment requires a State to license a marriage between two people of the same-sex. Various decisions of the US Supreme Court had already recognised the right to marry. Justice Kennedy (writing for the majority) observed that the right to marry consists of the following four components: (i) the right of choice; (ii) the protection of intimate association by supporting the union of two persons; (iii) safeguards for children and families, and (iv) cornerstone of social order because marriage is the basis for governmental rights, benefits, and responsibilities.*
>
> *179. The opinion of the majority held that the components of marriage are not exclusive to heterosexual couples. Thus, the State by not recognising a same-sex union (which is legal) and by not granting benefits which accrue from a marriage was held to be treating same-sex couples unequally, violating the equal protection clause.*
>
> *180. Earlier judgments of the US Courts had held that marriage is a civic right because it is fundamental to existence and survival, is part of the fundamental right to privacy, and essential to the orderly pursuit of happiness. It was also held that without the right to marry, one is excluded from the full range of human experience and is denied "full protection of the laws for one's avowed commitment to an intimate and lasting relationship." The jurisprudence which has emanated from the US Courts indicates that the right to marry is*

> *recognised as a fundamental right because of the benefits (both expressive and material) attached to it.*

Justice Chandrachud is of the view that the benefits that a marriage entails were the driving force behind the democratisation of marriage in the United States, which can be inferred from the four components of the right to marry stated in the American judgment. These four components are - *(i) the right of choice; (ii) the protection of intimate association by supporting the union of two persons; (iii) safeguards for children and families, and (iv) cornerstone of social order because marriage is the basis for governmental rights, benefits, and responsibilities.*

In his judgment, Justice Chandrachud has attributed the significance of marriage as a social and economic institution to the expressive (self-definition, autonomy and pursuit of happiness) and material benefits attached to it and has elaborated on the several intangible benefits (such as societal acceptance of off-springs) and tangible benefits (such as property benefits, evidentiary privilege, tax benefits, etc.). conferred on married people. This view is in line with the court's decision to establish a high-power committee, instead of granting legal recognition to non-heterosexual unions, which will evaluate the benefits that non-heterosexual couples are denied. He states as follows:

> *182...The petitioners seek that the Court recognise the right to marry as a fundamental right. As explained above, this would mean that even if Parliament and the State legislatures have not created an institution of marriage in exercise of their powers under Entry 5 of the Concurrent list, they would be obligated to create an institution because of the positive postulate encompassed in the right to marry. This argument cannot be accepted.*
>
> *183... The State through the instrument of law characterises marriage with two constituent elements: the expressive*

component and the material component. Marriage may not have attained the social and legal significance it currently has if the State had not regulated it through law. Thus, while marriage is not fundamental in itself, it may have attained significance because of the benefits which are realised through regulation.

Addressing the implications of the cases of Shafin Jahan and Shakti Vahini on the case at hand, Justice Chandrachud states that both of them deal with societal impediments imposed on inter-religious or inter-caste couples who intend to marry. Moreso, he finds that in Shafin Jahan it was held that no State or non-State entity can interfere with their right to marry a person of their choice. Further, with regards to the case of Puttaswamy, he states that the judgement only made a passing reference to the right to marry. It did not trace the right to marry to any of the entrenched fundamental rights. He goes on to state as follows:

184. This Court in Justice KS Puttaswamy (9J) (supra) while holding that privacy is a fundamental right was not guided by the content given to privacy by the State. This Court was of the opinion that if the right to privacy is not secured, the full purport of the rights entrenched in the Constitution could not be secured. Similarly, this Court in Unnikrishnan (supra) held that the right to education is a fundamental right. The right to education was derived from the provisions of the Directive Principles of the State Policy and their centrality to development of an individual. Entry 25 of the Concurrent list authorizes Parliament and State legislatures to enact laws on "education." The State in pursuance of this power has enacted numerous legislations relating to education such as laws establishing and regulating universities and colleges. However, the right to education was held to be a fundamental right, not because of any statute or law but because of its centrality to the values that the Constitution espouses. The arguments of

the PART D 140 petitioners that the Constitution recognises a right to marry is hinged on the meaning accorded to marriage by statutes, which cannot be accepted.

Justice Chandrachud reaches to the conclusion that the right to marry is not a fundamental right. He states as follows:

185. The Constitution does not expressly recognize a fundamental right to marry. Yet it cannot be gainsaid that many of our constitutional values, including the right to life and personal liberty may comprehend the values which a marital relationship entails. They may at the very least entail respect for the choice of a person whether and when to enter upon marriage and the right to choose a marital partner.

1.2 Justice S. Ravindra Bhat

At the outset of his judgment, Justice Bhat establishes the nature of marriage as 'a social institution which predates all rights, forms of political thoughts and laws', rather than a creation of the statute. He describes how the institution of marriage operates worldwide and goes on to state as follows:

6. The respondents are right, in one sense in underlining that all conceptions of what constitutes marriage, all traditions and societies, have by and large, historically understood marriage as between heterosexual couples. The contexts of culture, social understanding of what constitutes marriage, in every social order are undoubtedly very important. At the same time, for the purpose of determining the claims in these petitions, it is also necessary to mark the progression of what constitutes marriage, in every social order are undoubtedly very important. At the same time, for the purpose of determining the claims in these petitions, it is also necessary to mark the progression of what were deemed constitutive and essential constituents, and essential boundaries within

which marriages were accepted.

While adjudicating upon whether there exists a fundamental right to marry, Justice Bhat elaborates on how customs and practices are the source of this institution and how the state is external to these sources and exists merely as a regulator and facilitator. He states as follows:

45. This court has recognized that marriage is a social institution. As elaborated in Part I, marriage existed and exists, historically and chronologically in all of the senses – because people married before the rise of the state as a concept. Therefore, marriage as an institution is prior to the state, i.e., it precedes it. The status is still, not one that is conferred by the state (unlike the license regime in the US). This implies that the marriage structure exists, regardless of the state, which the latter can utilise or accommodate, but cannot be abolished as a concept. Under this view terms of marriage are set, to a large extent, independently of the state. Its source is external to the state. That source defines the boundaries of marriage. This implies that state power to regulate marriage does not sit easy with the idea of marriage as a fundamental right. In attempting to analyse the claim to a fundamental right to marry, there are primarily two competing claims about the nature of marriage: one being that the state should exercise more control over marriage to support and protect "traditional purposes and perceptions" and the other, that each individual should have the right to define marriage for themselves and state involvement in marriage should be minimal.

46. If indeed there is a right to marry unless it is elevated to a right akin to Articles 17, 23, and 24, [which apply to both state and nonstate agencies and actors], it cannot be operationalized. These provisions, most emphatically create positive obligations; likewise, Articles 15 (3), 15 (4) – and 15 (6), as well as Articles 16 (4), 16 (6) highlight state interest in creating conditions to further the goal of non-discrimination. Yet, the previous decisions of this court have carefully held such provisions to enable the state, and in a sense oblige it to take measures; but ruled out court mandated policies and laws. In our considered opinion, this is not however, one such case where the court can make a departure from such rule, and require the state to create social or legal status.

47. What is being asked for by the petitioners is state intervention in enabling marriage between queer or non-heterosexual couples. Civil marriage or recognition of any such relationship, with such status, cannot exist in the absence of statute. The demand, hence, is that of a right of access to a publicly created and administered institution. There is a paradox here or a contradiction, which runs to the root of the issue and weighs on this court's mind, heavily – in that the creation of the institution here depends on state action, which is sought to be compelled through the agency of this court.

Justice Bhat states how the recognition of the right to marry as a fundamental right in the US rested on the principles that it is essential to the orderly pursuit of happiness, the importance of commitment of two individuals towards each other and that it is a foundational relationship of society and goes on to criticise the same in the below mentioned paragraph:

49. This with respect is not sound – at least as applied to state licensing of marriage (as in the US), which is what civil marriage is. The fundamental importance of marriage remains that it is based on personal preference and confers social status. Importance of something to an individual does not per se justify considering it a fundamental right, even if that preference enjoys popular acceptance or support. Some may consider education to be fundamentally important in

that they consider nothing less than a postgraduate degree is fundamental; there may be a large section of the people, who consider that access to internet is a fundamental right, and yet others, who may wish that access to essential medication is a fundamental right. All these cannot be enforceable rights, which the courts can compel the state or governance institutions to provide. These cannot result in demand for creation of a social institution, and in turn creation of status, through a statute. This result – i.e. recognition, can be achieved only by enacted law.

In a later part of his judgement, Justice Bhat reiterates his position as stated below:

117. It is relevant to record a note of caution at this juncture. While the right to marry or have a legally recognised marriage is only statutory, the right to cohabit and live in a relationship in the privacy of one's home is fundamental, and enjoyed by all. This is not to say that the latter, is unqualified or without restriction. Rather, that the latter, is a right afforded to all, irrespective of the State's recognition of the relationship or status, as in the case of 'married' couples. The discriminatory impact recognised in the above paragraphs, however, is to highlight the effect of a legislative vacuum – specifically on long term queer couples, who do not have the avenue of marriage, to entitle them to earned benefits. Could this same logic then be extended to heterosexual couples that choose to not get married, despite having the avenue? With respect, this would require further consideration by the State, and was an aspect that was neither argued, nor were we called upon to decide, in the present petitions. Therefore, it is pointed out that State must remain cognizant of such an unwitting consequence of creating two parallel frameworks, for live-in or domestic partnerships, and marriages, and the confusion or anomalies this may cause to gendered legal frameworks (as they stand today) – while trying to remedy or mitigate the discrimination faced by queer couples.

118. Addressing all these aspects and concerns means considering a range of policy choices, involving multiplicity of legislative architecture governing the regulations, guided by diverse interests and concerns - many of them possibly coalescing. On 03.05.2023, during the course of hearing, the learned Solicitor General, upon instructions, had expressed the Union's position that a High Powered committee headed by the Union Cabinet Secretary would be formed to undertake a comprehensive examination to consider such impacts, and make necessary recommendations in that regard.

1.3 Justice Pamidighantam Sri Narasimha

Justice Narsimha's judgement concurs with Justice Bhat. With regard the nature of the institution of marriage, he states as follows:

5. There cannot be any quarrel, in my opinion, that marriage is a social institution, and that in our country, it is conditioned by culture, religion, customs and usages. It is a sacrament in some communities, a contract in some other. State regulation in the form of codification, has often reflected the customary and religious moorings of the institution of marriage. An exercise to identify the purpose of marriage or to find its 'true' character, is a pursuit that is as diverse and mystic as the purpose of human existence; and therefore, is not suited for judicial navigation. But that does not render the institution meaningless or abstract for those who in their own way understand and practice it.

8. The legal regulation of the institution of marriage, as it exists today, involves regulation of the solemnisation or ceremony of marriage, the choice of the partner, the number

of partners, the qualifying age of marriage despite having attained majority, conduct within the marriage and conditions for exit from the marriage.

10. The choice of the partner is not absolute and is subject to two-dimensional regulations: (i) minimum age of partners and (ii) the exclusions as to prohibited degrees. There is a differential minimum age prescription for male and female partners in most legislations. Thus males, who have otherwise attained the age of majority, cannot marry under these enactments, even though they exercise many other statutory and constitutional rights when they attain the age of eighteen.

12. In my considered opinion, the institutional space of marriage is conditioned and occupied synchronously by legislative interventions, customary practises, and religious beliefs. The extant legislative accommodation of customary and religious practices is not gratuitous and is to some extent conditioned by the right to religion and the right to culture, constitutionally sanctified in Articles 25 and Article 29 of the Constitution of India. This synchronously occupied institutional space of marriage, is a product of our social and constitutional realities, and therefore, in my opinion, comparative judicial perspectives offer little assistance. Given this nature of marriage as an institution, the right to choose a spouse and the right of a consenting couple to be recognized within the institution of marriage, cannot but be said to be restricted.

13. The learned Chief Justice has opined that marriage may not attain the social and legal significance it currently has if the State had not recognised and regulated it through law. It is further opined that marriage has attained significance because of the benefits which are realised through it. In this context, it is necessary to recount that until the post constitutional codification of laws relating to marriage and divorce, there was

no significant State intervention on customary laws relating to marriage. Even today, much of the Mohammedan law of marriage is governed by religious texts and customs and there is hardly any State intervention. The Sixth Schedule areas under the Constitution are largely governed by customary laws of marriage. That the State has chosen to regulate the institutional space of marriage and even if such regulation occupies the space in toto, by itself does not imply that marriage attained significance due to State recognition.

2. Constitutionality of the Special Marriages Act, 1954

2.1 Justice D. Y. Chandrachud

The constitutionality of the Special Marriages Act, 1954 ((hereinafter referred to as SMA) was challenged because it excludes the solemnisation of marriage between two non-heterosexual persons by implication as it only governs heterosexual unions. Justice Chandrachud analyses the decision of the South African Constitutional Court in Ministry of Home Affairs V. Fourie, where the court held a provision of the South African Marriage Act to be unconstitutional as it excluded same-sex couples by silence and omission.

Justice Chandrachud, while admitting to the similarity between the present case and the case of Fourie, differentiates the position relating to the matter in the two countries and states as follows:

> *197. Though facially the case mounted by the petitioners before us is similar to the case mounted by the petitioners in Fourie (supra), the legal and the constitutional regime in South Africa and India varies. First, it must be noticed that unlike the SMA, there was only one provision in the South African Marriage Act (that is, Section 30(1)) which made a reference to heterosexual relationships. However, as indicated above, various provisions of the SMA (Sections 4, 27(1A), 31, 36, and 37) confine marriage to a union between heterosexual persons. Second, various enactments in South Africa already recognised same-sex unions unlike the Indian legal landscape where no law even remotely recognises the union between a same-sex couple. Thus, the canvas of the challenge before the South African Constitutional Court in Fourie (supra) and the legal and constitutional regime in place varies widely from that in India.*

Justice Chandrachud further considers the case of Ghaidan V. Godin-Mendoza, in which the petitioner urged the court to read the Rent Act such that it granted the surviving partner in a close and stable homosexual relationship the same rights as the surviving partner in a heterosexual relationship of a similar nature – the right to succeed the tenancy as a statutory tenant. The House of Lords agreed that the exclusion of non-heterosexual couples violated the European Convention on Human Rights (ECHR). The House of Lords held that there was no legitimate state aim which justified the difference in treatment of heterosexual and homosexual couples, and found that the Rent Act therefore violated the rights of the respondent under the ECHR Consequently, the House of Lords relied on Section 3 of the Human Rights Act, which demands that legislation must be read and given effect in a way which is compatible with the ECHR, to interpret the Rent Act to mean that the survivor of a homosexual couple would have rights on par with the survivor of a heterosexual relationship for the purposes of succession as a statutory tenant.

Justice Chandrachud, while differentiating the position in India from the one in the UK, states as follows:

> *203. It is not open to this Court to adopt the interpretative principle laid down in Section 3 of the Human Rights Act for a simple reason: The House of Lords derived the power to depart from legislative intent and read words into a statute such that it was compliant with the ECHR from the Human Rights Act, a statute enacted by the Parliament of UK. It did not rely on a common law principle or fashion a principle of interpretation based on common law. The House of Lords*

itself noted that "the interpretative obligation decreed by section 3 is of an unusual and far-reaching character." In India, there is no legislation which permits this Court to depart from legislative intent and read words into a legislation such that it is compliant with the Constitution. As discussed in the previous segment of this judgment on the power of judicial review, courts in India must be circumspect in relying on the law in other jurisdictions, torn from the context in which those decisions have been crafted. It is not permissible for this Court to exercise a power which the Parliament of another country conferred on its courts, absent a similar conferment of power under the Indian Constitution. This Court must exercise those powers which it has by virtue of the Constitution of India or any other Indian law. In any event, as the House of Lords held, courts may not exercise this power to make decisions for which they are ill equipped. This Court is not equipped to recognize the right of queer persons to marry under the SMA for reasons discussed in subsequent segments.

Justice Chandrachud then proceeds to lay down two approaches for the court to follow if it decides that the SMA is unconstitutional, i.e., to strike down the act as a whole, which would 'take India back to the pre-independence era', one of social inequality and religious intolerance, or to interpret the SMA in a gender-neutral way. He proceeds to say that the latter is not within the realm of this court and states as follows:

208. If this Court takes the second approach and reads words into the provisions of the SMA and provisions of other allied laws such as the ISA and HSA, it would in effect be entering into the realm of the legislature. The submissions of the petitioners indicate that this Court would be required to extensively read words into numerous provisions of the SMA and other allied laws. The Court is not equipped to undertake an exercise of such wide amplitude because of its institutional limitations. This Court would in effect be redrafting the law(s) in the garb of reading words into the provisions. It is trite law that judicial legislation is impermissible. We are conscious that the court usually first determines if the law is unconstitutional, and then proceeds to decide on the relief. However, in this case, an exercise to determine whether the SMA is unconstitutional because of under-inclusivity would be futile because of the limitations of this Court's power to grant a remedy. Whether a change should be brought into the legislative regime of the SMA is for Parliament to determine. Parliament has access to varied sources of information and represents in itself a diversity of viewpoints in the polity...

Justice Chandrachud is therefore of the opinion that striking down the relevant sections of the SMA is not a feasible exercise for the court. The legislature would be better equipped to do the same, given the complexities of the SMA and its intricate ties with personal laws. He concluded that determining the constitutionality of the Act would be a futile exercise due to the lack of the institutional capabilities of the court.

