IN THE SUPREME COURT OF INDIA
CIVIL WRIT JURISDICTION
WRIT PETITION (CIVIL) NO. 1142 OF 2022
(Under Article 32 of the Constitution of India)

Utkarsh Saxena and Anr. … Petitioners

Versus

Union of India … Respondent

Rejoinder Submissions by Dr. Abhishek Singhvi on Behalf of the Petitioners

"*A room without books is like a body without a soul*." - Cicero

"*The promises of human rights are like empty shells if they are not backed up by concrete actions and meaningful change*." – Mary Robinson

1. Petitioners raise three points in rejoinder:
    a. That a Constitution-compliant reading of the Special Marriage Act 1954 ('SMA') to allow for marriage equality - in the manner suggested by Petitioners - is within the bounds of legitimate statutory interpretation. It is not judicial 'surgery', or judicial legislation;
    b. That the relief sought by Petitioners is *workable*, and does not require this Hon'ble Court to create a 'new social institution' or a 'new definition of marriage', or to enter into the thicket of personal law and a host of other laws;
    c. That the prayer for striking down the notice-and-objection regime under the SMA is an ***essential and indivisible component*** to the prayer for marriage equality. Without it, Petitioners would have been granted a recognition of 'marriage' but without 'equality'.

2. As a preliminary point, Petitioners respectfully reiterate that they do not merely seek a *declaration* of their right to marry, but an *interpretation* of the Special Marriage Act that would allow for the solemnisation and/or registration of non-heterosexual marriages. The reason for this is that marriage is not an abstract concept but a concrete social institution, valuable both in its own right, and as a gateway to other rights. What Petitioners seek is a right to access, on equal terms, this social institution.

3. Furthermore, this is not a case where to grant this access, this Hon'ble Court would need to "legislate" or fill in a vacuum, and ought therefore to confine itself to a mere declaration. Access to the social institution of marriage, for non-heterosexual persons (as for heterosexual couples), goes through an existing legal regime: the Special Marriage Act. This case, therefore, is about how this existing legal regime may be *interpreted* in a non-discriminatory, constitution-compliant manner.

I. ON THE INTERPRETATION OF THE SPECIAL MARRIAGE ACT

4a. Both Petitioners and Respondents agree that marriage is a valuable and precious social institution, a source of meaning and dignity in our society, and the legislative articulation of the fundamental right to choose one's partner. Its importance lies, *inter alia*, in its expressive and symbolic valence, and in the protection and social legitimacy that it offers (especially for vulnerable couples who need it the most). Consequently, *discrimination* in access to the institution of marriage on the sole ground of ascriptive characteristics - in particular, sexual orientation and gender identity - violates constitutional guarantees of equality (Article 14), non-discrimination [Article 15(1)], freedom of expression [Article 19(1)(a)], and privacy and dignity (Article 21).

4b. Certain provisions of the SMA, as implemented thus far, prevent solemnisation and / or registration of non-heterosexual marriages. It is submitted that this is not an instance of 'under-inclusive' classification; rather, since the grounds for exclusion / non-inclusion in the SMA are ascriptive characteristics that amount to prohibited markers under Article 15, the issue is one of non-discrimination (akin to historical examples of exclusion of women from the vote as also exclusion of women from the industrial workplace/factories).

4c. However, the SMA admits of a *constitutionally-compliant interpretation*, by virtue of which the Act can be read as authorising the solemnisation and/or registration of non-heterosexual marriages.

5. To suggest, as Respondents do that such an interpretation ought to be rejected because of the supposed original intent of the statute, would go contrary to the doctrine of this Hon'ble Court, that the application of a statute ought not to be forever circumscribed by the range of *concrete circumstances that its framers intended it to apply to*.[1] The basis on which, *in this case*, Petitioners urge this Hon'ble

[1] *State (Through CBI)* v. *SJ Chowdhary & Ors*. [(1996) 2 SCC 428 (Paras 6, 10)] — Compilation IV Vol. 2 Judicial Precedents E-Pg. 7094 @ Pg. 7097-7099; *Laxmi Video*

Court to apply the principle of updating construction is - as submitted above - the need to interpret the SMA in a constitution-compliant manner.

6. To substantiate this argument, Petitioners have cited the House of Lords case of *Ghaidan*,[2] which met with strenuous objection from Respondents on account of an alleged difference in factual context. Petitioners reiterate that the purpose of citing *Ghaidan* was to illustrate to this Hon'ble Court that as a matter of *interpretive doctrine*, what Petitioners seek in this case is not an outlier either in India or globally, but well within established judicial best practices. *Ghaidan* offers guidance for the view that, to achieve a Convention or Constitution-compliant reading of a statute, it is permissible for a Court to depart from the *specific intention of the legislators*, as long as the proposed interpretation is consistent with the *underlying thrust* of the statute, and within the institutional competence of the judiciary.

7. The underlying thrust of a statute can be gleaned from its text, structure, and overall legislative purpose (as distinct from the purported original intention). The underlying thrust of the SMA is that it is a legislation that is not only *agnostic towards ascriptive characteristics* (such as faith, caste) of parties and social/cultural/personal law conventions about marriage, but in fact, was designed to facilitate marriages lying outside the pale of social acceptability. This is evident from:
    a. The long title and SOR of the SMA, which set it up as a pathway to marriage that is an alternative to personal laws.
    b. The text of the SMA - especially section 4 - which does not explicitly discriminate on ascriptive characteristics.

8. This underlying thrust of the SMA remains undiluted by the view that non-heterosexual marriages were not contemplated as part of its

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Theaters & Ors. v. *State of Haryana & Ors.* [(1993) 3 SCC 715 (Paras 9-10)] — Compilation IV Vol. 2 Judicial Precedents E-Pg. 4510 @ Pg. 4514.

[2] *Godin* v. *Ghaidan Mendonza* [2004 UKHL 30 (Paras 31-33, 51, 130-144)] — Compilation IV Vol. 4 Judicial Precedents E-Pg. 1138 @ E-Pgs. 1146, 1152, 1177-1182.

original intended *application.* Petitioners, therefore, request this Hon'ble Court to give full effect to the underlying thrust of the SMA, by extending its application - through interpretation - to non-heterosexual couples.

9. By way of conclusion on this point, Petitioners draw this Hon'ble Court's attention to the landmark judgement in ***Brown* v. *Board of Education***,[3] where the United States Supreme Court outlawed racial segregation in public schools, on the touchstone of the equal protection clause of the Fourteenth Amendment to the United States Constitution. It was never in dispute that when the Fourteenth Amendment was enacted in 1868, its framers did not *intend it to apply to desegregation*: indeed, it is popularly recounted that many legislators who supported the amendment supported segregation and the "separate but equal" doctrine. In *Brown*, however, the US Supreme Court discounted the specific *application-intent* of the framers of the Fourteenth Amendment, and asked itself, instead, what the *principle* of equality required of it, by way of constitutional interpretation.[4] Similarly, Petitioners' interpretation of the SMA focuses upon the underlying thrust and the *principle* - of recognising and legitimising marriages unsupported in social conventions - upon which the SMA is founded, rather than asking how the framers intended to decide each interpretive issue that might arise.

9A. Petitioners are taking the liberty of putting below an iconic photograph from 1960 of a young African-American girl, Ruby Bridges, being escorted at a hitherto racially-segregated school by white U.S. Marshals. This submission seeks to underline the fact that unpopular and anti-majoritarian impulses are necessarily absorbed into society only by unelected non-majoritarian judges sworn to upholding the values of a written Constitution, which in turn entrenches several counter-majoritarian values despite being an expression of the majority, We the People. That is the essence of entrenched constitutional rights, viz. those not affected by transient elected majorities or legislatures.

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[3] *Brown* v. *Board of Education* [347 U.S. 483 (1954)] (Not in the Compilation).
[4] *Brown* v. *Board of Education* [347 U.S. 483, 492-93 (1954)] (Not in Compilation).

10. Petitioners respectfully submit that the remedy that they seek is well within the bounds of statutory interpretation and not judicial 'surgery' of laws, or the 'creation of a new social institution', or - in the words of Respondents - a 'claim for a legislation.' Rather, the issue before this Hon'ble Court is one of discrimination of non-heterosexual persons from an already legally defined institution on the basis of prohibited markers under Article 15. ***A right to marry - along with a scheme for its implementation - already exists, and Petitioners only ask for non-discriminatory access to that existing right and institution***. ***Indeed, Petitioners' request is modest: it is to interpret certain provisions of the SMA in a way that is both Constitution-compliant, and consistent with the SMA's own underlying thrust***. Contrary to Respondents' submissions, this does not involve the Court in altering the *meaning* of words, or "the meaning of marriage". It only brings into the ambit of the Special Marriage Act a class that was hitherto (unconstitutionally) excluded.

10A. In conclusion, on the first issue, it is submitted that the mere recognition by way of judicial declaration of same-sex marriages without anything more, as argued by some of the Respondents,

would be akin to "*a body without a soul*." Further, to suggest that legislatures will work out content, volume, scope, and direction of this declaration would be somewhat like expecting statutory legislation to fill in content and meaning *qua* the right of non-discrimination under Articles 14 and 15. Absent the rich and diverse jurisprudence of this Hon'ble Court under Article 14, including its evolution from the doctrine of classification to non-arbitrariness to procedural due process and onto substantive due process, that Article would have remained a hollow shell with no operational reality and identity on the ground.

10B. It is interesting to note that several legislative Bills to amend and decriminalise consensual homosexual sex under Section 377 of the Indian Penal Code 1860 were not carried by legislative majorities and were voted out by overwhelming legislative majorities. It was only a harkening to entrenched constitutional values by constitutional judges that led to decriminalisation of homosexuality.

10C. Another example of reference to empty, unproductive, and largely meaningless legislative / executive rhetoric, is the established fact that despite *Navtej*,[5] and its specific directions in Paragraph 370 mandating dissemination in the public domain by central and state governments, the admitted factual position is that almost no such dissemination initiatives have been taken.[6]

10D. It is further respectfully submitted that legislative will is not necessarily a neutral, objective, or meritorious manifestation of desired constitutional objectives and constitutional morality. The Constitution is supreme precisely because, in many areas, it digresses from the wishes of mere electoral majorities. The zealous guarding and upholding of several minority rights including its many nuances is crucial precisely because electoral majorities are presumed by the Constitution-makers to be wrong, tyrannical, or oppressive at certain times. The excessive and repetitive reliance

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[5] *Navtej Johar* v. *Union of India*, [(2018) 10 SCC 1 (Paragraph 370, Nariman J.)] — Compilation IV Vol. 1 Judicial Precedents E-Pg. 814 @ E-Pg. 1008.

[6] Azeefa Fathima, 'Union govt did not publicise Section 377 judgement despite court order, RTIs reveal', The News Minute (April 19, 2023).

on legislative majority by the Respondents, underlying each of their arguments is therefore misplaced.

II. ON THE WORKABILITY OF THE RELIEF

Interaction with personal laws

11. Respondents rely on Chapter IV of the SMA to suggest that the SMA is inextricably linked with personal laws, creating unanticipated consequences that only the legislature can resolve. In particular, Section 19 of the SMA severs ties of persons of Hindu, Buddhist, Sikh, or Jaina religions married under the SMA from their undivided family. At the same time, Section 21 provides that succession to the property of *any person* married under the SMA will be governed by the provisions of the Indian Succession Act, 1925 ('ISA'). Respondents argue, however, that Section 21A of the SMA carves out an exception for marriages among persons professing the Hindu, Buddhist, Sikh or Jaina religion, stating that they remain members of their undivided families and governed by the Hindu Succession Act, 1956 ('HSA'), thus linking them back to religious and personal laws.

12. Petitioners submit that the Chapter IV scheme applied the following succession laws to different *heterosexual* couples before and after the 1976 amendment that introduced Section 21A:

Table 1: Relevant succession laws applicable to different SMA couples

Pre- 1976, prior to the introduction of Section 21A

Partner 1	Partner 2	Relevant succession law
Hindu	Hindu	ISA, severance from undivided family
Muslim	Muslim	ISA
Christian	Christian	ISA

Hindu	Muslim	ISA
Hindu	Christian	ISA
Muslim	Christian	ISA

Post- 1976 amendment and insertion of Section 21A

Partner 1	Partner 2	Relevant succession law
Hindu	Hindu	HSA, no severance from undivided family by virtue of S. 21A
Muslim	Muslim	ISA
Christian	Christian	ISA
Hindu	Muslim	ISA
Hindu	Christian	ISA
Muslim	Christian	ISA

13. Petitioners submit that Section 21A does not create a barrier to a constitution-compliant reading of the SMA. Section 21A only applies, even preliminarily, for marriages of two Hindus. Further, even when two Hindus marry under the SMA, Section 21A links the SMA regime to personal law only in two narrow respects, i.e. succession and membership of the undivided family.