2.2 Justice Sanjay Kishan Kaul

Justice Kaul on the other hand goes forward to determine the constitutionality of the SMA and analyses whether the exclusion of non-heterosexual couples from its ambit amounts to a violation of Article 15 of the constitution. He noted as follows in this regard:

12. The Petitioners' submissions demand that the Special Marriage Act, 187211 be tested on the touchstone of Part III of the Constitution, i.e., whether they are discriminatory on the basis of sex and thus violative of Articles 14 and 15 of the Constitution. It is now settled law that Article 14 contemplates a two-pronged test: (i) whether the classification made by the SMA is based on intelligible differentia; and (ii) whether the

classification has a reasonable nexus to the objective sought to be achieved by the State. The first prong, i.e., intelligible differentia implies that the differentia should be clear and not vague. Section 4 of the SMA is clear in so far as it contemplates a marriage between a male who has completed the age of twenty-one years and a female at the age of eighteen years. In defining the degrees of prohibited relationships, Section 2(b) of the SMA exclusively applies to a relationship between a man and a woman. Thus, by explicitly referring to marriage in heterosexual relationships, the SMA by implication creates two distinct and intelligible classes – i.e., heterosexual partners who are eligible to marry and non-heterosexual partners who are ineligible.

Under the second prong, the Court examines whether the classification is in pursuit of a state's objective. The SMA's Statement of Objects and Reasons assists us in determining the objective. It is reproduced hereunder:

13. Statement of Objects and Reasons. — This Bill revises and seeks to replace the Special Marriage Act of 1872 so as to provide a special form of marriage which can be taken advantage of by any person in India and by all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess. The parties may observe any ceremonies for the solemnisation of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers. For the benefit of Indian citizens abroad, the Bill provides for the appointment of Diplomatic and Consular Officers as Marriage Officers for solemnising and registering marriages between citizens, of India in a foreign country…

14. From the above, we see that the SMA postulates a 'special form of marriage' available to any person in India irrespective of faith. Therefore, the SMA provides a secular framework for solemnization and registration of marriage. Here, I respectfully disagree with my brother Justice Ravindra Bhat, that the sole intention of the SMA was to enable marriage of heterosexual couples exclusively. To my mind, the stated objective of the SMA was not to regulate marriages on the basis of sexual orientation. This cannot be so as it would amount to conflating the differentia with the object of the statute. Although substantive provisions of the SMA confer benefits only on heterosexual relationships, this does not automatically reflect the object of the statute. For as we are all aware, we often act in ways that do not necessarily correspond to our intent. Therefore, we cannot look at singular provisions to determine substantive intent of the statute. Doing so would be missing the wood for the trees.

Justice Kaul believes that the SMA doesn't have the regulation of marriages on the basis of sexuality as one of its objects. He believes that the SMA was enacted to postulate a special form of marriage available to any person in India irrespective of their faith. He goes on to state as follows in this regard:

15. If the intent of the SMA is to facilitate inter-faith marriages, then there would be no rational nexus with the classification it makes, i.e., excluding non-heterosexual relationships.

16. In any event, regulating only heterosexual marriages would not be a legitimate State objective. It is settled law that the Court can also examine the normative legitimacy and importance of the State objective, more so in a case such as this where sex (and thereby sexual orientation) is an ex-facie protected category under Article 15(1) of the Constitution. An objective to exclude non-heterosexual relationships would be unconstitutional, especially after this Court in Navtej has elaborately proscribed discrimination on the basis of sexual

orientation. Therefore, the SMA is violative of Article 14.

Justice Kaul finds the non-regulation of non-heterosexual marriages to be violative of the protection against discrimination on the grounds of sex (and thereby sexual orientation). After determining its ultra-vires nature, he proceeds to reach the same conclusion that Justice Chandrachud reached, i.e., the court can't remedy this violation due to its limited institutional capacity and the existence of a complicated web of legislations that would require revamping if the statute was to be read broadly. He states as follows in this regard:

17. However, I recognize that there are multifarious interpretive difficulties in reading down the SMA to include marriages between non-heterosexual relationships. These have been enumerated in significant detail in the opinions of both the Hon'ble Chief Justice and Hon'ble Justice Bhat. I also agree that the entitlements devolving from marriage are spread out across a proverbial 'spider's web' of legislations and regulations. As rightly pointed out by the Learned Solicitor General, tinkering with the scope of marriage under the SMA can have a cascading effect across these disparate laws.

18. In fact, the presence of this web of statutes shows that discrimination under the SMA is but one example of a larger, more deeper form of social discrimination against non-heterosexual people that is pervasive and structural in nature. Ordinarily, such an intensive form of discrimination should require keener and more intensive judicial scrutiny. However, due to limited institutional capacity, this Court does not possess an adequate form of remedy to address such a violation. As pointed out in the judgment of Hon'ble the Chief Justice, substantially reading into the statute is beyond the powers of judicial review and would be under the legislative domain. It would also not be prudent to suspend or strike down the SMA, given that it is a beneficial legislation and is regularly and routinely used by heterosexual partners desirous of getting married. For this reason, this particular methodology of recognizing the right of non-heterosexual partners to enter into a civil union, as opposed to striking down provisions of the SMA, ought to be considered as necessarily exceptional in nature. It should not restrict the Courts while assessing such deep-seated forms of discrimination in the future.

19. Non-heterosexual unions and heterosexual unions/ marriages ought to be considered as two sides of the same coin, both in terms of recognition and consequential benefits. The only deficiency at present is the absence of a suitable regulatory framework for such unions... I believe that this moment presents an opportunity of reckoning with this historical injustice and casts a collective duty upon all constitutional institutions to take affirmative steps to remedy the discrimination.

20. Thus, the next step in due course, would be to create an edifice of governance that would give meaningful realization to the right to enter into a union, whether termed as marriage or a union.

Thereafter, Justice Kaul addresses the need for reading the statutes in a way as to give effect to the right of non-heterosexuals to enter into a legally recognised union. He discusses about how various jurisdictions have inculcated the practice of reading statutes in harmony with fundamental rights and how India is no stranger to such a practice. He states the following with regard to the harmonious interpretation of benefit conferring legislations with the right to enter into a civil union:

21. ...The benefits pertaining to marriage are spread out across several incidental legislations and regulations. These statutes presently do not explicitly extend to civil unions.

However, now that we have recognized the right to enter into civil unions; such statutes must be read in a manner to give effect to this right, together with the principle of equality and non-discrimination under Articles 14 and 15. In other words, statutory interpretation must be in consonance with constitutional principles that are enumerated by this Court. Needless to say, this should not detract from the Committee's task of ironing out the nitty-gritties of the entitlements of civil unions.

22. This exercise is necessary to foster greater coherence within the legal system as a whole, both inter se statutes and between statutes and the Constitution. Reading statutes in this manner will facilitate 'interconnectedness' by allowing constitutional values to link statutes within the larger legal system. Constitutional values emanate from a living document and thus are constantly evolving. Applying constitutional values to interpret statutes helps update statutes over time to reflect changes since the statute's enactment. Ordinarily, constitutional principles come in contact with statutes when the validity of such statutes is being tested. However, constitutional values should play a more consistent role, which can be through the everyday task of statutory interpretation

26. This technique of reading in Constitutional values should be used harmoniously with other canons of statutory interpretation. In this context, legislations that confer benefits on the basis of marriage should be construed to include civil unions as well, where applicable.

Justice Kaul ends his judgment by concluding as follows:

33. Is this the end where we have arrived? The answer must be an emphatic 'no'. Legal recognition of non-heterosexual unions represents a step forward towards marriage equality. At the same time, marriage is not an end in itself. Our Constitution contemplates a holistic understanding of equality, which applies to all spheres of life. The practice of equality necessitates acceptance and protection of individual choices. The capacity of non-heterosexual couples for love, commitment and responsibility is no less worthy of regard than heterosexual couples. Let us preserve this autonomy, so long as it does not infringe on the rights of others. After all, "it's my life".

2.3 Justice S. Ravindra Bhat

Justice Bhat upheld the validity of the Special Marriage Act, 1954. He states that the Act makes classification between heterosexual couples of the same faith and inter-faith heterosexual couples rather than heterosexual and non-heterosexual couples. He also states that the sole reason for the enactment of the Act was to replace the earlier colonial era law and provide for certain new provisions; it does not refer to any specific object sought to be achieved or the reasons that necessitated the enactment of the new Act other than that it was meant to facilitate marriage between persons professing different faiths. He states as follows in regard to the non-inclusion of non-heterosexual couples in the SMA:

77. For a moment, if it is assumed (as the petitioners argue) that the classification is suspect, because non-heterosexual couples are not provided the facility of marriage, yet such "under classification" is not per se discriminatory. This aspect was highlighted by this court in Ambica Mills:

"Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate – difficulties arising out of both the nature

of the legislative process and of the society which legislation attempts perennially to re-shape – and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration."

79. The question of some categories being left out, when a new legislation is introduced, was the subject matter of the decision in Ajoy Kumar Banerjee & Ors. v. Union of India & Ors. where it was held that:

"[...] Article 14 does not prevent legislature from introducing a reform i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons. A law can be sustained if it deals equally with the people of well-defined class-employees of insurance companies as such and such a law is not open to the charge of denial of equal protection on the ground that it had no application to other persons."

These judgments have underlined that exclusion or under inclusion, per se, cannot be characterised as discriminatory, unless the excluded category of persons, things or matters, which are the subject matter of the law (or policy) belong to the same class (the included class).

Thereafter, Justice Bhat addresses the arguments made by the petitioners that a classification made in a legislation shall be done away with if it ceases to have a rationale. In this regard, he notes as follows:

85. In all the judgments cited by petitioners, the court was able to discern or find that a classification, made at an earlier point

in time, had lost its relevance, and operated in a discriminatory manner. In some circumstances, rather than declaring the entire law void, this court "read down" the relevant provision to the extent the statute could be so read. In the present case, the petitioner's arguments with respect to "reading down" provisions of the SMA are insubstantial. The original rationale for SMA was to facilitate inter-faith marriages. That reason is as valid today as it was at the time of birthing that law. It cannot be condemned on the ground of irrelevance, due to passage of time. It would be useful to recall principle of the opinion in Re Special Court's Bill (supra). The classification was primarily not between heterosexual and non-heterosexual couples, but heterosexual couples of differing faiths. All its provisions are geared to and provide for a framework to govern the solemnisation, or registration, of the marital relationship, which replicates the status that different personal laws bestow. Since there was no one law, which could apply for couples professing differing religions, the SMA created the governing norms- such as procedure, minimum age, prohibited degree of relationship and forbidden relationships for the male and female spouses respectively (through different schedules); the grounds of divorce, etc. The relevance of SMA has gained more ground, because of increasing awareness and increasing exercise of choice by intending spouses belonging to different faiths. It cannot be said, by any stretch of the imagination that the exclusion of non-heterosexual couples from the fold of SMA has resulted in its ceasing to have any rationale, and thus becoming discriminatory in operation. Without a finding of that kind, it would not be open to the court to invoke the doctrine of "reading down".

86. We, therefore, agree with the reasoning elaborated by the Chief Justice, Dr. Chandrachud, J that the challenge to the SMA fails.

He then proceeds to address the assertion of the petitioners that the SMA shall be read down in a gender-neutral manner in order to facilitate the purposive interpretation of the Act. Justice Bhat reiterates that the purpose of the SMA was to facilitate the marriage of interfaith heterosexual couples who couldn't solemnise their union under the existing personal laws and hence no such reading down is called for. He also explains how a gender-neutral interpretation can be detrimental for women. He states as follows:

> *99. …The provisions and the objects of the SMA (as discussed in the earlier section on discrimination) clearly point to the circumstance that Parliament intended only one kind of couples, i.e., heterosexual couples belonging to different faiths, to be given the facility of a civil marriage.*
>
> *100. The petitioners' argued that the purpose of the SMA was to provide a framework for civil marriages not based on personal law includes same-sex marriages. Yet, structurally, Section 4 (conditions relating to solemnization of special marriages), contemplates marriages between a man and a woman. To read SMA in any other manner would be contrary to established principles of statutory interpretation as discussed in preceding paragraphs. It is also not permissible for the court to 'read up' and substitute the words "any two persons" to refer to a marriage between non-heterosexual couples.*
>
> *101. Gender neutral interpretation, much like many seemingly progressive aspirations, may not really be equitable at times and can result in women being exposed to unintended vulnerability, especially when genuine attempts are made to achieve a balance, in a social order that traditionally was tipped in favour of cis-heterosexual men. The purpose of terms like 'wife', 'husband,' 'man,' and 'woman' in marriage*

> *laws (and other laws on sexual violence and harassment as well) is to protect a socially marginalised demographic of individuals. For instance, women facing violence by their partner have a right to seek recourse under the Domestic Violence Act, which assures- and is meant to assure that they (the victims) are safeguarded and provided relief against such injustice. In fact, provisions in SMA, for alimony, and maintenance (Section 36 and 37) confer rights to women; likewise, certain grounds of divorce (conviction of husband for bigamy, rape) entitle the wife additional grounds (Section 27) to seek divorce. Other provisions such as: Section 2 (b) read with Part I (for a male) and Part II (for a female) enact separate degrees of prohibited relationships; Section 4 (c), uses the terms "husband" and "wife"; Section 12, 15, 22, 23, 27(1), Section 31(1) (iiia) and (2) (special provision for jurisdiction in case of 55 proceeding for the wife), Sections 36 and 37 provide for maintenance and alimony for the wife), Section 44 (Punishment of bigamy). The general pattern of these provisions – including the specific provisions, enabling or entitling women, certain benefits and the effect of Sections 19, 20, 21 and 21A of SMA is that even if for arguments' sake, it were accepted that Section 4 of SMA could be read in gender neutral terms, the interplay of other provisions- which could apply to such non-heterosexual couples in such cases, would lead to anomalous results, rendering the SMA unworkable.*
>
> *102. Furthermore, if provisions of SMA are to be construed as gender neutral (such as persons or spouses, in substitution of wife and husband) as the petitioners propose, it would be possible for a cis-woman's husband to file a case or create a narrative to manipulate the situation. Gender neutral interpretation of existing laws, therefore, would complicate an already exhausting path to justice for women and leave room for the perpetrator to victimise them. A law is not merely meant to look good on paper; but is an effective tool to*

remedy a perceived injustice, addressed after due evaluation about its necessity. A law which was consciously created and fought for, by women cannot, therefore, by an interpretive sleight be diluted.

Therefore, Justice Bhat is of the view that the non-inclusion of non-heterosexual couples in the SMA act is not discriminatory, as the primary distinction made by the SMA was between couples of the same faith and inter-faith couples. He further elaborates how the Act's sole purpose was to facilitate heterosexual marriages which couldn't be solemnised under the existing personal laws and how the gender-neutral reading of the SMA would lead to unintended consequences, such as degradation of the safeguards made for women. He notes as follows in his conclusion:

149(v) The challenge to the SMA on the ground of under classification is not made out. Further, the petitioner's prayer to read various provisions in a gender neutral' manner so as to enable same-sex marriage, is unsustainable.

Justice Chandrachud offers his observations on the position held by Justice Bhat. He is of the view that Justice Bhat is contradicting himself and states as follows in this regard:

333. My learned brother contradicts himself when he holds that the SMA is not discriminatory by relying on its object, on the one hand, and that the state has indirectly discriminated against the queer community because it is the effect and not the object which is relevant, on the other. My learned brother discusses in detail the deprivation, exclusion, and discrimination faced by the queer community. In effect, he: (i) recognizes that they have a right not to be discriminated against; and (ii) holds that the actions of the state have the effect of discriminating against them. However, he does not take the step which logically follows from such a ruling which is to pass directions to obviate such discrimination and ensure

the realization of the rights of the queer community. I cannot bring myself to agree with this approach. The realization of a right is effectuated when there is a remedy available to enforce it. The principle of ubi jus ibi remedium (that is, an infringement of a right has a remedy) which has been applied in the context of civil law for centuries cannot be ignored in the constitutional context. Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude.

3. Right of Transgender Persons in Heterosexual Relationships to Marry

3.1 Justice D.Y. Chandrachud

The portion of the judgement dedicated to the question of transgender right to marriage, can aptly be summarised with paragraph 277 of Justice Chandrachud's judgement. Justice Chandrachud disavows the conflation of gender identity with sexuality. The discussion of transgender rights to marry cannot be viewed as polar opposite to the scheme of heterosexual marriages. While there is a multitude of relations which fall within the ambit of transgender unions, the heteronormative understanding of marriage is also within this ambit. According to Justice Chandrachud:

> *277. The gender of a person is not the same as their sexuality. A person is a transgender person by virtue of their gender identity. A transgender person may be heterosexual or homosexual or of any other sexuality. If a transgender person is in a heterosexual relationship and wishes to marry their partner (and if each of them meets the other requirements set out in the applicable law), such a marriage would be recognized by the laws governing marriage. This is because one party would be the bride or the wife in the marriage and the other party would be the bridegroom or the husband. The laws governing marriage are framed in the context of a heterosexual relationship. Since a transgender person can be in a heterosexual relationship like a cis-male or cis-female, a union between a transwoman and a transman, or a transwoman and a cisman, or a transman and a ciswoman can be registered under Marriage laws. The transgender community consists of inter alia transgender men and transgender women. A transgender man has the right to marry a cisgender woman under the laws governing marriage in the country, including personal laws. Similarly, a transgender woman has the right to marry a cisgender man. A transgender man and a transgender woman can also marry. Intersex persons who identify as a man or a woman and seek to enter into a heterosexual marriage would also have a right to marry. Any other interpretation of the laws governing marriage would be contrary to Section 3 of the Transgender Persons Act and Article 15 of the Constitution.*

Justice Chandrachud begins his evaluation of the right of transgender persons to marry by differentiating between sex, gender and sexual orientation. He also goes on to state the following with regard to transgender persons:

> *257. ...Transgender people may choose to undergo hormonal therapy or surgery (commonly known as gender affirming surgery or sex reassignment surgery) to alter their bodies to make them conform to their gender. People may be transgendered regardless of whether they choose to or are able to undergo a surgery.*

He succinctly differentiates between sex and sexuality in the following paragraph:

> *258. ...The sex of a person is determined by their reproductive organs and structure, their gender identity depends on their internal experience of gender, and their sexual orientation is defined by the gender of the people that they are attracted to.*

In response to the Attorney General's argument that the Transgender Persons Act ('the Act') covers the entire queer community under its ambit and hence prohibits discrimination

against the entire community, Justice Chandrachud states as follows:

> *This argument does not hold any water. The legislation applies only to persons with a genderqueer or transgender identity and not to persons whose sexual orientation is not heterosexual.*

He then emphasised on the need for a legislation that prohibits discrimination against non-heterosexual people and stated as follows:

> *263. ...The decision in Navtej (supra) was a clear indication of the fact that the LBGTQ community is entitled to equal treatment before law. Parliament is yet to enact a law to this effect. This Court is of the opinion that there is an urgent need for a law which inter alia prohibits discrimination on the basis of sexual orientation and gives full effect to the other civil and social rights of LGBTQ persons. In the absence of such a law, members of the LGBTQ community will be unable to exercise their rights and freedoms to the fullest extent and will have to approach the courts for their enforcement on a case-by-case basis. This is not a desirable outcome. As in this case, courts are not always equipped to deal with all issues which are brought before them. Even if the courts are institutionally equipped to address the grievances in the case before them, no citizen should have to institute legal proceedings for the enforcement of their rights every time they seek to exercise that right. This would be contrary to the very concept of the guarantee of rights.*

Justice Chandrachud then goes over the expansive nature of the protection against discrimination provided under the act to transgender persons and comes to the conclusion that the Government has a duty not only to prevent discrimination against transgender persons (by persons and public as well as private

establishments) but also to address it where it is found to take place. He then states the following while considering the right of transgender persons to marry:

> *275. Section 3 of the Transgender Persons Act prohibits the state from discriminating against transgender persons. Section 20 of the Transgender Persons Act indicates that the statute is in addition to, and not in derogation from any other law for the time being in force. Parliament was no doubt cognizant of the statutes governing marriage when it enacted the Transgender Persons Act and Section 3(e) in particular.*
>
> *276. The laws which govern marriage in the country specify conditions which the bride and the bridegroom must satisfy for their marriage to be recognized. This is true of personal laws as well as the SMA. The structure of these enactments also regulates marriage between a husband and a wife. They use the words "bride" and "bridegroom," "wife" and "husband," "male" and "female," or "man" and "woman." These legislations regulate heterosexual marriages in India. Laws which are incidental to marriage such as the DV Act, the Dowry Prohibition Act 1961 or Section 498A of the IPC seek to address the hetero-patriarchal nature of the relationship between a man and a woman.*

Therefore, Justice Chandrachud is of the opinion that transgender persons can marry their partner if they're in a heterosexual relationship and such a marriage will be validly recognised by the law.

3.2 Justice S. Ravindra Bhat

Justice Bhat agrees with Justice Chandrachud's decision regarding the right of transgender persons to marry. He states as follows:

> *119. We are in agreement with the Part (xi) of the learned Chief Justice's opinion which contains the discussion on the right*

of transgender persons to marry. We are also in agreement with the discussion relating to gender identity [i.e., sex and gender are not the same, and that there are different people whose gender does not match with that assigned at birth, including transgender men and women, intersex persons, other queer gendered persons, and persons with socio-cultural identities such as hijras] as well as the right against discrimination under the Transgender Persons Act 2019. Similarly, discussion on the provisions of the Transgender Persons Act, 2019 and enumeration of various provisions, remedies it provides, and harmonious construction of its provisions with other enactments, do not need any separate comment. Consequently, we agree with the conclusion [(G(m)] that transgender persons in heterosexual relations have the right to marry under existing laws, including in personal laws regulating marriage. The court's affirmation, of the HC judgment in Arun Kumar v. Inspector General of Registration is based upon a correct analysis.

4. Queerness is Not Merely an "Urban" or "Un-Indian" Concept

An important facet of the judgement, is the Supreme Court's view on whether non-hetero normative relationships are confided purely to the urban echelon of Indian society. While not instrumental to the ratio of the case, it serves as an important observation to dismiss pre conceived notions about non-heterosexual relationships in India.

4.1 Justice D.Y. Chandrachud

Justice Chandrachud's judgement serves as the primary driving force in rejecting the contentions of the Union of India, as well as, the other respondents, with regards to the question. Firstly, he notes that the question of whether homosexuality is natural or unnatural is no longer relevant, in lieu of the Navtej Johar judgement, which made it clear that it is both innate and natural. Secondly, he brings to light the fact that the concept of non-heterosexual persons and relationships has enjoyed a unique history in India, not in congruence with the western conception of such. He states as follows:

> *82. The respondents have also averred that homosexuality or gender queerness is not native to India. This contention does not hold any water. In India, persons with a gender queer identity who do not fit into the binary of 'male' and 'female' have long been known by different names including hijras, kothis, aravanis, jogappas, thiru nambis, nupi maanbas and nupi maanbis. In fact, the term 'transgender person' as it is understood in English or the 'third gender' does not always fully or accurately describe the gender identity of those who*

are known by some of these terms. Additionally, the social structure of the communities of transgender persons in India is unique and does not mirror 'western' structures. It is native to our country. The judgment of this Court in NALSA (supra) also explored the presence of the transgender identity and other forms of gender queerness in Indian lore.

84. Like the English language, some English words employed to describe queer identities may have originated in other countries. However, gender queerness, transgenderism, homosexuality, and queer sexual orientations are natural, age-old phenomena which have historically been present in India. They have not been 'imported' from the 'west.' Moreover, if queerness is natural (which it is), it is by definition impossible for it to be borrowed from another culture or be an imitation of another culture.

Arguably, the most important manner in which Justice Chandrachud disproves the idea of queerness being an urban and elite concept is by pointing to the various Petitioners in the case.

86. This Court need look no further than the petitioners in this case to illustrate the point that queerness is neither urban nor elite:

a. One of the petitioners grew up in Durgapur, West Bengal and Delhi and states that she came to terms with her sexuality when she was an adult. Another petitioner in the same case grew up in Varanasi, Uttar Pradesh and states that she knew that she was a lesbian from a young age;

b. One of the petitioners hails from Muktsar, Punjab and happens to be OBC. Another petitioner in the same case happens to be Dalit. They come from working class backgrounds;

c. Another petitioner was born in Mumbai to Catholic parents. She attempted to die by suicide and later had to beg on the streets in order to survive;

d. Some petitioners before this Court are transgender persons and activists. One of them is a public personality – Akkai Padmashali. She hails from a non-English speaking, working class background. At a young age, she left home. She worked as an assistant in a shop selling ceramics but quit because she unable to hide her true gender identity. Circumstance forced her to become a sex worker to sustain herself. Later, she was awarded the Karnataka Rajyotsava Award, Karnataka's second highest civilian award, for her contribution to social service.

e. Yet another petitioner who is a transgender person was born in a family of farmers who grew coconuts and betel leaves. She later worked in a factory in her case, too, circumstance forced her to become a sex worker. She is now a social activist; and

f. One of the petitioners is a lesbian who lives in Vadodara, Gujarat.

Justice Chandrachud recognises the reasons for which one may perceive queerness to be an urban concept merely due to its greater prevalence in urban spaces as compared to rural parts of India. He states as follows:

93. To imagine queer persons as existing only in urban and affluent spaces is to erase them even as they exist in other parts of the country. It would also be a mistake to conflate the 'urban' with the 'elite.' This renders invisible large segments of the population who live in urban spaces but are poor or otherwise marginalized. Urban centres are themselves geographically and socially divided along the lines of class, religion, and caste and not all those who live in cities can be termed elite merely by virtue of their residence in cities.

94. Finally, it is essential to recognize that expressions of queerness may be more visible in urban centres for a variety of reasons. For one, cities may afford their inhabitants a degree of anonymity, which permit them to live their true lives or express themselves freely. This may not always be possible in smaller towns or villages, where the families or communities of queer persons may subject them to censure and disapprobation, or worse.96 The experiences of queer persons may also be more visible in urban spaces because such persons have greater access to the various resources required to make one's voice heard. This only means that the marginalized are yet to be heard when they speak and not that they do not exist. This is not to say that society does not inflict violence upon the LGBTQ community in cities but only to indicate potential reasons for their increased visibility in cities. In conclusion, queerness is not urban or elite. Persons of any geographic location or background may be queer.

Justice Chandrachud opines on the idea of queerness and how its perception of being un-Indian, is largely product of British Colonialism.

95. In pre-colonial times, the Indian subcontinent was home to a diverse population with its own, unique understanding of sexuality, companionship, morality and love. Stories, history, myths, and cultural practices in India indicate that what we now term 'queerness' was present in pre-colonial India. It would not be a faithful description of the times to say that queerness was "accepted" by the populace. Rather, society did not often view (many manifestations of) the queer identity as something that required acceptance to begin with because it formed a part of ordinary, day-to-day life, similar to the heterosexual or cisgender identities. This was true for many parts of the country at many points of time, though perhaps not everywhere and at all times. This is not to suggest that society did not inflict any violence upon members of the LBGTQ community in pre-colonial times. Rather, it is to highlight that current beliefs, attitudes, and practices which are hostile to the LGBTQ community are not necessarily natural successors of the past.

96. The native way of life gradually changed with the entry of the British, who brought with them their own sense of morality. It was not their morality alone that they brought with them but also their laws. This Court discussed the legal legacy of the colonizers at length in National Legal Services Authority (supra) and Navtej Singh Johar (supra). To recapitulate, Section 377 of the IPC inter alia criminalized queer sexual acts and in so doing, imposed the morality of the British on the Indian cultural landscape...

98. It is evident that it is not queerness which is of foreign origin but that many shades of prejudice in India are remnants of a colonial past. Colonial laws and convictions engendered discriminatory attitudes which continue into the present. Those who suggest that queerness is borrowed from foreign soil point to the relatively recent increase in the expression of queer identities as evidence of the fact that queerness is 'new,' 'modern,' or 'borrowed.' Persons who champion this view overlook two vital details. The first is that this recent visibility of queerness is not an assertion of an entirely novel identity but the reassertion of an age-old one. The second factor is that establishment of a democratic nation-state and the concomitant nurturing of democratic systems and values over six decades has enabled more queer persons to exercise their inherent rights. An environment has been fostered which is conducive to queer persons expressing themselves without the fear of opprobrium. This Court also recognizes that queer persons have themselves been crucial in the project of fostering such an environment. The constitutional

guarantees of liberty and equality have gradually been made available to an increasing number of people. This seems to be true across the world – the global turn towards democracy has created the conditions for the empowerment of queer people everywhere. Progress has perhaps been inconsistent, non-linear, and at a less than ideal pace but progress there has been. We must recognize the vital role of Indian society in contributing to the evolving social mores. The evolution may at times seem imperceptible, but surely it is.

4.2 Justice Sanjay Kishan Kaul

Justice Kaul addresses the question through an interesting lens. He points out the apparent redundancy in the argument of queerness being an urban or elite concept. Both public perception of a certain concept, as well as, the majoritarian values of India are immaterial to the Supreme Court. It is a question of constitutional rights and not a question of public opinion.

4. In their submissions, the Respondents raised doubts about the social acceptability of non-heterosexual relationships. Before we address the same, it is no longer res integra that the duty of a constitutional Court is to uphold the rights enshrined in the Constitution and to not be swayed by majoritarian tendencies or popular perceptions. This Court has always been guided by constitutional morality and not by social morality.

Justice Kaul further goes on to list various examples of non-heterosexual relations throughout Indian History:

5. A pluralistic social fabric has been an integral part of Indian culture and the cornerstone of our constitutional democracy. Non-heterosexual unions are well-known to ancient Indian civilisation as attested by various texts, practices, and depictions of art. These markers of discourse reflect that such unions are an inevitable presence across human experience. Hindu deities were multidimensional and multi-faceted and could appear in different forms. One of the earliest illustrations is from the Rig Veda itself. Agni, one of the most important deities, has been repeatedly described as the "child of two births" (dvijanman), "child of two mothers" (dvimatri), and occasionally, "child of three mothers" (the three worlds).

6. In Somdatta's Kathasaritsagara, same-sex love is justified in the context of rebirth. Somaprabha falls in love with Princess Kalingasena and claims that she loved her in her previous birth as well. Hindu mythology is replete with several such examples. We need not be detained in an effort to capture each of them. The significant aspect is that same-sex unions were recognised in antiquity, not simply as unions that facilitate sexual activity, but as relationships that foster love, emotional support, and mutual care.

7. Even in the Sufi tradition, devotion is often constructed around the idea of love as expressed through music and poetry. In several instances, the human relationship with the divine was expressed by mystics through the metaphor of same-sex love. Love across genders is also reflected in the Rekhti tradition of Lucknow. This tradition is centred around the practice of male poets writing in a female voice and is characterised by its homoeroticism. Significantly, the depictions of same-sex relationships are charged with affects such as love, friendship, and companionship.

Where the Judges Disagree

The minority judgment of Chief Justice Chandrachud and Justice Kaul recognises a right to intimate association, adoption rights regardless of marital status as well as issues directives for the protection of LGBTQIA+ persons.

5. Intimate Associations should be granted legal protection

5.1 Chief Justice D.Y. Chandrachud (The Minority Opinion)

While deciding whether non-heterosexual couples have a right to enter into a union, Justice Chandrachud evaluates the same from the lens of a variety of Fundamental Rights. He elaborates on how the fundamental rights framework enable the attainment of the goals of self-development and sustaining a quality life. He identifies two crucial capabilities, i.e., Emotions (Being able to have attachments to things and people outside ourselves) and Affiliation (Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another) as 'central requirements for a quality life'.

He goes on to underscore the importance of these capabilities by stating the following two reasons:

> *216. ...First, both capabilities focus on the human side of a person, that is, the ability and necessity of a person to emote and form relationships and associations. Second, the distinction between the capabilities of 'emotions' and 'affiliation' is that in the former, the emphasis is upon the agency of the individual and the freedom they have to form bonds with other people while in the latter, the emphasis is upon granting recognition to such associations.*

He goes on to emphasise on how our abilities to feel emotions, to love, and to be loved are fundamental to the nature of humanity, and goes on to state as follows:

> *217. Humans are unique in many respects. We live in complex societies, are able to think, communicate, imagine, strategize, and do more. However, that which sets us apart from other species does not by itself make us human. These qualities are necessary elements of our humanity but taken alone, they paint an incomplete picture. In addition to these qualities, our ability to feel love and affection for one another makes us human. We may not be unique in our ability to feel the emotion of love but it is certainly a fundamental feature of our humanity. We have an innate need to see and to be seen – to have our identity, emotions, and needs fully acknowledged, recognized, and accepted. The ability to feel emotions such as grief, happiness, anger, and affection and the need to share them with others makes us who we are. As human beings, we seek companionship and most of us value abiding relationships with other human beings in different forms and capacities...*
>
> *218. It is insufficient if persons have the ability and freedom to form relationships unregulated by the State. For the full enjoyment of such relationships, it is necessary that the State accord recognition to such relationships. Thus, the right to*

enter into a union includes the right to associate with a partner of one's choice, according recognition to the association, and ensuring that there is no denial of access to basic goods and services is crucial to achieve the goal of self-development.

Justice Chandrachud goes on to explain that the term "expression" within Article 19(1)(a) and the right to form associations under Article 19(1)(c) is the freedom of an individual to express and manifest how they choose to love a person, as well as, whom they choose to love. He states:

219. Article 19(1)(a) of the Constitution recognizes the right to freedom of speech and expression. Freedom postulates within its meaning, both, an absence of State control as well as actions by the State which create the conditions for the exercise of rights and freedoms. Article 19(1)(c) of the Constitution recognizes the freedom to form associations or unions or co-operative societies. The freedom of speech and expression is not limited to expressive words. It also includes other forms of expression such as the manifestation of complex identities of persons through the expression of their sexual identity, choice of partner, and the expression of sexual desire to a consenting party. Earlier judgments of this Court have held that expression of gender identity is a protected freedom under Article 19(1)(a). In NALSA (supra), this Court held that the expression of gender identity is a form of protected expression under Article 19(1)(a). In Navtej (supra), this Court held that Section 377 of the IPC infringes upon the freedom of expression of queer persons, protected under Article 19(1)(a).

220. Courts have traditionally interpreted the right to form an association guaranteed under Article 19(1)(c) to mean associations formed by workers or employees for collective bargaining to attain equitable working conditions. However, the entire gamut of the freedom protected under Article 19(1)(c) cannot be restricted to this singular conception. The ambit of the freedom under Article 19(1)(c) is much wider. The provision does not merely protect the freedom to form an association to create spaces for political speech or for espousing the cause of labour rights. While that is a very crucial component of the freedom protected under Article 19(1)(c), the provision also protects the freedom to engage in other forms of association to realize all forms of expression protected under Article 19(1)(a).

222. It could be denied directly when the law prohibits such an association. The operation of Section 377 of the IPC criminalizing homosexual activity is a form of direct restriction on the freedom of association.

223. On the other hand, the State could indirectly infringe upon the freedom when it does not create sufficient space to exercise that freedom. A formal associational status or recognition of the association is necessary for the free and unrestricted exercise of the freedom to form intimate associations. Needless to say, there may be reasonable restrictions on this right. However, other than legally valid and binding restrictions, the right to intimate associations must be unrestricted. The State by not endorsing a form of relationship encourages certain preferences over others. In a previous segment of this judgment, we have discussed the tangible and intangible benefits of recognizing relationships in the form of marriage. While the tangible benefits of marriage are traceable to the content of law, the intangible benefits are secured merely because State recognises the relationship through the instrument of law...