14. With respect to this narrow range of circumstances, Petitioners reiterate that there are three plausible interpretive methods of addressing Section 21A in its narrow application to SMA marriages between two Hindus.
    a. *First,* theoretically, this Hon'ble Court may elect not to pronounce on the applicability of Section 21A to non-heterosexual Hindu couples in the present litigation, and leave questions of succession open for future litigation.
    b. *Secondly,* in the alternative, this Hon'ble Court may hold that the SMA will apply to non-heterosexual couples exactly as it is applied to heterosexual couples by virtue of the introduction

of Section 21A in 1976. Specifically, Hindu non-heterosexual couples will be governed by the HSA (like Hindu heterosexual couples) and non-Hindu / interfaith non-heterosexual couples will be governed by the ISA (like non-Hindu / interfaith heterosexual couples).

To achieve this reading, this Hon'ble Court may extend its gender-neutral reading of the SMA to the HSA and ISA. It may hold that the words "widow", "widower" in the ISA (limited to issues of marriage) and "male Hindu", "female Hindu", "widow", and "widower" in the HSA (again, limited to issues of marriage), shall be interpreted in a manner that is agnostic of gender and sexual orientation. To include transgender persons, the Court may further hold that the words "male" and "female" under Sections 8 and 15 of the HSA may be read as persons, exactly as prayed for in the case of the SMA. For an outline of relevant provisions of the HSA and the ISA, please see Annexure 4; for a detailed note on the workability of this gender-neutral approach to different scenarios under the SMA, ISA, and HSA, please see Annexure I.[7]

c. It is submitted that there is a third option: that this Hon'ble Court may hold that since religious and personal law-related issues - by agreement of parties - are beyond the scope of this litigation, it follows that personal law statutes *as well as provisions of secular laws that relate back to personal laws* (like Section 21A of SMA) are excluded from consideration. Since Section 21A itself was introduced as an exception to the regime under Sections 19-21, non-consideration of the issue of Section 21A would simply mean a reversion to the *default* regime of ISA. This would be a consistent interpretive approach.

15. It would *not* follow from this approach that non-heterosexual Hindu couples who marry under the SMA would be excluded from legal

[7] Kartik Kalra, "Gendered Beyond Repair? – Proposing an Interim Succession Regime for Same-Sex Marriages in Existing Law", *Indian Constitutional Law and Philosophy Blog* (May 4, 2023), available here.

succession regimes altogether. Like non-Hindu/interfaith couples, they are governed by the ISA. This is because Section 21A – on its terms – assumes that marriages that it applies to are *also* capable of being valid under the Hindu Marriage Act (which is a precondition to apply the HSA to any marriage relationship). Till the right of non-heterosexual couples to marry under the HMA is adjudicated upon by this Hon'ble Court or provided for by the legislature, non-heterosexual marriages simply do not meet the preconditions for the triggering of Section 21A.

16. Put yet another way, since the Petitioners are not seeking the right to marry, and the rights that flow from marriage (such as succession) under personal laws codified under the HMA and HSA, the issue of Section 21A - which is a gateway *from* the SMA to the HSA - need not be examined and can be expressly excluded from consideration by the present Constitution Bench of this Hon'ble Court, even if non-heterosexual marriages are recognised under the SMA.

Women's rights in heteronormative settings

17. In a nutshell, this subheading contends that several provisions of the SMA which attempt to create a protective arc for women in a heterosexual marriage (treating them as - structurally - the more vulnerable gender) need not be interpreted in favour of either spouse in a non-heterosexual marriage. This stand of the Petitioners fully answers and takes care of the Respondents' wrongful contention that a gender-neutral approach to the SMA defeats the purpose of certain provisions enacted to counter unique, gendered situations. If the aforesaid gender-neutral approach of the Petitioners - eschewing the sections dealing with preferential protective treatment of women under the SMA - is accepted, the diverse contentions (eg. relating to Section 27 of the SMA) raised by the Respondents, would not arise. In that sense, this set of submissions of the Respondents is either a red herring or attempts to set up a strawman in the name of the Petitioners and then triumphantly shoot it down.

18. Petitioners submit that these grounds and sections of the SMA, which deal with important *gendered* and *heterosexual* settings, and legal protections in such contexts, are not part of their prayer for marriage equality. The Petitioners are not seeking interpretation of every gendered word in the SMA in a gender-neutral way. To the contrary, they only assail those parts of the SMA that require a constitution-compliant reading on grounds of discrimination and exclusion of non-heterosexual couples from the institution of marriage. **Hence, the focus of interpretation similarly has to be on the discriminatory aspects of the Act that are relevant to <u>and</u> exclude non-heterosexual couples. Those provisions that specifically deal with heteronormative settings and offer rights/protections to women *qua* men do not require a constitutionally-compliant interpretation, and are beyond the scope of this Petition.**

19. It is crucial to clarify that this is not a case of cherry-picking different interpretive regimes for the same words within the same statute. Returning to the issue of the underlying thrust of legislation and a constitution-compliant reading, when it comes to *the use of gendered terms to specifically address gendered imbalances of power and therefore achieve substantive equality,* limiting such terms to their gendered, heterosexual, context is what is consistent with the law's underlying thrust as well as Constitutional principles.

20. It can therefore be seen that the Petitioners' approach is entirely consistent in principle, with its two anchoring points being the underlying thrust of the SMA and the fundamental rights in the Constitution. In other words, it is permissible for the specific interpretation of different gendered terms across the SMA to be interpreted with a view to ensuring that their interpretation serves the underlying thrust of the SMA and the principles of non-discrimination and equality.