... For the right to have real meaning, the State must recognise a bouquet of entitlements which flow from an abiding relationship of this kind. A failure to recognise such

entitlements would result in systemic discrimination against queer couples. Unlike heterosexual couples who may choose to marry, queer couples are not conferred with the right to marry by statute. To remedy this, during the course of the hearing, the Solicitor General of India made a statement that a committee chaired by the Cabinet Secretary will be constituted to set out the rights which will be available to queer couples in unions. The Committee shall set out the scope of the benefits which accrue to such couples.

He goes on to analyse Article 19(1)(e), which grants the right to reside and settle anywhere in India, and states that to settle down somewhere is to build one's life there and reside there permanently. He says that the right to settle down anywhere, especially in the case of the queer community who more often than not migrate from their hometown to different parts of the country, includes the right to enter into a relationship with a person and to build a life with them. He found the right to a union to be grounded under Article 19(1)(e) and stated as follows:

226.Citizens of India have the right to settle in any part of the territory of India in terms of Article 19(1)(e). They, like all other citizens, may exercise this right in two ways:

a. First, they may build their lives in a place of their choosing (in accordance with law) either by themselves or with their partner. They may reside in that place permanently (subject to other reasonable restrictions including those intended to protect the rights of tribal communities). This right is uniquely significant to persecuted groups (such as queer persons, inter-caste couples, or interfaith couples) who migrate from their hometowns to other places in the country, including cities;202 and

b. Second, they may "settle down" with another person by entering into a lasting relationship with them. In fact, this mode of the exercising the right under Article 19(1)(e) is encompassed by the first mode because to many people, building a life includes choosing their life partner.

Hence, the right to enter into a union is also grounded in Article 19(1)(e).

Chief Justice Chandrachud further challenges the societal notion of a typical family that dominates our collective understanding, comprising of a mother, a father and an offspring who goes on to enter into a heterosexual union. He cites the judgment of the Supreme Court in the case of Deepika Singh v. Central Administrative Tribunal, wherein it was held as follows:

228...Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. A household may be a single-parent household for any number of reasons, including the death of a spouse, separation, or divorce. Similarly, the guardians and caretakers (who traditionally occupy the roles of the "mother" and the "father") of children may change with remarriage, adoption, or fostering. 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.

Focusing upon the right of queer persons to a family, and how the constitution protects the right of every person to be different and yet be protected under the same umbrella of constitutional rights, Justice Chandrachud states as follows:

229. Queer relationships may constitute one's family. Persons in such relationships are fulfilling their innate and human

need to be a part of a family and to create their family. This conception of a family may be atypical but its atypical nature does not detract from the fact that it is a family. Further, queer persons are often rejected by their natal families and have only their partner or their chosen community to fall back on. In addition to the different forms of kinship recognized in Deepika Singh (supra), the guru-chela bond of transgender persons may also be a familial bond…

…The Constitution accounts for plural identities and values. It protects the right of every person to be different. Atypical families, by their very nature, assert the right to be different. Difference cannot be discriminated against simply because it exists. Articles 19 and 21 protect the rights of every citizen and not some citizens.

Continuing his analysis of Article 21, which guarantees the right to life and personal liberty, Justice Chandrachud goes on to explain how it also encompasses the rights to dignity, autonomy and privacy. He also states that freedoms merely in their forms aren't sufficient. While they purport to make us free, they fail to effectively do so for some set of people due to lack of schemes, policies and institutions. 'When citizens are prevented from exercising their rights, the courts of the country create the conditions for their exercise by giving effect to the laws enacted by the legislative wing or the schemes formulated by the executive wing.' He goes on to explain how queer persons are also covered under the wide umbrella of this right and how it affects their right to enter into a union and states as follows:

232. Simply put, the ability to do what one wishes to do and be who one wishes to be (in accordance with law) lies at the heart of freedom.

233 Article 21 is available to all persons including queer persons. Article 21 encompasses the rights to dignity, autonomy, and privacy. Each of these facets animates the others. It is not possible to speak of the right to enter into a union without also speaking of the right to intimacy, which emanates from these rights. These rights demand that each individual be free to determine the course of their life, as long as their actions are not barred by law. Choosing a life partner is an integral part of determining the course of one's life. Most people consider this decision to be one of the most important decisions of their lives – one which defines their very identity. Life partners live together, spend a significant amount of time with one other, merge their respective families, create a family of their own, care for each other in times of sickness, support one another and much more. Hence, the ability to choose one's partner and to build a life together goes to the root of the right to life and liberty under Article 21. Undoubtedly, many persons choose not to have a life partner – but this is by choice and not by a deprivation of their agency. The law constrains the right to choose a partner in certain situations such as when they are within prohibited degrees of relationships or are in a consanguineous relationship.

234… Preventing members of the LGBTQ community from entering into a union also has the result of denying (in effect) the validity of their sexuality because their sexuality is the reason for such denial. This, too, would violate the right to autonomy which extends to choosing a gender identity and sexual orientation. The act of entering into an intimate relationship and the choices made in such relationships are also protected by the right to privacy. As held by this Court in Navtej (supra) and Justice KS Puttaswamy (9J) (supra), the right to privacy is not merely the right to be left alone but extends to decisional privacy or privacy of choice.

Justice Chandrachud explicates on how mental health is a state of complete wellbeing and not merely the absence of mental

illnesses. In this regard, he noted that:

> *235. …A person's mental well-being can only be secured if they are allowed the freedom and liberty to make choices about their lives. If their choices are restrained, their overall mental well-being would undoubtedly be degraded. Choices may be restrained by expressly denying them their freedom or by failing to create conditions for the exercise of such freedom.*

Justice Chandrachud reaches to the conclusion that the right to complete mental health is not being implemented in the case of queer persons due the restraint on the exercise of their right to choose. He states as follows:

> *236. The right of queer persons to access mental healthcare is recognized by Section 18 which stipulates that persons have a right to access mental healthcare without being discriminated against on the basis of their sex, gender, or sexual orientation. This is undoubtedly a progressive step in line with constitutional ideals. The mental health of members of the LGBTQ community may suffer not only because of the discrimination they may face at the hands of their families or society in general but also because they are prevented from choosing their life partner and entering into a meaningful, long-lasting relationship with them. The effect of the right to life under Article 21 read with Section 18 of the Mental Healthcare Act is that queer people have the right to complete mental health, without being discriminated against because of their sex, gender, or sexual orientation. A natural consequence of this is that they have the right to enter into a lasting relationship with their partner. They also have a right not to be subjected to inhumane and cruel practices or procedures.*

Justice Chandrachud proceeds to elaborate on the implications of the right to conscience granted by Article 25. He states as follows:

> *237. Article 25(1) has four components – the first component makes the right available to all persons. The second component indicates that all persons are equally entitled to the rights it codifies. The third component deals with two distinct concepts: the right to freedom of conscience and the right freely to profess, practice and propagate religion. While the freedom of conscience subsumes within its fold the right to profess, practice and propagate religion, it is not restricted to this right alone. The rights with respect to religion are one aspect of the freedom of conscience. The fourth component makes the rights codified in Article 25 subject to public order, morality, health, and the other provisions of Part III. The right under Article 25 is an individual right because conscience inheres in an individual.*

> *239. All persons, including members of the queer community, have the right to judge the moral quality of the actions in their own lives, and having judged their moral quality, have the right to act on their judgment in a manner they see fit. This attribute is of course not absolute and is capable of being regulated by law. In the segment of this judgment on the right to life and liberty, this Court noticed that the meaning of liberty is – at its core – the ability to do what one wishes to do and be who one wishes to be, in accordance with law. All persons may arrive at a decision regarding what they want to do and who they want to be by exercising their freedom of conscience. They may apply their sense of right and wrong to their lives and live as they desire, in accordance with law. Some of the decisions the moral quality of which they will judge include the decision on who their life partner will be and the manner in which they will build their life together. Each individual is entitled to decide this for themselves, in accordance with their conscience.*

In effect, he states that the right to conscience extends beyond

rights pertaining to religious freedom and includes the right of a person to adjudge the morality of their actions themselves. He notes that the right is subject to four exceptions – public order, morality, health, and the other fundamental rights. He adds that the none of these exceptions are applicable to the right of queer persons in entering into a union, since 'morality' is to be construed as 'constitutional morality' and not 'societal morality'. He goes on to state as follows:

> *240. ...Hence, the content of morality must be determined on the basis of the preambular precepts of justice, liberty, equality, and fraternity. None of these principles are an impediment to queer persons entering into a union. To the contrary, they bolster the proposition that queer persons have the right to enter into such a relationship. Finally, the other provisions in Part III (which may also restrict the exercise of the right under Article 25) do not act as a bar to the exercise of the right in the present case. Similar to the preambular values, they give rise to the right to enter into a union.*

> *241. A union may emerge from an abiding, cohabitational relationship of two persons – one in which each chooses the other to impart stability and permanence to their relationship. Such a union encapsulates a sustained companionship. The freedom of all persons (including persons of the queer community) to form a union was recognised by this Court in Navtej. Such a union has to be shielded against discrimination based on gender or sexual orientation.*

He then quotes a part of his judgement in the case of K.S. Puttaswamy V. Union of India:

> *242. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15, and 21 of the Constitution.*

Upon reaching the conclusion that non-heterosexual unions shall not be discriminated against, and shall be conferred the benefits which their counterparts enjoy, he states as follows:

> *243. This Court recognized that equality demands that queer persons are not discriminated against. An abiding cohabitational relationship which includes within its fold a union of two individuals cannot be discriminated against on the basis of sexual orientation. Material and expressive entitlements which flow from a union must be available to couples in queer unions. Any form of discrimination has a disparate impact on queer couples who unlike heterosexual couples cannot marry under the current legal regime.*

> *244. As a consequence of the rights codified in Part III of the Constitution, this Court holds that all persons have a right to enter into an abiding union with their life partner. This right, undoubtedly, extends to persons in queer relationships. At this juncture, it is necessary to clarify the difference between relationships and unions of the kind which this Court speaks of, and unions and marriages. Any person may enter into a consensual romantic or sexual relationship with another person. This may last for a few months or for years. Regardless of the period for which the relationship continues, no legal consequences attach to it, except where provided by law (such as in terms of the DV Act). However, when two persons enter into a union with a person whom they consider to be their life partner, certain legal consequences will follow. For instance, if one of them happens to die, their partner will have the right to access the body of the deceased.*

Justice Chandrachud then proceeds to the issue of discrimination

against queer people and its implications on their right to enter into a union. He pointed out the narrow interpretation of the impermissibility of discrimination based on sexual orientation in the case of Navtej. He points out as follows:

> *246. We find it necessary to supplement the observations of this Court in Navtej (supra) on the impermissibility of discrimination based on sexual orientation. The causal relationship between homophobia and gender stereotypes is not the only constitutional approach to grounding the prohibition of discrimination based on sexual orientation in Article 15. Subsuming the discrimination faced by queer persons into the sex-gender debate runs the risk of being reductionist. Gender theory only captures one part of the complex construction of sexual deviance. Over-emphasizing gender norms as a reason for the discrimination faced by the queer community will be at the cost of reducing their identity.*

He then addresses the issue of sexuality and gender identity being not covered under the factors provided under Article 15 (Sex, creed, caste, religion, race and place of birth) due to their non-ascribed in nature due to the involvement of the element of choice. He states as follows:

> *251...The understanding of Article 15(1) cannot be premised on the distinction between ascribed and achieved status. Such an understanding does not truly capture the essence of the anti-discrimination principle. The anti-discrimination principle incorporated in Article 15 identifies grounds on the basis of which a person shall not be discriminated. These grounds are markers of identity. The reason for constitutionally entrenching these five markers of identity (that is, religion, caste, race, sex, and place of birth) is that individuals (and groups) have historically and socially been discriminated against based on these markers of identities. These identities must be read in their historical and social context instead of through the narrow lens of ascription.*

> *252. When Article 15 is read in the broader manner indicated above, the word "sex" in Article 15 of the Constitution takes within its meaning "sexual orientation" not only because of the causal relationship between homophobia and sexism but also because 'sex' is used as a marker of identity. The word 'sex' cannot be read independent of the social and historical context. Thus, 'sex' in Article 15 includes within its fold other markers of identity which are related to sex and gender such as sexual orientation. Thus, a restriction on the right to enter into a union based on sexual orientation would violate Article 15 of the Constitution.*

After establishing sexuality as a basis of discrimination which is prohibited under the constitution, he addresses the argument of the union which contended that legal recognition of queer unions 'would lead to chaos'. He addresses it as follows:

> *254. The right to enter into a union like every other fundamental right can be restricted by the State. It is now established that the Courts must use the four prong proportionality test to assess if the infringement or restriction of a right is justified... However, if the State restricts the right or has the effect of restricting the right (both directly and indirectly) based on any of identities mentioned in Article 15, such a restriction would be unconstitutional.*

> *255. We do not accept the argument of the Union of India that permitting non heterosexual unions would lead to allowing incestuous, polyandrous, and polygamous unions for all communities (the personal laws of some religious and trial communities currently permit polygamy or polyandry). The restriction on the ground of sexual orientation will violate Article 15 of the Constitution. On the other hand, the restriction on incestuous, polygamous or polyandrous*

unions would be based on the number of partners and the relationships within the prohibited degree. The Court in that case will determine if the State's interest in restricting the right based on the number of partners and prohibited relationships is proportionate to the injury caused due to the restriction of choice. In view of the discussion above, a restriction based on a marker of identity protected by Article 15 cannot be equated to a restriction based on the exercise of choice. For this reason, we find that the apprehension of the Union of India is unfounded when tested on constitutional principles.

5.2 Justice Sanjay Kishan Kaul (Minority Opinion)

Justice Kaul agrees with Justice Chandrachud on non-heterosexual couples have the right to enter into a legally recognized union. He states as follows:

> *11. The judgment of the Hon'ble Chief Justice notes that the right to form unions is a feature of Articles 19 and 21 of the Constitution. Therefore, the principle of equality enumerated under Articles 14 and 15 demands that this right be available to all, regardless of sexual orientation and gender. Having recognized this right, this Court has taken on board the statement of the Learned Solicitor General to constitute a Committee to set out the scope of benefits available to such unions. I agree with the Hon'ble Chief Justice.*

He agrees that non-heterosexuals have the right to form legally recognised unions as a part of their right to equality, right to life and liberty and the right to freedom (of expression, association, etc.)

5.3 Justice S. Ravindra Bhat (Majority opinion)

Justice Bhat recognised the right of non-heterosexuals to enter into a 'relationship' which includes the right to choose a partner, cohabit and enjoy physical intimacy with them, to live the way they wish to, and other rights that flow from the right to privacy, autonomy and dignity. He also goes on to state that non-heterosexuals are, like all citizens, entitled to live freely, and express this choice, undisturbed in society. Whenever their right to enjoyment of such relationship is under threat of violence, the state is bound to extend necessary protection. But his adjudication of whether they have a right to enter into a legally recognised union, like his decision on whether there is a fundamental right to marry, has the perception of marriage as a 'social institution' as its focal point. He argues that the court can't by its intervention allow entry into a social institution and that the state shall only be concerned with such interventions in a social institution if it has a legitimate state interest in doing the same. He states the following in this regard:

> *53. The learned Chief Justice in a detailed discussion of the 'goal of self-development', rights under Article 19 (including the right to freedom of speech and expression, and to form 'intimate' associations, to settle in any part of India), Article 21, and Article 25, arrives at the conclusion that the right to union (or right to enter into an abiding cohabitational relationship) can be traced to these express provisions, which in turn enrich this right. Thereafter, having traced this right to union, it is propounded that the 'positive' postulate of fundamental rights (as explained in an earlier section of the draft opinion), necessitates or places a positive obligation on the State to accord recognition to such relationships/unions. This, in our considered opinion, is not necessary. Further, our point of disagreement is deepened by the discussion in Part D(v) and*

(vi) in the learned Chief Justice's draft opinion, prior to the section on 'the right to enter into a union'- which lays down a theory on the 'positive postulates' of fundamental rights and the consequential obligation on the State. For the reasoning elaborated in Part IV of our opinion, we cannot agree to this characterisation of the entitlement, or any corresponding state obligation to create a status through statute.

54. If it is agreed that marriage is a social institution with which the State is unconcerned except the limited state interest in regulating some aspects of it, does it follow that any section of the society (leaving aside the issue of rights of non-heterosexual couples) – which wishes for creation of a like social institution, or even an entry into a zone which is not popular or otherwise does not fall within the institution of marriage – can seek relief of its creation by court intervention?

Justice Bhat also points out that unenumerated rights can't be demanded from the court unless there's an overt action from the government threatening the exercise of the same. He states as follows:

55. ...Every fundamental right, is not enjoyed by an individual, to the same degree of absoluteness – for instance: Article 19 has a clear stipulation of reasonable restrictions for each freedom; Article 15 and 16 have a clear negative injunction on the State against discrimination, within which substantive equality is baked in and requiring the State to step in or facilitate; Article 25, is subject to other fundamental rights and freedoms under Part III, etc. There are restrictions, to the content of these rights. A discussion of Article 21 elucidates this point. However, even while tracing these numerous 'unenumerated' rights – the right to a clean environment, right to shelter, etc. – the courts have been (necessarily so) circumspect in how these can be enforced. Often, these rights have come to be enumerated in response to State action that threatened the freedom, or right directly or indirectly, thus compelling the litigant to invoke the jurisdiction of this court, to remind the State of the negative injunction that impedes its interference, and must guides its actions. Does this, however, mean that a litigant could knock on the doors of this court, seeking to enforce each of these unenumerated rights? A simple example would offer some clarity – consider a poet who wishes to share their work, with the public at large. Now provided that there is no direct restriction, or those in the nature of having a chilling effect, the State's role in enabling or facilitating this freedom enjoyed by the poet, is limited. This court cannot direct that the State must create a platform for this purpose; this would be a stretch, in the absence of any overt or inert threat.