21. Hence, this Hon'ble Court may declare that provisions of the SMA with respect to solemnization and registration of marriage are extended to non-heterosexual couples, except to the extent

that provisions of the SMA or any other law in force are enacted for a "wife" against "husband" in a heterosexual marriage or for a "woman" against a "man" in a gender-specific context. These provisions, in their application to non-heterosexual marriages, need not be interpreted exclusively in favour of either partner in a non-heterosexual marriage. A list of such provisions in the SMA, clearly created for special protection in favour of a structurally vulnerable section - such as women in a heterosexual marriage - is included in Annexure 2.

Interaction with other laws that include matrimonial rights

22. Respondents argue that the prayer for the bundle of allied rights that accompany marriage cannot be addressed by this Court, as they involve multiple legislation and complications, and hence require rewriting by Parliament to accommodate same-sex and queer couples.

23. Petitioners disagree. A valid marriage in the eyes of law is like an index or key to other secular matrimonial and family laws. The current scheme holds that only a man and woman married under the Act can qualify as a legally married couple, entitling them to benefits under other statutes that require married status.

24. Statutes that use the gender neutral word "spouse" require no further changes; rights under these statutes will naturally flow if the Supreme Court interprets spouse to include same-gender and queer partners under the SMA. For a list of allied rights that use the word "spouse", please see Annexure 3.

25. Statutes that use gendered words like "husband" and "wife" may be interpreted in a gender-neutral way as "persons", consistent with the interpretation sought under the SMA for marriage equality. It is hereby clarified that the present set of Petitioners have limited submissions specifically to the issues arising from the SMA and on succession issues limited to the ISA (as in *Paras* 14 to 16) and are not seeking this Hon'ble Court's interpretation for the diverse list of

Acts that use gendered words, which may be reserved for future interpretation.

26. It is further submitted that it is not open for Respondents to argue that the Petitioners' fundamental rights may not be recognised simply because it will open the pathway to further litigation seeking the full and equal import of the rights that may be recognised here. The forward march of the law and of fundamental freedoms has been based on litigations such as these, and recognition of fundamental rights of citizens cannot be held hostage to the false virtue of preventing further litigation.

Age related provisions

27. On Section 4(c) and the age qualification —
    a. In the case of same-sex couples, the provision may be read as prescribing 18 years for both parties in a lesbian relationship, and 21 years for both parties in a gay relationship.
    b. In the case of transgender persons, whichever gender / sex they identify as, the concerned age requirement would apply. That is, a trans-man would become eligible at 21 years of age, while a trans-woman would become eligible at 18 years of age.

28. The approach in the previous paragraph leaves open the question of age qualification for persons seeking to marry under the SMA who do not identify as either 'man' or 'woman'. Petitioners suggest the following alternative routes of interpretation that this Hon'ble Court may adopt to ensure inclusion of 'non-binary' and 'intersex' individuals in the SMA's ambit:
    a. *First,* the SMA's silence on the age of qualification for persons other than 'men' or 'women' may be read as imposing no restriction beyond that imposed by other laws that stipulate the age at which persons become capable of binding themselves under law. This age is 18 years. As such, therefore, this Court may hold that, subject to the concerned Legislature exercising

its power to introduce an age-based qualification for non-binary persons, they will become eligible to marry under the SMA upon attaining 18 years of age.

b. *Alternatively,* qua the age issue, the Court may lay down guidelines as an interim measure, while leaving it open to Parliament to fill in the vacuum in due course.

Civil unions not an equal alternative

29. During the course of hearings, an alternative of creating civil unions for same-sex and queer couples was also discussed. Petitioners respectfully submit that civil unions do not address the constitutional anomaly presented by exclusion of non-heterosexual couples from the legal and social institution of ***marriage***.

30. In ***Lewis v. Harris***,[8] the New Jersey Supreme Court considered the validity of the state's marriage laws that excluded non-heterosexual couples. The majority held such laws to be unconstitutional, but allowed for the anomaly to be remedied either by an amendment to the marriage laws or by creation of a *separate* civil union status for queer couples. Poritz C.J. (joined by Long, and Zazzali, JJ.), dissented from the aforesaid majority view and held that civil union status for queer couples was not the right remedy for the problem. They said (in words which later became the majority US SC view):

> "We must not underestimate the power of language. ***Labels set people apart as surely as physical separation on a bus or in school facilities.*** Labels are used to perpetuate prejudice about differences that, in this case, are embedded in the law. ***By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples.*** Ultimately, the message is that what same-sex couples have is not as

[8] *Lewis* v. *Harris* [188 N.J. 415 (2006)] (Not in compilation).

> important or as significant as "real" marriage, ***that such lesser relationships cannot have the name of marriage***."[9]

31. After the US Supreme Court decision in ***Obergefell v. Hodges,***[10] the aforesaid view, without reference to Poritz C.J. and her judicial colleagues, has become the prevailing one: it has been held that equal protection requires that a *marriage* between two persons of the same sex be recognised and licenced.

32. Indeed, any other view would militate against India's own jurisprudence on substantive equality. Relegating non-heterosexual relationships to 'civil unions' and denying their access to the marital institution, would send those in such relationships a clear message of subordination: that their relationships are 'less than', inferior to relationships that comply with the entrenched heteronormative order. That the Petitioners' relationships do not deserve the name of marriage. By doing so, civil union status would undermine the Petitioners' "***full and equal*** social, economic, political, and cultural participation in society", and contribute to the Petitioner's subordination as a disadvantaged group.[11]

33. Petitioners respectfully submit that a separate regime of civil unions to recognise their relationships of love would be akin to reviving from its jurisprudential grave the 'separate-but-equal' doctrine that we today know as, simply, segregation.

III. On the Notice and Objection Regime

34. Petitioners respectfully submit that the declaratory relief with respect to interpreting the SMA so as to allow equal marriage regardless of sexual orientation or gender identity ["equal marriage"], is only an essential but incomplete component of marriage equality. The other essential, indivisible component is the striking down as

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[9] *Lewis* v. *Harris* [188 N.J. 415 (2006) (Page 467 (internal pg. 27), Poritz, C.J.)] (Not in compilation).
[10] *Obergefell* v. *Hodges* [576 U.S. 644 (2015)] — Compilation IV Vol. 4 Judicial Precedents E-Pg. 2407 @ E-Pg. 2407.
[11] *Joseph Shine* v*. Union of India* [(2019) 3 SCC 39 (Paras 171-174, Chandrachud J.)] — Compilation IV Vol. 2 Judicial Precedents E-Pg. 2964 @ E-Pg. 3076-3077.

unconstitutional of the notice-and-objection regime provided under the SMA for marriages solemnised thereunder. Without the latter, the former will give the Petitioners' access to marriage, but not equality with their heterosexual counterparts. Moreover, even access to marriage will be rendered illusory, in particular, for socially and economically vulnerable "non-elite" queer couples - i.e., the very category whose rights are most in need of effective protection by this Hon'ble Court.