Justice Bhat differs from Justice Chandrachud in (i) holding that there is a 'right to relationship' instead of a 'right to union' and (ii) that the said right emanates solely from Article 21 (right to life and liberty) instead of Articles 19 (the right to freedom of speech, to form associations and to reside and settle anywhere in the country), 21 and 25 (right to conscience). He states as follows in this regard:

62. ...In the case of free speech and expression, right to association and the other rights spelt out in Article 19 and the rights spelt out in Article 25, the core content of these are hard fought freedoms and rights primarily directed against state action and its tendency to curb them. To the question whether it is possible to locate an entitlement to lead to positive obligation and to facilitate the exercise of free speech, generally by mandating a horizontally applicable parliamentary law or legal regime, the answer would be a self-evident negative.

63. There is no difficulty about the right of two consenting persons to decide to live together, to co-habit with each other, and create their unique idea of a home, unconstrained by what others may say….

64. The idea that one right can lead to other rights, emanating from it, has been conclusively rejected by this court by seven judges, in All India Bank Employees Association v. National Industrial Tribunal…

67. We do not therefore, agree with the learned Chief Justice who has underlined that the positive postulate of various rights, leads to the conclusion that all persons (including two consenting adult queer persons) have an entitlement to enter into a union, or an abiding cohabitational relationship which the state is under an obligation to recognize, "to give real meaning" to the right. There is no recorded instance nor was one pointed out where the court was asked to facilitate the creation of a social institution like in the present case.

69. Therefore, even if we were to, for argument sake, recognise an entitlement under the Constitution to enter into an abiding cohabitational relationship or union– in our opinion, it cannot follow to a claim for an institution. There are almost intractable difficulties in creating, through judicial diktat, a civil right to marry or a civil union, no less, of the kind that is sought by the petitioners in these proceedings. "Ordering a social institution" or re-arranging existing social structures, by creating an entirely new kind of parallel framework for non-heterosexual couples, would require conception of an entirely different code, and a new universe of rights and obligations. This would entail fashioning a regime of state registration, of marriage between non-heterosexual couples; the conditions for a valid matrimonial relationship amongst them, spelling out eligibility conditions, such as minimum age, relationships which fall within "prohibited degrees"; grounds for divorce, right to maintenance, alimony, etc.

70. As a result, with due respect, we are unable to agree with the conclusions of the learned Chief Justice, with respect to tracing the right to enter into or form unions from the right to freedom of speech and expression [Article 19(1)(a)], the right to form associations [Article 19 (1)(c)], along with Article 21 and any corresponding positive obligation. It is reiterated that all queer persons have the right to relationship and choice of partner, co-habit and live together, as an integral part of choice, which is linked to their privacy and dignity. Any further discussion on the rights which consenting partners may exercise, is unnecessary. No one has contested that two queer partners have the rights enumerated under Article 19 (1) (a); (c), and (d), or even the right to conscience under Article 25. The elaboration of these rights, to say that exercise of choice to such relationships renders these rights meaningful, and that the state is obliged to "recognise a bouquet of entitlements which flow from such an abiding relationship of this kind" is not called for. We therefore, respectfully disagree with that part of the learned Chief Justice's reasoning, which forms the basis for some of the final conclusions and directions recorded in his draft judgment.

Nevertheless, he discusses the discriminatory impact of such non-recognition of such unions and notes as follows in a later part of the judgment:

137. Social acceptance is an important aspect of the matrimonial relationship, but that is not the only reality; even in the exercise of choice by the parties to a marriage, there may be no acceptance at all, by members of their respective families; others too may shun them. Yet, their relationship has the benefit of the cover of the law, since the law would

recognize their relationship, and afford protection, and extend benefits available to married persons. This however eludes those living in non-heterosexual unions, who have no such recognition in all those intersections with laws and regulations that protect individual and personal entitlements that are earned, welfare based, or compensatory. The impact, therefore, is discriminatory.

145. In the present case, however, the approach adopted in the above three cases would not be suitable. The court would have to fashion a parallel legal regime, comprising of defined entitlements and obligations. Furthermore, such framework containing obligations would cast responsibilities upon private citizens and not merely the State. The learned Chief Justice's conclusions also do not point towards directions of the kind contemplated in Vishaka (supra). However, the outlining of a bouquet of rights and indication that there is a separate constitutional right to union enjoyed by queer couples, with the concomitant obligation on the State to accord recognition to such union, is what we take exception to.

His standing on the right to a legally recognised union is again summarised as follows:

149 ... (ii). An entitlement to legal recognition of the right to union – akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting in legal status.

(iv) Previous judgments of this court have established that queer and LGBTQ+ couples too have the right to union or relationship (under Article 21) – "be it mental, emotional or sexual" flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship.

Therefore, Justice Bhat is of the view that while the right to be in a relationship is incontestable, benefits that arise out of relationships cannot be conferred through judicial fiat.

5.4 Justice Pamidighantam Sri Narasimha (Majority opinion)

Justice Narasimha in his judgment, while entirely agreeing with justice Bhat makes the following observations:

18. Additionally, the opinion of the learned Chief Justice, situates the right to choice of a partner and right to legal recognition of an abiding cohabitational relationship within Article 25 of the Constitution of India. Emphasis is placed on the term "freedom of conscience" which is placed alongside the right to freely profess, practice and propagate religion. The opinion situates in this freedom of conscience, the right not only to judge the moral quality of one's own action but also to act upon it. If that were permissible under Article 25, then the textual enumeration of freedoms in Article 19 become redundant, since these freedoms can be claimed to be actions on the basis of one's own moral judgment. I find it difficult to agree with such a reading of Article 25.

19. I am not oblivious to the concerns of the LGBTQ+ partners with respect to denial of access to certain benefits and privileges that are otherwise available only to married couples. The general statutory scheme for the flow of benefits gratuitous or earned; property or compensation; leave or compassionate appointment, proceed on a certain definitional understanding of partner, dependant, caregiver, and family. In

that definitional understanding, it is no doubt true, that certain classes of individuals, same-sex partners, live-in relationships and non-intimate care givers including siblings are left out. The impact of some of these definitions is iniquitous and in some cases discriminatory. The policy considerations and legislative frameworks underlying these definitional contexts are too diverse to be captured and evaluated within a singular judicial proceeding. I am of the firm belief that a review of the impact of legislative framework on the flow of such benefits requires a deliberative and consultative exercise, which exercise the legislature and executive are constitutionally suited, and tasked, to undertake.

5.5 Justice Chandrachud Addresses Justice Bhat's Argument that the Court Cannot Facilitate the Grant of Right to Individuals in Absence of Existing Legislation.

He states as follows:

324. In the opinion authored by him, my learned brother, Justice Ravindra Bhat states that unenumerated rights are recognised by Courts in response to State action "that threaten the freedom or right directly or indirectly." With due respect, such a narrow understanding of fundamental rights turns back the clock on the rich jurisprudence that the Indian courts have developed on Part III of the Constitution. This Court has held in numerous cases held that the rights of persons are infringed not merely by overt actions but also by inaction on the part of the State...

325. In NALSA (supra), this Court held that the State by rendering the transgender community invisible and failing to recognize their gender identity deprived them of social and cultural rights. This Court recognised the duty of the State to

enable the exercise of rights by the transgender community and issued a slew of directions to enforce this duty...

326. In Union of India v. Association of Democratic Reforms, proceedings under Article 136 were initiated against the judgment of the High Court of Delhi which recognised the rights of citizens to receive information regarding criminal activities of a candidate to the legislative assembly...

328. I also disagree with the observations of Bhat J that in the absence of a legal regime, the power of this Court to issue directions to enable the facilitation of rights is limited. In Sheela Barse v. Union of India, the petitioner, a social activist brought to the attention of this court that the State of West Bengal jailed persons with mental disabilities who are not suspected, accused, charged of, or convicted for, committing any offence but only for the reason that they are mentally ill. The decision to jail them was made based on an instant assessment of their mental health. This Court held that the admission of such mentally ill persons to jails was illegal and unconstitutional. This Court also directed that hospitals shall be immediately upgraded, psychiatric services shall be set up in all teaching and district hospitals, including filling posts for psychiatrists, and integrating mental health care with the primary health care system. In PUCL v. Union of India, the petitioner submitted that the right to livelihood implies that the State has a duty to provide food to people. In a series of orders, this Court identified government schemes which constituted legal entitlements of the right to food and outlined the manner of implementing these schemes

6. The Right of Queer Persons to Adopt Children.

<u>6.1 Justice D.Y. Chandrachud (Minority opinion)</u>

Justice Chandrachud considered the validity of the adoption regulations framed by the Central Adoption Resource Authority from three dimensions, i.e., the scope of the regulation in relation to the parent legislation, i.e., the Juvenile Justice Act (hereinafter referred to as JJ Act), the violation of Article 14 (equality before the law) and Article 15 (right against discrimination). The provisions of the law that were considered are mentioned below:

Section 57. Eligibility of prospective adoptive parents:

> *...(2) In case of a couple, the consent of both the spouses for the adoption shall be required.*
>
> *Regulation 5 of the Adoption Regulations*
>
> *Regulation 5. Eligibility criteria for prospective adoptive parents*
>
> *...(2) Any prospective adoptive parent, irrespective of their marital status and whether or not they have biological son or daughter, can adopt a child subject to the following, namely*
>
> *(a) the consent of both the spouses for the adoption shall be required, in case of a married couple;*
>
> *(b) a single female can adopt a child of any gender;*
>
> *(c) a single male shall not be eligible to adopt a girl child.*

> *(3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption.".*

Justice Chandrachud analysed the provisions as follows:

> *291. ...The general conditions in clause (1) are aimed at securing the best interest of the child. The conditions focus on physical, emotional, and financial stability. Clause (2) stipulates that any person irrespective of their marital status and irrespective of whether they already have a biological child can adopt. To this extent, the provision is expansive. However, clause 2(a) states that: (a) in case of a married couple, the consent of both the spouses is required; and (b) though a single female can adopt a child of any gender, a single male shall not be eligible to adopt a girl child. Clause (3) prescribes a further restriction on the conditions to be met before someone can adopt. The provision states that a child shall be given in adoption to a couple only if they have at least two years of a stable marital relationship (except in cases of relative or step-parent adoption).*
>
> *292. ...Regulations 5(2)(a) and 5(3) elucidates that: (a) only married couples can be prospective adoptive parents; and (b) such couples must be in "at least two years of stable marital relationship". A reading of the Adoption Regulations indicates that while a person can in their individual capacity be a prospective adoptive parent, they cannot adopt a child together with their partner if they are not married.*
>
> *295. It is settled law that delegated legislation must be consistent with the parent act and must not exceed the powers granted under the parent Act (JJ Act). The rule making authority must exercise the power for the purpose for which it is granted. The provisions of the delegated legislation will be ultra vires if they are repugnant to the parent Act or exceed*

the authority which is granted by the parent Act. Section 57(5) delegates to CARA the power to prescribe any other criteria in addition to the criteria prescribed by the provision. However, in view of the line of cases on subordinate law-making, this power cannot be read expansively. CARA's power to prescribe additional criteria is limited by the express provisions and legislative policy of the JJ Act.

296. The Adoption Regulations place two restrictions on a couple who wish to adopt: first, the couple must be married, and second, the couple must have been in a stable marital relationship. We will now determine if the prescription of these two additional conditions is violative of the provisions of the JJ Act and the Constitution.

299. Section 57(2) does not stipulate that only married couples can adopt. It states that "in case of a couple" the consent of both the spouses must be secured. This is a clear indicator that adoption by a married couple is not a statutory requirement. Section 57(2) provides that the consent of both the parties must be received if the prospective adoptive parents are in a married relationship. The usage of the phrase spouse in Section 57(2) does not mean that it excludes unmarried couples from adopting.

300. However, Regulation 5(3) of the Adoption Regulations bars unmarried partners from being prospective adoptive parents. These Regulations only permit persons to adopt in an individual capacity and not jointly as an unmarried couple. Regulation 5(2) states that every person irrespective of whether they are married or unmarried will be able to be prospective adoptive parents. The subsequent criteria in clause (a) (that is, the requirement for the consent of both spouses if they are married) does not exclude an unmarried couple from adopting. It only states that if the couple is married, then the consent of both the parties shall be secured. However, Regulation 5(3) in express terms excludes unmarried couples from adopting by prescribing the condition that the couple must have been in two years of a 'stable marital relationship.' As observed in the previous paragraph, the JJ Act does not preclude unmarried couples from adopting. Though Section 57 of the JJ Act grants CARA the power to prescribe additional criteria, the criteria must not exceed the scope of the legislative policy. Neither the general principles guiding the JJ Act nor Section 57 in particular preclude unmarried couples from adopting a child. In fact, all the other criteria ensure the child's best interests. The Union of India has not proved that precluding unmarried couples from adopting a child (even though the same people are eligible to adopt in their individual capacity) is in the child's best interests. Thus, CARA has exceeded its authority by prescribing an additional condition by way of Regulation 5(3), which is contrary to tenor of the JJ Act and Section 57 in particular.

301. Further, the usage of the phrase 'stable' in Regulation 5(3) is vague. It is unclear if the provision creates a legal fiction that all married relationships which have lasted two years automatically qualify as a stable relationship or if there are specific characteristics in addition to those prescribed in Regulation 5(1) (that is, physical, mental, and emotional wellbeing) which would aid in the characterization of a married relationship as a stable one. Hence, Regulation 5(3) exceeds the scope of the JJ Act.

After establishing that Regulation 5 of the adoption regulations are ultra-vires the Juvenile Justice Act, Justice Chandrachud goes on to determine the validity of the regulation in light of Article 14 and 15 of the Constitution and states as follows:

302. Regulation 5(3) of the Adoption Regulations has classified

couples into married and unmarried couples for the purpose of adoption. The intent of CARA to identify a stable household for adoption is discernible from Regulation 5(3). However, CARA has proceeded under the assumption that only married couples would be able to provide a stable household for the child. Such an assumption is not backed by data. Although married couples may provide a stable environment, it is not true that all couples who are married will automatically be able to provide a stable home. Similarly, unmarried relationships cannot be characterized as fleeting relationships which are unstable by their very nature. Marriage is not necessarily the bedrock on which families and households are built. While this is the traditional understanding of a family, we have already elucidated above that this social understanding of a family unit cannot be used to deny the right of other couples who are in domestic partnerships or live-in relationships to found a family.

303. It is now a settled position of law that classification per se is not discriminatory and violative of Article 14. Article 14 only forbids class legislation and not reasonable classification. A classification is reasonable, when the following test is satisfied:

a. The classification must be based on an intelligible differentia which distinguishes the persons or things that are grouped, from others left out of the group; and

b. The differentia must have a rational nexus to the object sought to be achieved by the statute.

304. ...Placing a child in a stable family is undoubtedly in pursuance of a child's interest. However, the respondents have not placed any data on record to support their claim that only married relationships can provide stability. It is true that separating from a married partner is a cumbersome process when compared to separating from a partner with whom a person is in a live-in relationship. This is because separation from a married partner is regulated by the law while live-in relationships are unregulated by law. ... There is no single form of a stable household. There is no material on record to prove the claim that only a married heterosexual couple would be able to provide stability to the child. In fact, this Court has already recognized the pluralistic values of our Constitution which guarantee a right to different forms of association.

305. The Union of India is required to submit cogent material to support its claim that only married partners are able to provide a stable household. However, it has not done so. ... The Union of India has not been able to demonstrate that a single parent who adopts a child will provide a more stable environment for a child who is adopted than an unmarried couple. For all these reasons, Regulations 5(2)(a) and 5(3) of the Adoption Regulations are violative of Article 14 of the Constitution.

308. The petitioners' challenge to Regulation 5(3) of Adoption Regulations is mounted on the ground that is discriminates against the queer community. The challenge is not on the ground that it violates the right to adopt nor is it the petitioners case that they have a fundamental right to adopt. The crux of the petitioners' case is that Regulation 5(3) discriminates against the queer community because it disproportionately affects them.

309. Regulation 5(3), though facially neutral, indirectly discriminates against atypical unions (such the relationship between non-heterosexual partners) which have not been recognised by the State. Queer marriages have not been recognized by the state and queer persons in atypical unions cannot yet enter into a marriage which is recognized by the state. Though the additional criteria prescribed by the

Adoption Regulations would also affect a heterosexual person's eligibility to adopt a child, it would disproportionately affect non-heterosexual couples. This is because the State has not conferred legal recognition to the unions between queer persons, in the form of marriage. Consequently, an unmarried heterosexual couple who wishes to adopt a child has the option of marrying to meet the eligibility criteria for adoption. However, this option is not available to queer couples. When Regulation 5(3) is understood in light of this position, a queer person who is in a relationship can only adopt in an individual capacity. This exclusion has the effect of reinforcing the disadvantage already faced by the queer community.

313...The Court examines if the law is discriminatory not based on whether there is a classification based on the identity but whether there is discrimination based on the identity. While doing so it determines if it is a protective provision. However, once it is established that the law discriminates based on protected identities, it cannot be justified based on state interest. Thus, once it is proved that the law discriminates based on sexual orientation as in this case (because it disproportionately affects queer persons), no amount of evidence or material submitted by the State that such discrimination is based on state's interest can be used as a justification.

316. The law cannot make an assumption about good and bad parenting based on the sexuality of individuals. Such an assumption perpetuates a stereotype based on sexuality (that only heterosexuals are good parents and all other parents are bad parents) which is prohibited by Article 15 of the Constitution. This assumption is not different from the assumption that individuals of a certain class or caste or religion are 'better' parents. In view of the above observations, the Adoption Regulation is violative of Article 15 for discriminating against the queer community.

317. In view of the observations above, Regulation 5(3) is ultra vires the parent Act for exceeding the scope of delegation and for violating Articles 14 and 15 of the Constitution. It is settled that courts have the power to read down a provision to save it from being declared ultra vires. Regulation 5(3) is read down to exclude the word "marital". It is clarified that the reference to a 'couple' in Regulation 5 includes both married and unmarried couples including queer couples. In bringing the regulations in conformity with this judgment, CARA is at liberty to ensure that the conditions which it prescribes for a valid adoption subserve the best interest and welfare of the child. The welfare of the child is of paramount importance. Hence, the authorities would be at liberty to ensure that the familial circumstances provide a safe, stable, and conducive environment to protect the material well-being and emotional sustenance of the child. Moreover, CARA may insist on conditions which would ensure that the interest of the child would be protected even if the relationship of the adoptive parents were to come to an end in the future. Those indicators must not discriminate against any couple based on sexual orientation. The criteria prescribed must be in tune with constitutional values. The principle in Regulation 5(2)(a) that the consent of spouses in a marriage must be obtained if they wish to adopt a child together is equally applicable to unmarried or queer couples who seek to jointly adopt a child.

318. Thus, the phrases "male applicant" and "female applicant (in case of applicant couples)" in Schedules II, III, VI and VII of the Adoption Regulations are substituted with the phrases "prospective adoptive parent 1" and "prospective adoptive parent 2 (in case of applicant couples).

Justice Chandrachud, therefore, is of the opinion that regulation

5 of the adoption regulations which only allow married couples to adopt a child together exceeds the delegated legislative powers of the JJ Act and is in violation of Article 14 and 15 of the constitution and hence needs to be read down to exclude the word 'marital' from it.

Thereafter, he goes on to analyse the validity of a circular released by the CARA, which rendered a prospective adoptive parent ineligible for adoption. He goes on to state as follows:

> *322. Regulation 5(1) of the Adoption Regulations prescribes a general criterion (in the form of a guiding principle) for prospective adoptive parents which is that they must be physically, mentally, and emotionally fit, they must not be convicted of a criminal act, and they must not have a life-threatening disease. These criteria are equally applicable to couples and persons who wish to adopt in their individual capacity. All the other subsequent provisions in Regulation 5 are specific to couples (that is, the requirement of a stable relationship and the consent of both parties) and individuals (that is, that a male cannot adopt a girl child). Hence, the additional criterion prescribed by the CARA circular for a person to adopt in an individual capacity must be traceable to the principles in Regulations 5(1) and 5(2)(c). The condition imposed by CARA circular is neither traceable to the principles in Regulations 5(1) and 5(2)(c) nor is it traceable to any of the provisions of the JJ Act. The CARA Circular has exceeded the scope of the Adoption Guidelines and the JJ Act.*
>
> *323. According to the Adoption Regulations, unmarried couples cannot jointly adopt a child. Though the additional criteria prescribed by the CARA Circular would also affect a heterosexual person's eligibility to adopt a child, it would disproportionately affect non-heterosexual couples since the State has not conferred legal recognition in the form of marriage to the union between non-heterosexual persons. When the CARA Circular is read in light of this legal position, a person of the queer community would be forced to choose between their wish to be an adoptive parent and their desire to enter into a partnership with a person they feel love and affinity with. This exclusion has the effect of reinforcing the disadvantage already faced by the queer community. For these reasons and the reasons recorded in Section D (xiii)(a)(III), the CARA Circular is violative of Article 15 of the Constitution.*

Justice Chandrachud held the circular to be violative of Article 15, as it disproportionately affects non-heterosexual couples more than their counterparts due to the lack of legal recognition of such unions.

6.2 Justice S. Ravindra Bhat (Majority opinion)

Justice Bhat held the adoption regulations to not be ultra vires the parent act. He goes on to explain how the legislative intent of the Juvenile Justice Act needs to be understood in the broader context and the purpose of the Act, i.e., to hold the best interest of the child paramount. He states as follows in this regard:

> *122. With respect, we disagree with the interpretation of Section 57(2) of the JJ Act itself. A reading of the provision as a whole, makes it amply clear that it intends joint adoption only to married couples. While the word "couple" is not preceded by 'married', the use of "spouse" later in the sentence, rules out any other interpretation. The principle of noscitur a sociis (meaning of a word should be known from its accompanying or associating words) is squarely applicable; a provision is to be seen as a whole, wherein words are to be read in the context of accompanying or associating words. In K. Bhagirathi G. Shenoy and Ors. v. K.P. Ballakuraya & Anr., it was observed:*

"It is not a sound principle in interpretation of statutes to lay emphasis on one word disjuncted from its preceding and succeeding words. A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim noscitur a sociis (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision."...

123. To read Section 57(2) as enabling both married and unmarried couples to adopt, but that the statutory provision contemplates a restriction or requirement of 'consent' only on the former kind of couple is not based on any known principle of interpretation. There is a strong legislative purpose in the requirement of obtaining consent of the spouse, which is rooted in the best interest of the child; for their welfare, and security. The parent Act, and delegated legislation, both are clear that a prospective adoptive parent can be a single person (whether unmarried, widower, etc.) and on them, there exists no restriction other than on a single male being barred from adopting a girl child. The restriction of 'consent' of partner, applies only in the case of a couple. This is because the child will enter into a family unit – consisting of two parents, as a result of the adoption and will in reality, enjoy the home that is made of both partners. Acceptance, therefore, of the other partner, is imperative; it would not be in the best interest of the child if one of the partners was unwilling to take on the responsibility. The only other legislative model is Section 7 and 8 of the Hindu Adoption and Maintenance Act, 1956 which mandates consent of both spouses (which much like other personal laws, uses the gendered language of "wife" and "husband").

124. Therefore, given that we differ on the starting point itself – that section 57(2) of the JJ Act permits joint adoption by both married and unmarried couples (as held by the learned Chief Justice) – we are of the considered opinion that is not a case of delegated legislation being ultra vires the parent Act.

125. The legislative choice, of limiting joint adoption only to married couples needs to be understood in the broader context of the JJ Act, and its purpose – which is the best interest of the child are paramount. Legal benefits and entitlements, flow either from/in relation to the individual adopting (when a single person adopts), or the married couple adopting as a unit. In the case of bereavement, of such single parent, custody of the child may be taken by a relative in the former, whereas continued by the surviving spouse, in the latter. But consider, that in the case of a married couple – there is a breakdown of marriage, or simply abandonment/neglect of one partner and the child, by the other. There are protections in the law, as they stand today, that enable such deserted, or neglected spouse, to receive as a matter of statutory right – maintenance, and access to other protections. Undoubtedly, the DV Act offers this protection even to those in an unmarried live-in relationship, but consider a situation that does not involve domestic violence, and is plain and simple a case of neglect, or worse, desertion. It is arguable that both partners, are equally responsible for the child after the factum of adoption; however – it begs the question, how can one enforce the protection that is due to this child?

126. ... To read the law in the manner adopted by the learned Chief Justice, with all due respect, would have disastrous outcomes, because the ecosystem of law as it exists, would be unable to guarantee protection to the said child in the case of breakdown of an unmarried couple, adopting jointly. This, therefore, would not be in the best interest of the child.

Justice Bhat then proceeds to analyse why the reading down of

the provisions to include unmarried couples as well would not be an appropriate exercise as well. While Justice Bhat agrees that the discrimination faced by non-heterosexual couples is pretty evident in the case of adoption, he acknowledges that the reading down of the provisions to include unmarried couples would have unintended consequences and the appropriate remedy would be for the legislators to take note of and to act on the issue. He addresses the arguments made by the petitioners and states as follows in this regard:

> *127. Counsel relied on the case of X v. Principal Secretary (supra) where this court read down 'married woman' to just 'woman' for the purpose of interpretating the MTPA Act, to argue that a similar interpretation be adopted for the law relating to adoption. In our considered opinion, that case was on a different footing altogether – it related to an individual woman's right to choice and privacy, affecting her bodily autonomy. Given the fundamental right that each childbearing individual has, and the objective of the Act, the classification on the basis of marital status, was wholly arbitrary. The JJ Act and its regulations are on a different footing. Here, the object of the Act and guiding principle, is the best interest of the child (and not to enable adoption for all).*
>
> *128. It is agreeable that all marriages may not provide a stable home, and that a couple tied together in marriage are not a 'morally superior choice', or per se make better parents. Undoubtedly, what children require is a safe space, love, care, and commitment – which is also possible by an individual by themselves, or a couple– married or unmarried. There is no formula for a guaranteed stable household. Principally, these are all conclusions we do not differ with. As a society, and in the law, we have come a long way from the limited conception of a nuclear family with gendered roles, and privileging this conception of family over other 'atypical' families. However, the fact that Parliament has made the legislative choice of including only 'married' couples for joint adoption (i.e., where two parents are legally responsible), arises from the reality of all other laws wherein protections and entitlements, flow from the institution of marriage. To read down 'marital' status as proposed, may have deleterious impacts, that only the legislature and executive, could remedy – making this, much like the discussion on interpretation of SMA, an outcome that cannot be achieved by the judicial pen. Having said this, however, there is a discriminatory impact on queer couples, perhaps most visible through this example of adoption and its regulation, that requires urgent state intervention…*
>
> *129. Furthermore, the previous analysis of SMA has led this Court to conclude that its provisions cannot be modified through any process of interpretation and that the expression "spouse" means husband and wife or a male and female as the case may be, on an overall reading of its various provisions. By Section 2(64) of the JJ Act, expressions not defined in that Act have the same meanings as defined in other enactments. The SMA is one example. Likewise, the other enacted laws with respect to adoption is the Hindu Adoption and Maintenance Act. That contains the expression "wife and husband". In these circumstances, we are of the opinion that the manner in which Section 57(2) is cast, necessitating the existence of both spouse and their consent for adoption of a child. In such a relationship, Regulation 5(3) cannot be read down in the manner suggested by the learned Chief Justice.*
>
> *130. Therefore, in our opinion, whilst the argument of the petitioners is merited on some counts, at the same time, the reading down of the provision as sought for would result in the anomalous outcome that heterosexual couples who live together, but choose not to marry, may adopt a child together and would now be indirect beneficiaries, without the legal*

protection that other statutes offer – making it unworkable (much like the discussion on SMA in Part V)

132. Furthermore, given the social reality that queer couples are having to adopt in law as individuals, but are residing together and for all purposes raising these children together – means that the State arguably has an even more urgent need to enable the full gamut of rights to such children, qua both parents. For instance, in an unforeseen circumstance of death of the partner who adopted the child as an individual, the child in question may well become the ward of such deceased's relatives, who might (or might not) even be known to the child, whereas the surviving partner who has been a parent to the child for all purposes, is left a stranger in the law. Therefore, this is yet another consequence of the non-recognition of queer unions, that the State has to address and eliminate, by appropriate mitigating measures.

He summarised his position as follows:

149. ...Regulation 5(3) of the CARA Regulations cannot be held void on the grounds urged. At the same time, this court is of the considered opinion that CARA and the Central Government should appropriately consider the realities of de facto families, where single individuals are permitted to adopt and thereafter start living in a non-matrimonial relationship. In an unforeseen eventuality, the adopted child in question, could face exclusion from the benefits otherwise available to adopted children of married couples. This aspect needs further consideration, for which the court is not the appropriate forum....

6.3 Justice Chandrachud Addresses the Concerns of Justice Bhat Regarding Adoption

337. The opinion of Bhat, J. highlights that the reading of the Adoption Regulations to permit unmarried couples to adopt would have 'disastrous outcomes' because the law, as it stands today, does not guarantee the protection of the child of unmarried parents adopting jointly. A reading of the numerous laws relating to the rights of children qua parents indicates that the law does not create any distinction between children of married and unmarried couples so long as they are validly adopted. Section 12 of the Hindu Adoptions and Maintenance Act 1956 states that an adopted child shall be deemed to be the child of their adopted parents for all purposes from the date of adoption. Similarly, Section 63 of the JJ Act also creates a deeming fiction. The provision states that a child in respect of whom an adoption order is issued shall become the child of the adoptive parents and the adoptive parents shall become the parents of the child as if the child had been born to the adoptive parents, including for the purposes of intestacy.

338. In view of the deeming fiction created by Section 12 of the Hindu Adoptions and Maintenance Act 1956 and Section 63 of the JJ Act, an adopted child is a legitimate child of the adopting couple. The manner of determination of legitimacy prescribed by Section 112 of the Indian Evidence Act 1872286 shall not apply in view of the deeming fiction created by Section 12 of the Hindu Adoptions and Maintenance Act 1956 and Section 63 of the JJ Act. Thus, all the benefits which are available under the law to a legitimate child (who has been validly adopted) of a married couple will equally be available to the legitimate child of an unmarried couple. For example, Section 20 of the Hindu Adoptions and Maintenance Act 1956 which provides that a Hindu is to maintain their children does not make any distinction between a legitimate child of

a married and an unmarried couple. Similarly, succession law in India does not differentiate between the child of a married and an unmarried couple if the child has been adopted by following the due process of law. Further, the breakdown of the relationship of an unmarried couple will not lead to a change in applicable law because the child will continue to be a legitimate child even after the breakdown of the relationship. It is therefore unclear what the 'disastrous outcomes' referred to, are. My learned brother has also failed to address whether Regulation 5(3) is discriminatory for distinguishing between married and unmarried couples for the purpose of adoption and for the disproportionate impact that it has on the members of the queer community while simultaneously holding that "the State cannot, on any account, make regulations that are facially or indirectly discriminatory on the ground of sexual orientation."

7. Directions of protection for the LGBTQIA+ community from violence and discrimination

The directions as given by Chief Justice Chandrachud, mandate the active protection of the LGBTQIA+ community and address police violence, civil rights, rights of partners to make medical decisions in an emergency etc. Some of the directives are to the various organs of the state including state and central governments as well as police. With respect to the High-Powered Committee to be constituted by the Central Government, it too is directed to 'consider' how the bouquet of rights which flow out of relationships can be operationalised. The directives of Justice Bhat limit themselves to the constitution of the High-Powered Committee.

7.1 Justice D.Y. Chandrachud (Minority opinion)

A key aspect of Chief Justice Chandrachud's judgement is the idea of an intimate association being about a bouquet of entitlements. While the majority failed to recognize the right to marry as being a fundamental right, Chief Justice Chandrachud's directions affords a measure of protection to the LGBTQIA+ community. These protectionary measures overlap with some of the entitlements that flow from marriage.

> *339. Counsel for the petitioners and some counsel for the respondents advanced extensive submissions on the various forms of violence and discrimination that society and the state machinery inflict upon the queer community, and*

especially queer couples. This has been discussed in detail in the prefatory part of the judgment. Counsel sought directions to obviate such violence and discrimination.

a. The Union Government, State Governments, and Governments of Union Territories are directed to:

i. Ensure that the queer community is not discriminated against because of their gender identity or sexual orientation;

ii. Ensure that there is no discrimination in access to goods and services to the queer community, which are available to the public;

iii. Take steps to sensitise the public about queer identity, including that it is natural and not a mental disorder;

iv. Establish hotline numbers that the queer community can contact when they face harassment and violence in any form;

v. Establish and publicise the availability of 'safe houses' or Garima Grehs in all districts to provide shelter to members of the queer community who are facing violence or discrimination;

vi. Ensure that "treatments" offered by doctors or other persons, which aim to change gender identity or sexual orientation are ceased with immediate effect;

vii. Ensure that inter-sex children are not forced to undergo operations with regard only to their sex, especially at an age at which they are unable to fully comprehend and consent to such operations;

viii. Recognize the self-identified gender of all persons including transgender persons, hijras, and others with sociocultural identities in India, as male, female, or third gender. No person shall be forced to undergo hormonal therapy or sterilisation or any other medical procedure either as a condition or prerequisite to grant legal recognition to their gender identity or otherwise;

b. The appropriate Government under the Mental Healthcare Act must formulate modules covering the mental health of queer persons in their programmes under Section 29(1). Programmes to reduce suicides and attempted suicides (envisaged by Section 29(2)) must include provisions which tackle queer identity;

c. The following directions are issued to the police machinery:

i. There shall be no harassment of queer couples by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;

ii. They shall not force queer persons to return to their natal families if they do not wish to return to them;

iii. When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, they shall on verifying the genuineness of the complaint ensure that their freedom is not curtailed;

iv. When a police complaint is filed apprehending violence from the family for the reason that the complainant is queer or is in a queer relationship, they shall on verifying the genuineness of the complaint ensure due protection; and

v. Before registering an FIR against a queer couple or one of the parties in a queer relationship (where the FIR is sought to be registered in relation to their relationship), they shall conduct a preliminary investigation in terms of Lalita Kumari v. Government of U.P, to ensure that the complaint discloses

a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police shall close the complaint after recording a statement to that effect.

In a section titled, 'Conclusions and orders of enforcement', Chief Justice Chandrachud concludes that:

s. We record the assurance of the Solicitor General that the Union Government will constitute a Committee chaired by the Cabinet Secretary for the purpose of defining and elucidating the scope of the entitlements of queer couples who are in unions. The Committee shall include experts with domain knowledge and experience in dealing with the social, psychological, and emotional needs of persons belonging to the queer community as well as members of the queer community. The Committee shall before finalizing its decisions conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories.