35. It is true that the notice-and-objection regime - in principle - applies to all kinds of marriages, including heterosexual marriages. However, this should not become a reason for this Hon'ble Court to refrain from deciding it in *this* case, as it applies to these specific Petitioners standing before this Hon'ble Court, for whom the issue squarely and most urgently arises. Indeed, it is because of its universal nature that a challenge to the notice-and-objection regime can be made by *any* affected party: heterosexual or homosexual. In *this* case, the challenge is being made by affected *same-sex and queer couples*, on the basis that - as submitted above - the declaratory relief would be illusory without striking down the notice-and-objection regime.

35A. It would be erroneous to assume that unless and until all members or all categories of members of any class affected by a legislation subject to challenge or interpretation, are present before the Hon'ble Court, the constitutional court should not deal with the issue or relegate it to adjudication before Division Benches. The correct test is whether a vitally and directly affected class (like the current Petitioners) undeniably having locus are before the Court. If they are, the absence of other affected classes, e.g. heterosexual persons, will not and cannot foreclose or be a bar to the decision of a constitutional court. Furthermore, if the content of such challenge by the class which approaches the Court is credible, clear, and strong, it would be unjust to deny relief to the class (i.e. the Petitioners herein) on the basis that other classes would be affected by that decision and are not before this Court. The test of judicial intervention is a positive one, seeing as it does the standing and

status of the class before the Court, and not denying relief on the basis of another class not present before the Court.

36. Furthermore, there is a far more direct link between the two issues with respect to queer marriages. As it has been clarified that this litigation deals only with the possibility of legalising queer marriages under the SMA, should Petitioners prevail, the *only* law available to them to get married under will be the SMA - with its notice-and-objections regime. Unlike most heterosexual couples, queer couples will not be able to get married under personal laws at all, and are thus *compulsorily* subjected to the notice-and-objection regime. The only way for Petitioners to avoid the notice-and-objection regime's onslaught on their privacy, dignity, and personal safety, is to simply not marry at all. This makes a resolution of the notice and objection regime indispensable for the resolution of this case.

37. Thirdly, there is a further direct link between the two issues here, that does not arise for heterosexual couples. The notice-and-objections regime removes the choice from a queer couple about *when* they want to come out to the world at large and on what terms. This is an issue of decisional autonomy that directly impacts *queer couples who wish to marry* - which is a central issue in these petitions.

38. Finally, as Petitioners have set out in their written submissions, and in oral arguments before this Hon'ble Court, the reasons why a resolution of the notice-and-objections regime is essential to the grant of effective relief of marriage include:
    a. The notice-and-objection period allows for public harassment and intimidation of vulnerable couples. Granting to queer couples the *right* to marry while leaving the notice-and-objection regime intact will create a situation where a large swathe of queer couples will have been granted the right under law, but will be unable to exercise it by virtue of violence facilitated, though not sanctioned, by the same law itself. See

Annexure 5 for a report on threats faced by queer couples from their immediate families and communities.[12]

b. Granting a declaratory relief while leaving the notice-and-objection regime intact will sanction a regime of indirect discrimination, where the impact of this Hon'ble Court's judgement will vary along lines of class, caste, and faith. As this Court (speaking through Chandrachud J. as he then was) has previously noted, legal provisions that do not mandate, but nonetheless *facilitate* discrimination, are unconstitutional.

39. Indeed, in conclusion, on the issue of the notice-and-objections regime, it is submitted that this topic constitutes a normal, secular, civic, but major irritant of the life of all couples invoking the SMA and the Petitioners invite its invalidation on traditional, established, and classic grounds of constitutional adjudication, *de hors* Parts I and II of the submissions hereinabove.

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[12] National Herald, Same-Sex Marriage: 'One barrier less to live a fuller life', available here

Annexure 1

Indian Constitutional Law and Philosophy

EQUALITY / FAMILY LAW AND THE CONSTITUTION / NON-DISCRIMINATION / SAME-SEX MARRIAGE / SEX EQUALITY / TRANSGENDER RIGHTS

Guest Post: Gendered Beyond Repair? – Proposing an Interim Succession Regime for Same-Sex Marriages in Existing Law

- MAY 4, 2023MAY 9, 2023
- GAUTAM BHATIA
- 1 COMMENT

[This is a guest post by **Kartik Kalra**.]

During the hearing stages of the marriage equality case (*Supriyo @ Supriya Chakraborty v. Union of India)* before the Supreme Court, the Union has consistently highlighted the gendered language of the web of legislation governing marital relations, which includes the succession regime. This argument highlights the Court's structural inability to redress the discriminatory character of the exclusion of same-sex marriage – even if the Court interprets **Section 4(c)** (https://indiankanoon.org/doc/594580/) of the Special Marriage Act, 1954 ("SMA") to permit same-sex marriages, the highly gendered web of legislation governing marital relations subsists. Since this web of legislation includes the law on succession, the argument proposes the Court's abstention as the sole way of avoiding unanticipated complications. What happens when a Hindu homosexual couple marries – would they continue being a part of their respective Hindu Undivided Families ("HUF")? When a gender-neutral interpretation of the SMA is offered, would the relationships stipulated in the orders of succession in the Hindu Succession Act, 1956 ("HSA") and the Indian Succession Act, 1925 ("ISA") be constructed similarly? In case this is done, would elements of classical Hindu law that permeate into legislation – especially in context of notional partitions u/s 6 of the HSA, also undergo interpretive changes?

In this piece, I examine the veracity of this, and propose that a gender-neutral construction of the ISA and HSA offers sufficient resolution. Since the HSA governs succession for Hindu unions pursuant to Section 21A of the SMA, I propose the extension of this interpretive choice to both the ISA and HSA in avoiding inter-se disparities among same-sex unions. In saving the SMA from unconstitutionality due to its exclusion of same-sex marriages, therefore, the Court must declare the extension of its gender-neutral interpretation of the words "widow" and "widower", as they appear under the SMA, to both the ISA

and HSA. Since the HSA (unlike the ISA) operates substantially within the gender binary, preventing the exclusion of Hindu transgender persons from the succession regime requires yet another declaration – the terms "male" and "female", especially as they appear u/ss 8 and 15 of the HSA (defining the orders of succession), must be interpreted to include transgender persons based on their gender self-identification.

I make this argument in the following manner, using only extant statutory framework and doctrine – *firstly*, I propose the framework for succession under the ISA for inter-faith and non-Hindu same-sex unions; *secondly*, I propose the framework for succession under the HSA for Hindu same-sex unions; and *thirdly*, I propose that the ideal path for the Court to adopt, in order to prevent a disparity among same-sex unions inter-se, would be to mandate the continued application of the HSA to govern succession for Hindu same-sex unions.

A Preliminary Framework for Same-Sex Succession for Non-Hindus under the ISA

Section 21 (https://indiankanoon.org/doc/388438/) of the SMA holds that succession to the property of any person whose marriage is solemnized therein would occur in accordance with the ISA, meaning that the personal laws of neither partner apply in the devolution of property. An exception is carved u/s 21A (https://indiankanoon.org/doc/11410/), which states that when two Hindus marry under the SMA, the HSA governs their succession. The HSA, however, won't be applicable when a Hindu marries a non-Hindu, given Section 19 (https://indiankanoon.org/doc/1168217/) calling for their severance from the HUF. On the other hand, when two Muslims, Parsis, Christians or Jews marry under the SMA, the ISA applies with full force given Section 21, while retaining their membership of their respective households given the absence of an equivalent Section 19. The law governing succession for two kinds of marriages under the SMA – those between a Hindu and a non-Hindu; and those among non-Hindus – is found in Chapter II of the ISA, which I shall demonstrate to be as efficaciously applicable to same-sex unions using the gender-neutral interpretation of the terms "widow" and "widower" u/ss 33 and 35 of the ISA. The law is quite simple, which is as follows:

1. **Section 33(a) of the ISA –** In the presence of widow and lineal descendants, the former takes a one-third share, and the latter take two-thirds collectively;
2. **Section 33(b) of the ISA** – In the absence of lineal descendants, but the presence of widow and kindred, the former takes one-half, while the latter take the remaining one-half collectively.

While Section 33 of the ISA uses the term "widow" to signify the spouse, Section 35 equates the rights of the widow and the widower. Any reference to the rights of a widow, therefore, also constitutes a reference to those of the widower. This already makes matters quite simple – a reference to a male's "widow", pursuant to extant statutory framework, can be interpreted as a reference to their widower. Likewise, a reference to the rights of a female's "widower" can be interpreted as one to their "widow". The succession regime under the ISA also prevents the exclusion of transgender persons – a single order of succession is envisioned for all persons, irrespective of their gender or sex identities. For clarity on spousal shares in succession for same-sex unions, consider the following illustrations:

A, a Muslim male, marries B, a Parsi trans-man under the SMA. A dies, leaving behind B, two adopted sons, two adopted daughters, his mother, father, brother and sister.

Here, given the application of Section 21 of the SMA, succession occurs u/s 33 of the ISA. In the presence of lineal descendants, kindred are excluded. On this basis, A's mother, father, brother and sister are excluded. B, being A's "spouse" under the reinterpreted succession regime, takes a one-third share. The two adopted sons and two adopted daughters take a two-thirds collectively.

C, a Christian trans-woman, marries D, a Muslim female under the SMA. D dies, leaving behind C, one adopted son, two adopted daughters, her mother, father, brother and sister.

Here, given the presence of lineal descendants, kindred are excluded. C, being D's "spouse", takes one-third. The adopted son and two adopted daughters take two-thirds collectively.

From these two examples, it can be seen that the regime contained u/s 33 of the ISA, along with a gender-neutral interpretation of Section 35, makes matters quite simple for intestate succession for same-sex unions without requiring substantial legislative intervention. Matters may not be as simple for Hindu homosexual unions, both in terms of the inclusion of transgender persons and the highly gendered order of succession contained in the Schedule. I discuss this in the following section.

A Preliminary Framework for Succession for Hindu Homosexual Unions

Given the greater complexity of succession under the HSA, I propose a framework for same-sex succession specifically for Hindu same-sex unions in this section. In order to do so, *firstly*, I examine succession under the HSA in general (sub-section A); *secondly*, I evaluate the use of the HSA to undertake same-sex succession (sub-section B); and *thirdly*, I discern some anomalies arising from a gender-neutral interpretation of the HSA (sub-section C).

Succession under the HSA

As noted above, Section 21A of the SMA mandates the HSA's continued application to two Hindus who marry therein. This section, inserted in 1976, serves the purpose of preserving the HUF. It claims to do so by excluding the application of severance-based disability generated by Section 19, retaining the Hindu's membership of the HUF if they marry another Hindu. The solemnization of a Hindu homosexual union under the SMA, therefore, mandates the application of the HSA to govern the marital parties' succession.

The HSA retains the Mitakshara-based distinction between Joint Family Property ("JFP") and separate property, with the former referring to property held jointly by the coparcenary – a managerial unit overseeing the property's economic well-being. The coparcenary, following the Hindu Succession (Amendment) Act, 2005, consists of sons and daughters of up to three degrees of lineal descent, who possess a share in the JFP. The first stage of devolution occurs using a process called a notional partition, which crystallizes the coparceners' shares in the JFP immediately prior to the coparcener's death. Following the crystallization of all coparceners' shares, the second stage concerns the devolution of the deceased coparcener's share on their heirs according to the order stipulated u/s 8 of the HSA r/w the Schedule if they identify as "male"; and according to the order stipulated u/s 15 of the HSA if they identify as "female".