The Committee shall in terms of the exposition in this judgment consider the following:

i. Enabling partners in a queer relationship (i) to be treated as a part of the same family for the purposes of a ration card; and (ii) to have the facility of a joint bank account with the option to name the partner as a nominee, in case of death;

ii. In terms of the decision in Common Cause v. Union of India, as modified by Common Cause v. Union of India, medical practitioners have a duty to consult family or next of kin or next friend, in the event patients who are terminally ill have not executed an Advance Directive.Parties in a union may be considered 'family' for this purpose;

iii. Jail visitation rights and the right to access the body of the deceased partner and arrange the last rites; and

iv. Legal consequences such as succession rights, maintenance, financial benefits such as under the Income Tax Act 1961, rights flowing from employment such as gratuity and family pension and insurance.

The report of the Committee chaired by the Cabinet Secretary shall be implemented at the administrative level by the Union Government and the governments of the States and Union Territories.

7.2 Justice S. Ravindra Bhat (Majority opinion)

Justice Bhatt is not in agreement with the Directives passed by Chief Justice Chandrachud. However, the only point on which he does agree is the constitution of a High-Powered Committee. The directions given by Justice Bhat do nothing further for the protection of rights. They merely lay out once again, the deeply unsatisfactory majority opinion:

149. This court hereby summarizes its conclusions and directions as follows:

i. There is no unqualified right to marriage except that recognised by statute including space left by custom.

ii. An entitlement to legal recognition of the right to union – akin to marriage or civil union, or conferring legal status upon the parties to the relationship can be only through enacted law. A sequitur of this is that the court cannot enjoin or direct the creation of such regulatory framework resulting

in legal status.

iii. The finding in (i) and (ii) should not be read as to preclude queer persons from celebrating their commitment to each other, or relationship, in whichever way they wish, within the social realm.

iv. Previous judgments of this court have established that queer and LGBTQ+ couples too have the right to union or relationship (under Article 21) – "be it mental, emotional or sexual" flowing from the right to privacy, right to choice, and autonomy. This, however, does not extend to a right to claim entitlement to any legal status for the said union or relationship.

v. The challenge to the SMA on the ground of under classification is not made out. Further, the petitioner's prayer to read various provisions in a 'gender neutral' manner so as to enable same-sex marriage, is unsustainable.

vi. Equality and non-discrimination are basic foundational rights. The indirect discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a relevant eligibility factor, for queer couples who in their exercise of choice form relationships, have to be suitably redressed and removed by the State. These measures need to be taken with expedition because inaction will result in injustice and unfairness with regard to the enjoyment of such benefits, available to all citizens who are entitled and covered by such laws, regulations or schemes (for instance, those relating to employment benefits: provident fund, gratuity, family pension, employee state insurance; medical insurance; material entitlements unconnected with matrimonial matters, but resulting in adverse impact upon queer couples). As held earlier, this court cannot within the judicial framework engage in this complex task; the State has

to study the impact of these policies, and entitlements.

vii. Consistent with the statement made before this Court during the course of proceedings on 03.05.2023, the Union shall set up a high-powered committee chaired by the Union Cabinet Secretary, to undertake a comprehensive examination of all relevant factors, especially including those outlined above. In the conduct of such exercise, the concerned representatives of all stakeholders, and views of all States and Union Territories shall be taken into account.

viii. The discussion on discriminatory impacts is in the context of the effects of the existing regimes on queer couples. While a heterosexual couple's right to live together is not contested, the logic of the discriminatory impact [mentioned in conclusion (vi) above] faced by queer couples cohabiting together, would definitionally, however, not apply to them.

ix. Transgender persons in heterosexual relationships have the freedom and entitlement to marry under the existing statutory provisions.

x. Regulation 5(3) of the CARA Regulations cannot be held void on the grounds urged. At the same time, this court is of the considered opinion that CARA and the Central Government should appropriately consider the realities of de facto families, where single individuals are permitted to adopt and thereafter start living in a non-matrimonial relationship. In an unforeseen eventuality, the adopted child in question, could face exclusion from the benefits otherwise available to adopted children of married couples. This aspect needs further consideration, for which the court is not the appropriate forum.

xi. Furthermore, the State shall ensure - consistent with the previous judgment of this Court in K.S. Puttaswamy (supra),

Navtej Johar (supra), Shakti Vahini (supra) and Shafin Jahan (supra)- that the choice exercised by queer and LGBTQ couples to cohabit is not interfered with and they do no face any threat of violence or coercion. All necessary steps and measures in this regard shall be taken. The respondents shall take suitable steps to ensure that queer couples and transgender persons are not subjected to any involuntary medical or surgical treatment.

xii. The above directions in relation to transgender persons are to be read as part of and not in any manner whittling down the directions in NALSA (supra) so far as they apply to transgender persons.

xiii. This court is alive to the feelings of being left out, experienced by the queer community; however, addressing their concerns would require a comprehensive study of its implications involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum to provide suitable remedies.

8. Realizing the Dream Deferred

The jurisprudence of marriage equality begins not from *Supriyo*, but rather from the very first case down the line decriminalizing homosexuality (Naz-I). Unfortunately, these gains were reversed by the Supreme Court in *Suresh Kumar Koushal* (Naz-II), which led to widespread protests across the nation. Naz-I had awoken a nation from its slumber and made it see the silent minority whose rights had been trampled from the day the country had received a modern day-governance and administrative system, the only reason for this oppression being as to who they love. After (Naz-II), the Court promptly reversed its decision in *Navtej Singh Johar* (Naz-III), repealing the draconian S.377- which criminalized the sexual expression of homosexuality itself. The Court made further strides in *NALSA* by granting recognition to genders existing outside the traditional gender binary and in Puttaswamy when it held that privacy is an inviolable right that extends even to the institution of marriage.

Supriyo is a setback to this march of the law on marriage equality. However, the divided decision in *Supriyo* has sown the seeds for future progressive activism characterized by a stronger emphasis on equal marriage rights. However, such activism can't and won't formulate overnight- it would require consistent galvanisation of resources, energy and effort from activists belonging to different walks of life to help raise awareness about this.

It is also worth noting that after the Supreme Court in *Supriyo*, a petition was filed seeking recognition of Deed of Familial Association in the Madras High Court in the case of Prasanna J. vs. S. Sushma and Ors (MANU/TN/7445/2023). The purpose of such a deed is to ensure that two persons will have the right to live in a relationship. While continuing with that relationship,

they will also have the right to protection under Article 21 of the Constitution.

According to the Petitioner, "*if the parties enter into a contract in the name and style of a "Deed of Familial Association", whenever questions are asked or they are put to shame and harassment or their safety is in danger, this Deed will come to their aid and it can be shown to those who are questioning the relationship to make them understand that two persons have come together on their own choice and they have a right to be in such a relationship and that their relationship cannot be disturbed by anyone*."

The Court reasoned that "*since the Hon'ble Apex Court in the Supriyo's case, has categorically recognized the right of choice of two persons to have relationship. In view of the same, such persons must have protection to live in the Society without being disturbed or harassed. For that purpose, the Deed of Familial Association will at least give some respect and status to such relationship.*"

Accordingly, the judge directed the Social Welfare and Women Empowerment Department in its Policy to consider the procedure for registration of Deed of Familial association and scope for such a deed. One must explore these deeds of familial association as a way of legal recognition of civil unions between queer partners.

Another path which has opened up is that after the *Supriyo* decision, is the series of notification that have been issued by different Ministries recognizing, and redressing violence faced by the LGBTQIA+ community. The Government has been forced to take steps to acknowledge and redress the violence faced by the queer community including the violence they face from the police and state officials.

S L . No	Details of the Notification	Issuing Ministry
1.	On 10th July 2024, a notification was issued providing Advisory on law and order measures to be taken such that the queer community do not fact any threat of violence, harassment, or coercion. The Advisory directs the Police to not force queer persons to return to their natal families, to undertake preliminary inquiry in case a FIR is be registered.	Ministry of Home Affairs Bearing No: F.No.11034/26/2024-IS-IV
2.	On 15th July 2024, the Ministry included queer persons in their understanding of visitation rights in prisons as well as allowed for communication with them. It specifically noted, "They can meet a person of their choice without any discrimination or judgement".	Ministry of Home Affairs Bearing No: V-17013/33/2024-PR
3.	On 21st August 2024, Director General of Health Services directed that measures to ensure health care access and reducing discrimination towards LGBTQ+ community must be taken. This specifically restricts sex conversion therapy and recommends a change in curricula.	Ministry of Health and Family Welfare Bearing No: C.18018/05/2024/SAS-III
4.	On 23rd August 2024, the Ministry issued an advisory on Enabling partners in a queer relationship to be treated as a part of the same household for the purposes of ration card and other social welfare entitlements.	Ministry of Consumer Affairs, Food and Public Distribution Bearing No.:F. No.1(3)/2018-Comp. Cell(E-348552)

5.	On 28th August 2024, the Ministry invoked the Supriyo judgement to clarify that there is no restriction for persons of Queer community to open a joint bank account. Queer persons can nominate another queer person as a nominee to receive the balance in account of death of the account holder.	Ministry of Finance, Bearing No. F.No.6/8/2023-Welfare

A copy of these notifications can be found in the Annexure E. Some of these notifications make a direct reference to the *Supriyo* judgement to ensure rights of the LGBTQIA+ persons. This is the beginning of recognition of different forms of recognition of queer partnership.

A Review Petition of this judgement, challenging the denial of marriage equality, has been filed and is pending in the Supreme Court. A High-Powered Committee under this judgement has been set up rather opaquely. Details of the involvement of queer persons in the committee is unclear. The committee is mandated to ensure wide consultations across the country to understand the struggles of the LGBTQIA+ community and realise their fundamental rights. The legal and social milestones over the last three decades - from the decriminalisation of homosexuality to recognition of the transgender identity - are proof of social movements driving change. Our struggles on the ground to assert our right to civil union must continue with renewed rigour.

One should be able to draw from the minority judgment of Chief Justice D.Y. Chandrachud and Justice Kaul to continue to make the case for the importance of relationship recognition of LGBQIA+ persons. The minority recognizes the vital importance of giving a legal status to intimate associations, provides protections to

LGBTQIA+ persons and recognizes the right to adoption. While this is not full marriage equality, these are vital steps forward taken by the minority.

One hopes that the dissent becomes a path to full marriage equality. Thinking of meaningful dissents, one cannot but invoke Justice Khanna's brave dissent in *ADM Jabalpur v State of Madhya Pradesh*, where against the majority, Justice Khanna upheld the right of detained persons to challenge their detentions even during an emergency. He ended his dissenting judgement by invoking the words of the former US chief justice Charles Evans Hughes:

> *'A dissent in a court of last resort, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.'*

The fate of marriage equality depends upon the intelligence of a future day. Our job is to cultivate that intelligence today.

9. Acknowledgements

We would like to extend our heartfelt gratitude to all those who have contributed to this booklet on the judgment regarding marriage equality in India. We thank our interns Arav Tivari, Naomi Fleur, Amartya Urs, Varun Soni and Mihir Sharma for their contribution. We thank Rumi Harish and Sunil Mohan for their artwork on the cover pages which has brought vibrancy and poetic meaning to this booklet. We would also like to thank all our colleagues at ALF for their inputs and invaluable support to publish this booklet.

We acknowledge the vital role of community organizers who have worked at the grassroots to support and advocate for the rights of the queer community. Their commitment to social change has informed our work and inspire us to persevere in the pursuit of justice. We hope this booklet serves as a resource for advancing marriage equality and understanding the significance of this judgment in shaping a more inclusive future.

Annexure - A

Court Produced Transcript/Live Screening of the Hearing

The court produced transcript of the hearings can be found below:

1. 18th April 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012586.pdf
2. 19th April 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012589.pdf
3. 20th April 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012585.pdf
4. 25th April 2023, https://www.youtube.com/watch?v=NBbPzBNs3pc
5. 26th April 2023, https://www.youtube.com/watch?v=XlZ-XpV7kLM
6. 27th April 2023, https://www.youtube.com/watch?v=wt_ggbJ5DVQ
7. 3rd May 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012510.pdf
8. 9th May 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012594.pdf
9. 10th May 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012527.pdf
10. 11th May 2023, https://www.youtube.com/watch?v=LOtwkyn4lhI

Annexure - B

Key Arguments Put Forth by the Petitioners in the Case

Petitioners:

The main contentions Petitioners put forth were grounded in fundamental constitutional rights, previously affirmed by the Supreme Court in landmark cases, such as NALSA (2014) and Navtej Singh Johar (2018), which recognized non-binary gender identities and decriminalized homosexuality.

1. Violation of Right to Equality (Article 14): The petitioners argued that the exclusion of same-sex marriages under the Special Marriage Act (SMA), 1954, violates the right to equality. They pointed out that Section 4(c) of the SMA recognizes marriages only between a 'male' and a 'female,' thereby discriminating against same-sex couples. This denial, deprives queer persons of rights that heterosexual couples enjoy, such as adoption, surrogacy, inheritance, and pension benefits.

2. Infringement on Right to Life and Personal Liberty (Article 21): Building on previous jurisprudence, the petitioners argued that not recognizing same-sex marriages undermines their right to live with dignity and autonomy. The right to privacy, as recognized in the Puttaswamy judgment, includes the right to intimate association, which encompasses the right to form relationships and marry. The petitioners also invoked the Navtej Johar judgment, which decriminalized homosexuality, emphasizing that personal liberty and dignity should extend to same-sex marriages.

3. Violation of Freedom of Expression and Association (Article 19): It was contended that by denying same-sex couples the right to marry, the law stifles their ability to fully express their identities and form associations in the form of marital relationships. Marriage, as an institution, is deeply tied to personal identity, and it was argued that being denied this status is a violation of their constitutionally protected rights to expression and association.

4. Impact on Access to Legal and Social Benefits: The petitioners stressed that the non-recognition of same-sex marriages denies them a range of legal benefits that heterosexual couples take for granted, including inheritance, maintenance, adoption, spousal pension, and insurance. This creates a deep legal disparity, effectively marginalizing LGBTQIA+ individuals by limiting their access to critical protections and resources.

5. Recognition of Changing Social Norms: The petitioners urged the court to recognize the evolving social fabric and to adapt laws to reflect contemporary realities. They noted that international trends have increasingly moved toward recognizing same-sex marriages, and India, as a progressive democracy, should not lag behind in ensuring equal rights for its LGBTQIA+ citizens.

6. Parallels to Other Jurisdictions and Progressive Rulings: Drawing from international jurisprudence, the petitioners argued that the non-recognition of same-sex marriages in India stands in contrast to global movements towards marriage equality. Countries around the world have recognized the right of same-sex couples to marry, and India's constitutional values of dignity and equality should similarly evolve to provide legal recognition to such relationships

Respondents – Key Arguments

1. Traditional Definition of Marriage: Marriage in India has always been understood as a union between a biological male and female. This definition is deeply rooted in religious and cultural traditions, and altering it could have far-reaching consequences for society, especially since marriage here is primarily about procreation and family lineage.

2. Legislative Domain: It is not for the courts but for the legislature to decide such matters. Changes to the institution of marriage, which impact society at large, should reflect the will of the people through Parliament, not judicial decisions. The legislature is better suited to engage with public consultation and create laws based on democratic processes.

3. No Fundamental Right to Marriage: While fundamental rights like equality and dignity exist, the Constitution does not guarantee a right to marry, especially in the context of same-sex unions. Marriage is a social institution governed by specific laws, and not every desire or form of association can be equated to a fundamental right.

4. Impact on Personal Laws: If same-sex marriages are recognized, it could disrupt the personal laws of various communities in India, (such as Hindus, Muslims) who all have distinct legal frameworks for marriage, inheritance, and family rights. Changing marriage laws for same-sex couples could cause legal conflicts and confusion across these systems.

5. Family Structure and Parenting: The traditional family structure, consisting of a male father and a female mother, has always been seen as the ideal environment for raising children. Allowing same-sex couples to marry and adopt could challenge this structure, leading to uncertainty about the best interests of the child in adoption and family law cases.

6. Wider Legal and Social Impacts: Allowing same-sex marriages would require amendments to a wide range of laws, including inheritance, taxation, and employment benefits. These changes would not only complicate the legal landscape but could also lead to unintended consequences across different sectors of society.

These arguments essentially rested on preserving the traditional concept of marriage, emphasizing that such a change should be made through legislative reform, if at all, rather than through judicial intervention.