In *Uttam v. Saubhag Singh* (https://indiankanoon.org/doc/21722097/), the Supreme Court held that a property loses its character as JFP once it devolves u/s 8, meaning that the devolution of a single coparcener's share in the JFP may alter its identity [18]. The inheritors, however, are free to restart their own HUF, which carries a very low threshold as held in *Commissioner of Wealth Tax v. R. Sridharan* (https://indiankanoon.org/doc/1902100/#:~:text=Commissioner%20of%20Income%2Dtax(l,tax%20Act%2C%20or%20Wealth%20Tax) [10]. In that case, a Hindu man married a Christian woman under the SMA, claiming to have begun an HUF with himself and his son as coparceners. The Court accepted his contention, holding that the petitioner must only discharge the burden of being a Hindu u/s 2(c) of the HSA [10]. This was quite easy to prove, given its extremely low threshold according to the standards in *Yagnapurushadji v. Muldas* (https://indiankanoon.org/doc/145565/) [29]. On this basis, while all property

devolving u/s 8 at the death of any coparcener becomes separate property in the hands of coparcenary heirs, those heirs can restart their HUF. Lastly, it must be noted that one's membership of the HUF (and the coparcenary) is immune from decisions to the contrary made by its remaining members, irrespective of the grounds of such a decision. The HSA contains an exhaustive list of factors disqualifying one from succeeding – murdering the person whose property one wishes to inherit; and being a descendant of one who ceased to be a Hindu. Section 28 (https://indiankanoon.org/doc/385983/#:~:text=28.,on%20any%20other%20ground%20whatsoever.) of the HSA is explicit in holding that "[n]o person shall be disqualified from succeeding…on any other ground whatsoever", emphasizing the exhaustive character of the HSA's two disqualifications. On this basis, therefore, the HUF's objections to a same-sex marriage carry no implications for the marital parties' right to succeed to JFP.

Same-Sex Succession under the HSA

The rules for intestate succession for males and females are provided differently under the HSA, couched in gendered terms – the property of a "male Hindu" devolves upon the "widow"; the property of a "female Hindu" devolves upon the "widower". In case the Court holds that these terms must be construed as "spouse" to save them from unconstitutionality, devolution for a same-sex female union would be covered u/s 15 (https://indiankanoon.org/doc/1202482/), and for a same-sex male union u/s 8 (https://indiankanoon.org/doc/1968317/). This interpretive choice will extend to transgender persons in the manner done by *Arunkumar v. Inspector General of Registration* (https://indiankanoon.org/doc/188806075/) – one's gender self-identification would determine their status as "male" or "female" for the purposes of the order of succession. A transgender woman may be regarded as "female", and a transgender man as "male" for determining the applicable order of succession. While this resolution is unsatisfactory due to its reduction of diverse identities into the gender binary, its purpose is to demonstrate the Court's ability to secure sufficient equality using its gender-neutral interpretive framework. The argument proposing the Court's structural inability in securing equality in matters of succession, therefore, is weak.

I now discuss concrete scenarios demonstrating the functionality of the gender-neutral interpretation of the succession regime. For the male union, the spouse of the deceased would inherit simultaneously with the deceased's other Class I heirs specified in the Schedule (https://egazette.nic.in/WriteReadData/1956/E-2173-1956-0038-99150.pdf). For the female union, the spouse of the deceased would inherit simultaneously with their sons and daughters, to the exclusion of all others. Consider the following illustrations:

A, a Hindu trans-woman, marries B, a Hindu female under the SMA. A dies, leaving behind B, two daughters D_1 and D_2, two sons S_1 and S_2, her brother, and her sister.

A, being a trans-woman, would be regarded as "female" pursuant to the gender-neutral interpretive framework. The coparcenary shares of D_1, D_2, S_1 and S_2 would be crystallized, and an equal share conferred on B pursuant to *Gurupad v. Hirabai* (https://indiankanoon.org/doc/1090707/). In that case, the Court held that the widow is entitled to a share equal to that of the sons when undertaking a notional partition, since the notional partition occurs in accordance with rules of classical Hindu law mandating the same [11]. The HSA, as amended by the Hindu Succession (Amendment) Act, 2005, states that all references to "sons" be construed as those to "daughters", leading to an interesting amalgam of classical Hindu law and the HSA. In this amalgam, the spouse (B) is entitled to a share equal to the sons' and daughters' coparcenary shares. The gender-neutral construction of the term "widow", therefore, must be taken to its logical conclusion, and prior doctrine on devolution of property be interpreted to maximize the rights of same-sex unions.

When this notional partition is undertaken, the sons and daughters, along with B, get one-sixth each. This one-sixth, according to *Saubhag Singh*, is their separate property. At the second stage of devolving the deceased's share in the coparcenary, A's own one-sixth devolves upon their heirs u/s 15. This devolves upon the sons and daughters along with B u/s 16, giving them an additional share of one-thirtieth each. The total property with D_1, D_2, S_1, S_2 and B, at the end of the exercise, would be one-fifth each.

C, a Hindu male, marries F, a Hindu trans-man under the SMA. C dies, leaving behind F, two daughters D_1 and D_2, a daughter of a pre-deceased son D_3, and a daughter of a pre-deceased daughter D_4.

F, being a trans-man, would be regarded as "male" for the purposes of deciding the order of succession, which would occur u/s 8 r/w the Schedule. A notional partition would be undertaken u/s 6, crystallizing the coparcenary shares of D_1, D_2, D_3, and D_4, along with conferring an equal share on F (being C's "spouse") pursuant to *Gurupad v. Hirabai*. The reasoning in the above example applies directly.

In the notional partition, D_1, D_2, D_3, D_4 and F get one-sixth each. This one-sixth, according to *Saubhag Singh*, is their separate property. At the second stage, C's own share devolves u/s 8. This devolves upon the D_1, D_2, D_3, D_4 and F since all of them are present in Class I of the Schedule – giving them an additional share of one-thirtieth each. The total property with each, the end of the exercise, would be one-fifth each.

On this basis, it can be seen that once a gender-neutral interpretation is offered to the terms "widow" and "widower" in the HSA, intestate succession for same-sex unions can function within extant statutory framework and doctrine. There arise anomalies, however, with regards to the relationship between one same-sex partner's spouse and the other's HUF. I discuss these in the following section.

Anomalies

Some anomalies may arise despite the gender-neutral interpretation of the terms "widow" and "widower", since the HSA's remaining text would remain highly gendered. In this section, I address one such anomaly – differential rights of male and female same-sex partners to inherit the other's ascendants' property u/ss. 8 and 15. Consider the following illustrations:

A, a Hindu male, and B, a Hindu male, marry under the SMA. A predeceases X, his father. X dies in 2023, leaving behind two sons, two daughters, and B.