Annexure - C

Compilation of Resources

1. On same-sex marriage, Supreme Court did not do justice by Saurabh Kirpal [October 27, 2023]: https://indianexpress.com/article/opinion/columns/same-sex-marriage-supreme-court-did-not-do-justice-9000906/#:~:text=While%20the%20marriage%20equality%20judgment,of%20queer%20couples%20to%20adopt
2. Saurabh Kirpal on the Constitutional Case for Marriage Equality in India by Saurabh Kirpal [August 3, 2023]: https://www.mercatus.org/ideasofindia/saurabh-kirpal-constitutional-case-marriage-equality-india
3. Marriage Equality Judgement: Overlooking fundamental rights by Arvind Narrain [November 4, 2023]: https://www.scobserver.in/journal/marriage-equality-judgement-overlooking-fundamental-rights-justice-bhat-on-marriage-equality/
4. The Supreme Court's Marriage Equality Judgment – I: On the Right to Marry and a Case of Abstention through Delegitimisation, by Kartik Kalra [October 21, 2023]: https://indconlawphil.wordpress.com/2023/10/21/the-supreme-courts-marriage-equality-judgment-i-on-the-right-to-marry-and-a-case-of-abstention-through-delegitimisation-guest-post/
5. The Supreme Court's Marriage Equality Judgment – II: "Do I contradict Myself?", by Masoom Sanyal [October 22, 2023]: https://indconlawphil.wordpress.com/2023/10/22/the-supreme-courts-marriage-equality-judgment-ii-do-i-contradict-myself-guest-post/
6. The Supreme Court's Marriage Equality Judgment – III: Judicial Creativity and Justice Kaul's Dissenting Opinion, by Masoom Sanyal [October 29, 2023]: https://indconlawphil.wordpress.com/2023/10/29/the-supreme-courts-marriage-equality-judgment-iii-judicial-creativity-and-justice-kauls-dissenting-opinion-guest-post/
7. The Supreme Court's Marriage Equality Judgment – IV Between Gendered and Neutral Approaches – Untying the Bench's Self-Made Knots, by Mihir Rajamane and Deeksha Viswanathan [November 2, 2023]: https://indconlawphil.wordpress.com/2023/11/02/the-supreme-courts-equal-marriage-judgment-iv-between-gendered-and-neutral-approaches-untying-the-benchs-self-made-knots-guest-post/
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11. The Supreme Court's Marriage Equality Judgment – VIII: On Adoption, by Hardik Choubey [November 15, 2023]: https://indconlawphil.wordpress.com/2023/11/15/the-supreme-courts-marriage-equality-judgment-viii-on-adoption-guest-post/

12. The Supreme Court's Marriage Equality Judgment – IX: Adoption Equality, Indirect Discrimination, and Unconstitutionality by Necessarily Implication, by Kartik Kalra [November 21, 2023]: https://indconlawphil.wordpress.com/2023/11/21/the-supreme-courts-marriage-equality-judgment-ix-adoption-equality-indirect-discrimination-and-unconstitutionality-by-necessarily-implication/

13. The Urban Elite v Union of India, by Rohin Bhatt, Penguin, 2024.

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15. PUCL Dialogues - Decoding the Supreme Court judgement denying Marriage Equality, by Arvind Narrain [October 24th, 2023]: https://www.facebook.com/peoples.union.for.civil.liberties/videos/847159720289404/

16. Redefining Union, The Future of LGBTQ+ Rights & Marriage Equality in India, by Arvind Narrain and Ammel Sharon, [June 16th, 2024]: https://bangaloreinternationalcentre.org/event/redefining-unions/

17. Courts and the Constitution Conference 2024: Day-1, NALSAR University of Law, Arvind Narrain on the Right to Marry, 03:11:00: https://www.youtube.com/watch?v=C7y6uQoYo2k

Annexure - D

Court Produced Transcript of the Hearing

The court produced transcript of the hearings can be found below :

1. 18th April 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012586.pdf
2. 19th April 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012589.pdf
3. 20th April 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012585.pdf
4. 3rd May 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012510.pdf
5. 9th May 2023 https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012594.pdf
6. 10th May 2023, https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/uploads/2024/01/2024012527.pdf

Annexure - E

F. No. 11034/26/2024–IS-IV
Government of India
Ministry of Home Affairs
(Internal Security-I Division)

New Delhi – 110001,
Date: ..10.. July, 2024

To,

Chief Secretaries/ Advisors to Administrators
(All States and UTs)

Subject: **Advisory on law & order measures to be taken such that queer community do not face any threat of violence, harassment or coercion- reg.**

Sir / Madam,

I am directed to say that several concerns have been brought to this Ministry's notice that queer persons often face harassment, including violence and discrimination, on account of their gender identity, sexual orientation etc. In this regard, with a focus on citizen -centric laws, and to ensure no discrimination against the queer persons, it is requested to issue suitable instructions to the police personnel in your State/UT on the following:

(i) There should be no harassment of queer persons by summoning them to the police station or visiting their places of residence solely to interrogate them about their gender identity or sexual orientation;

(ii) The police should not force queer persons to return to their natal families if they do not wish to return to them;

(iii) When a police complaint is filed by queer persons alleging that their family is restraining their freedom of movement, the police should, on verifying the genuineness of the complaint ensure that the freedom of queer person is not curtailed;

(iv) When a police complaint is filed by queer person(s) apprehending violence from their family, the police should verify the genuineness of the complaint and ensure due protection immediately;

(v) Before registering an FIR against queer persons or one of the queer persons (where the FIR is sought to be registered for them being together), the police should conduct a preliminary investigation in terms of *Lalita Kumari v. Government of U.P*, to ensure that the complaint discloses a cognizable offence. The police must first determine if the person is an adult. If the person is an adult and is in a consensual relationship with another person of the same or different gender or has left their natal home of their own volition, the police should close the complaint after recording a statement to that effect.

(vi) Confidentiality, with respect to queer status, may be maintained throughout while dealing with a queer person during investigation.

2. It is further requested to review and sensitize police, as also impart regular training for sensitization in dealing with complaints and grievances of queer person(s).

3. It is requested to acknowledge the receipt of this advisory.

Yours faithfully,

(Archana Varma)
Director (L&O)

Copy to:
1. **DsGP/IsGP (all States and UTs).**
2. **Commissioner of Police, Delhi**
3. **Principal Secretary/ Secretary, Home Department (All States & UTs)**

No. V-17013/33/2024-PR
Government of India
Ministry of Home Affairs
*****

Women Safety Division, 2nd Floor,
Major Dhyan Chand National Stadium,
India Gate Circle, New Delhi-110001
July 15, 2024

To

1. The ACS/Principal Secretary (Home) of all States and UTs
2. The DG/IG Police of all States and UTs
3. The DG/IG (Prisons) of all States and UTs

Subject: Prison Visitation Rights of Queer Community (LGBTQ+)

Sir/Madam,

It has been the constant endeavour of the Ministry of Home Affairs (MHA) to reach out to all States and Union Territories and share the contemporary guidelines and best practices on varied aspects of efficient prison administration and management. It has come to the notice of this Ministry that members of the queer community (LGBTQ+) are often discriminated against because of their gender identity or sexual orientation and often face violence and disrespect. With the objective of ensuring that there is no discrimination in access to goods and services to the queer community, which are available to the public at large, especially with reference to **prison visitation rights**, the following guidelines are reiterated.

2. MHA had prepared a 'Model Prison Manual, 2016' and a 'Model Prisons and Correctional Services Act' in 2023 and had shared the same with all State Governments and Union Territory Administrations for their guidance and implementation in their respective jurisdictions. The relevant provisions on **prison visitation rights** contained in the above two documents are recapitulated below for the information and guidance of all State/UT authorities:

Model Prison Manual, 2016:

"Every prisoner shall be allowed reasonable facilities for seeing or communicating with, his/her family members, relatives, friends and legal advisers for the preparation of an appeal or for procuring bail or for arranging the management of his/her property and family affairs. He/she shall be allowed to have interviews with his/her family members, relatives, friends and legal advisers once in a fortnight.

On admission, every prisoner should submit a list of persons who are likely to interview him/ her and the interview shall be restricted to such family members, relatives and friends. The conversation at the interviews shall be limited to private and domestic matters and there shall be no reference to prison administration and discipline and to other prisoners or politics. The number of persons who may interview a prisoner at one time shall ordinarily be limited to three.

Interviews with female prisoners shall, if practicable, take place in the female enclosure/ward."

It is reiterated that these provisions equally apply to the members of queer community and they can meet a person of their choice without any discrimination or judgement.

Model Prisons and Correctional Services Act, 2023:

"Prisoners may communicate with their Visitors, namely family members, relatives and friends through physical or virtual mode, under proper supervision of prison authorities. Visitors to inmates shall be verified/authenticated through biometric verification/identification.

Foreigner prisoners may communicate with their family members and consular representatives, as prescribed under the rules.

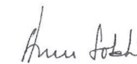
Every prisoner shall be allowed reasonable facilities of meeting or communicating with their family members (natal or chosen) relatives, friends and legal advisers for preparation of appeal or for procuring bail or for arranging the management of their property and family affairs. They shall be allowed to have interviews with their family members, relatives, friends and legal advisers."

It is reiterated that these provisions equally apply to the members of queer community and they can meet a person of their choice without any discrimination or judgement.

3. All State/UT Prison authorities are requested to take note of the above and sensitise the concerned officials at all levels to ensure that all persons are treated equally in a fair and just manner and no person, especially those belonging to queer community, are discriminated against in any manner whatsoever.

4. You are requested to acknowledge the receipt of this communication.

Yours sincerely,



(Arun Sobti)
Director (Prison Reforms)
Phone: 2307 5297
Email: dspr.atc@mha.gov.in

प्रो.(डॉ.) अतुल गोयल
Prof. (Dr.) Atul Goel
MD (Med.)
स्वास्थ्य सेवा महानिदेशक
DIRECTOR GENERAL OF HEALTH SERVICES

सत्यमेव जयते

भारत सरकार
स्वास्थ्य एवं परिवार कल्याण मंत्रालय
स्वास्थ्य सेवा महानिदेशालय
Government of India
Ministry of Health & Family Welfare
Directorate General of Health Services

No. C.18018/05/2024/SAS-III
21st August 2024

Subject: Ensuring the health care access and reducing discrimination towards LGBTQ+ community.

Dear *Colleagues,*

I wish to draw your attention towards an important matter; 'rights of LGBTQ+ community'. The LGBTQ+ community is an important part of society. They face challenges of discrimination in various spheres of life. It is essential that their rights be guarded through a non-discriminatory environment.

Evidence from literature suggests that LGBTQ+ individuals are at an increased risk for some health problems such as cancers (anal, breast, cervical), Sexually Transmitted Infections, Cardiovascular-disease and psychological issues (Depression, Anxiety, Substance use and attempted suicides). Associated stigma and discriminatory attitude also cause barriers in optimal access to healthcare services.

Therefore, it is proposed that following measures be adopted to ensure rights of LGBTQ+ community-

1. **Awareness Activities** – Planning of awareness activities at all levels of healthcare and in community towards understanding the psycho-social aspects of LGBTQ+ and their problems thereof.
2. **Prohibiting Sex-Conversion Therapy** – Ensuring that forced surgeries /procedures/ and/or treatment aimed to change gender identity or sexual orientation are not performed/done.
3. **Availability of Sex Reassignment Surgery (SRS)** – That SRS be made available at designated Government and/or Govt. Aided Autonomous Medical Institutions.
4. **Standard Operating Procedures** – Institutions designated as SRS Centres should have and follow Standard Operating Procedures for Sex-Reassignment-Surgeries. The same are being prepared by the MOHFW.
5. **Changes in Curricula** – Inclusion of health issues related to LGBTQ+ in the curricula of various medical, nursing, and paramedical courses. This will sensitise and train future health professionals towards a non-discriminatory attitude and specific health needs of the community. The National Medical commission has already taken some steps in this direction, these need to be implemented across the institutions.

...2/-

Room No. 446-A, Nirman Bhawan, New Delhi-110108
Tel. No.: 011-23061063, 23061438, Fax No.: 011-23061924, email:dghs@nic.in

6. **Availability of Tele consultation** – Strengthening availability of Tele consultation services for the community. TELE MANAS is a very useful tool to provide mental health services to the LGBTQ+ community, as it promotes complete confidentiality. Staff providing these services should be trained towards specific needs of the community.
7. **Sensitising and training various levels of staff** – Staff needs to be informed about terminologies and health care needs related to the community. They should have a non-discriminatory attitude towards the community.

I urge you to implement these measures and look forward to your positive response. With our combined efforts, I am confident that we will be able to strengthen our healthcare services towards the needs of the LGBTQ+ community.

Warm personal regards,

Encl.: Annexure- Detailed note.

Yours sincerely,

(Atul Goel)

To

1. Additional Chief Secretary/Secretary (Health) of all States/UTs.
2. Director, Medical Education of all States/UTs
3. Chairman, National Medical Commission, New Delhi
4. President, Indian Nursing Council
5. President, Dental Council of India
6. Director/Executive Directors of all AIIMS
7. Director, LHMC and Associated hospitals, New Delhi.
8. Medical Superintendent, ABVIMS & RML Hospital, New Delhi.
9. Medical Superintendent, VMMC and Safdarjung Hospital, New Delhi.

ANNEXURE

The LGBTQ+ populations face multiple challenges related to healthcare.

1. **Challenges related to Health issues**

    a. Increased risk of obesity
    b. Increased risk of Sexually transmitted infections
    c. Increased Risk of cancers (anal, breast, cervical, colorectal, endometrial, lung, and prostate)
    d. Increased Risk of Cardiovascular Disease

2. **Challenges related to Mental Health**

    a. High rates of Psychological/Psychiatric disturbances such as Depression, Anxiety, Substance use, Eating Disorders, Body image issues.
    b. Increased risk of attempted suicide

3. **Challenges related to healthcare access**

    a. Limited knowledge among Health Care Professionals
    b. Discriminatory Attitude towards these communities among Health Professionals
    c. Lack of confidentiality and privacy
    d. Stigma attached to this community

4. **Challenges related to Treatment, Surgery/Procedures**

    a. In the past, homosexuality was considered a disease. People often seek treatment for their LGBTQIA+ child especially from a Psychiatrist.
    b. Some persons may be subjected to hormonal treatment/procedures/ psychiatric treatment against their will.
    c. Sexual Reassignment Surgery is being done in the country but availability is limited and there are no uniform guidelines in place suited to socio-cultural needs of our country.

With these challenges in mind, some remedial measures are suggested-

1. **Improving healthcare access**

    a. Hospitals should have easily accessible services for various health issues of LGBTQ+ and also for SRS.
    b. Training sessions should be planned and held to sensitize receptionist & support staff towards issues of LGBTQ+ and the various terminologies.
    c. The medical evaluation should be done ensuring privacy and confidentiality.
    d. Appropriate pronouns should be used to address this population.
    e. Waiting areas should have non-discriminatory policy displayed.
    f. Staff should acquaint themselves with Gender Affirmative care guidelines.

....2/-

2. **Enhancing mental health services**

    a. Mental health services should be provided with full privacy and ensuring confidentiality.
    b. Mental Health Professionals should generate awareness on this not being any disease and discourage any kind of psychological treatment aimed at changing sexual orientation.
    c. TELE MANAS can be a very useful tool to provide initial mental health services to this population without any perceived stigma. The staff at TELE MANAS cells should be trained to handle the calls form persons from LGBTQ+ community

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F. No.1(3)/2018-Comp.Cell(E-348552)
Government of India
Ministry of Consumer Affairs, Food and Public Distribution
Department of Food & Public Distribution
Krishi Bhawan, New Delhi - 110001
Dated: 23/08/2024

To,

Additional Chief Secretary/Principal Secretary/Secretary
Food, Civil Supplies & Consumer Affairs Department
All States/UTs.

Subject: Advisory on enabling partners in a queer relationship to be treated as a part of the same household for the purposes of ration card - reg.

Sir/Madam,

I am directed to say that several concerns have been brought to this department's notice that persons in queer relationship often face discrimination in access to goods and services including the issue of ration cards and other social welfare entitlements. In this regard, with a focus to ensure that there is no discrimination in access to goods and services to the queer community which are available to the public at large, the following guidelines are issued for your action:

- The existing Ration Card Management System of your state should provide for the registration of members in the households in terms of (i) Gender - with options of Male, Female, Transgender and **Others** and (ii) Relationship with the Head of Household (which includes options of "others")
- In order to enable partners in a queer relationship to be treated as a part of the same household for the purposes of ration card the following procedure may be followed:
    - As per provisions of RCMS, one of the partners may apply as Head of Household by stating the gender as either male, female, transgender or **others** and entering "self" in the relationship column.
    - the partner may be included in the above household by entering relationship with the head of the household as **"others"** and mentioning their gender as male, female, transgender or **others**

2. All States and Union Territories are hereby requested to take cognizance of this directive and implement the necessary measures to ensure that partners in queer relationship are not subject to any discrimination in the issuance of ration cards. All the concerned officials at all levels may be sensitized in this regard.

3. You are requested to acknowledge the receipt of this communication.

4. This advisory is issued with the approval of the competent authority.

Yours faithfully,

(Jai Patil)
Joint Director (PD)
Tele-011-23383046

Copy to - Shri Ankit Srivastava, Under Secretary, Department of Social Justice and Empowerment, Shastri Bhawan, New Delhi.

F. No. 6/8/2024-Welfare
Government of India
Ministry of Finance
Department of Financial Services
*****

Jeevan Deep Building, Sansad Marg, New Delhi
the 28th August, 2024

Advisory

In connection with Hon'ble Supreme Court of India's judgement dated 17.10.2023 in the case of Supriyo @Supriya Chakraborty and another Vs. Union of India (Writ Petition Civil No. 1011/2022), this is to clarify that there are no restrictions for persons of the Queer community to open a joint bank account and also to nominate a person in queer relationship as a nominee to receive the balance in the account, in the event of death of the account holder. A clarification in this regard has also been issued by the Reserve Bank of India (RBI) to all the Scheduled Commercial Banks on 21.08.2024.

(Arun Kumar)
Under Secretary to the Government of India

To
All Stakeholders

On the 17th of October 2023, the Supreme Court of India delivered the verdict in Supriyo vs. Union of India, denying marriage equality to LGBTQIA+ persons. While the Court acknowledged the historical and systemic marginalization faced by queer individuals, it ultimately denied them the right to marriage equality under the Indian Constitution. The dream of marriage equality has been momentarily deferred. The minority opinion authored by the Chief Justice of India, DY Chandrachud however offers a vision for the future. It makes the case for the legal recognition of queer relationships, advocating for the dignity of LGBTQIA+ persons.

Through this booklet we aim to build critical conversation coupled with action towards a future where marriage equality is not a distant dream, but a lived reality for all.

For more information, contact:
Alternative Law Forum
contact@altlawforum.org
www.altlawforum.org
+91 80 22868757