In this example, in order to make B eligible for inheriting A's property, the words "widow of a pre-deceased son" as they appear under the Schedule would have to be read as "spouse of a pre-deceased son". Once this is done, B can inherit the property of X as a Class I heir along with the two sons and daughters, obtaining a one-twenty-fifth share.

C, a Hindu female, marries D, a Hindu female, under the SMA. C predeceases her father X. X dies in 2023, leaving behind two sons, two daughters and D.

In this example, there exists no statutory backing to make D eligible for inheriting X's property. Since C and D have entered into a female same-sex union governed by Section 15, the order of succession provided thereunder must be followed, which is the following (in the order of precedence):

Sons, daughters (including children of pre-deceased children) and husband;

Heirs of the husband;

Mother and father;

Heirs of the father.

The term "widower of a pre-deceased daughter", which describes the relationship between X and D, is evidently absent u/s 15. The absence of this term u/s 15 constitutes an impossibility to interpret it as "spouse of a pre-deceased daughter", and to consequently confer succession rights on D. There exists, therefore, an anomaly – while a same-sex partner of a male deceased could succeed to his partner's ascendant's property, the same-sex partner of a female deceased would be unable to. This anomaly may be illustrative of the Union's argument – judicial intervention may be unable to redress the highly gendered succession regime. In the following section, I argue that despite such occasional anomalies, the wisest choice to be exercised by the Court is to simply hold that until structured legislative change is introduced, the term "widow" and "widower/husband" shall signify "spouse" under both the ISA and the HSA.

Judicial Intervention Towards Succession and the Court's Options in *Supriyo*

There exists no constitutional bar to the Court offering a gender-neutral interpretation to the terms "widow" and "widower" under the HSA and ISA, which it would do to save the SMA's constitutionality. Marriage, without consequent succession rights, would be a continued equality violation, which the Court has sufficient infrastructure to redress. The options, therefore, are two – hold solely the ISA applicable to same-sex unions, resulting in Hindu same-sex unions' severance from the HUF and their consequent ineligibility to inherit from its members; or hold both the ISA and the HSA applicable (with its limited anomalies), continuing their membership of the HUF and their eligibility to inherit from its members.

If the Court doesn't wish to enter into the domain of succession under Hindu law due to anticipated allegations of overreach in matters of personal law, it may choose the former option. This option, however, carries substantial disadvantages for same-sex unions, for it would cause the extinction of their coparcenary rights and create a disqualification from inheriting the property of their HUF's members. Alternatively, it can declare that both the HSA and ISA be interpreted in a gender-neutral manner, with succession for same-sex unions occurring under both. This option, I propose, is the least disruptive, and ensures a continuity of coparcenary rights for same-sex unions while keeping intact their eligibility to inherit HUF's members' property. The argument portraying the exercise of this option as judicial interference in matters of personal law misses a crucial point: this ship has already sailed, for the HSA's contemporary succession regime for daughters and widows nowhere resembles its Mitakshara-law counterpart. The institution of the JFP has already been substantially weakened by legislation and case-law, with every single unit of property crystallizing upon a notional partition taking the avatar of separate property. The limited components of classical Hindu law that permeate into legislation, such as those dictating the manner of a notional partition, are equally efficaciously applicable to same-sex unions.

Further, as has been **noted** (https://www.tandfonline.com/doi/full/10.1080/24730580.2022.2139584) before, succession is a question of property, and concerns rights of a civil instead of religious character. The HSA has never been considered a religious codification necessitating the Court's interpretive abstention, and has been consistently imputed with a transformative character, at least on the lines of gender – ***Gurupad v. Hirabai*** (https://indiankanoon.org/doc/1090707/), ***Tulsamma v. Sesha Reddy*** (https://indiankanoon.org/doc/485394/), and ***Vineeta Sharma v. Rakesh Sharma*** (https://indiankanoon.org/doc/67965481/) are a few examples. The HSA's gender-neutral construction, therefore, is in line with the Court's consistent interventionist approach towards issues of succession law. In *Supriyo*, therefore, the Court must declare that same-sex marriages would occur under the SMA; and that succession for same-sex unions would be navigated both under both the ISA and the HSA, with a gender-neutral construction of the terms "widow" and "widower" as "spouse".

Conclusion

On this basis, I submit that despite a few anomalies, succession for same-sex unions can be navigated with relative ease within existing succession law and doctrine. The JFP institution has been weakened by legislative change and judicial decisions, and a risk of judicial interference must not be a consideration. The Court, while holding same-sex marriage permissible under the SMA, must declare that succession shall be governed by the ISA for interfaith and non-Hindu same-sex unions, and under the HSA for Hindu same-sex unions. In making this declaration, it must hold that a gender-neutral construction of the terms "widow" and "widower" be done, undermining the gendered character of property undergirding the succession regime. It must also strive to include transgender persons within the succession regime following *Arunkumar's* interpretive approach, using gender self-identification as the basis to determine the applicable order of succession. Members of a same-sex union must be conferred with the same succession rights as their heterosexual counterparts, a move that is well within the Court's reach in *Supriyo*.

EQUALITY, FAMILY LAW, NON-DISCRIMINATION, SAME-SEX MARRIAGE, SUCCESSION

One thought on "Guest Post: Gendered Beyond Repair? – Proposing an Interim Succession Regime for Same-Sex Marriages in Existing Law"

1. **Guest Post: Gendered Beyond Repair? – Proposing an Interim Succession Regime for Same-Sex Marriages in Existing Law – Prithwish Ganguli** says:
   MAY 4, 2023 AT 4:36 AM
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REPLY

ANNEXURE 2

Section 27A, SMA	(1A) A **wife** may also present a petition for divorce to the district court on the ground,— (i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; (ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898) (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.]
Section 31	Court to which petition should be made.—(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction-- (i) the marriage was solemnized; or (ii) the respondent, at the time of the presentation of the petition resides; or (iii) the parties to the marriage last resided together; or **(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition;**

	or (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is at that time residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive. (2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, **entertain a petition by a wife domiciled in the territories to which this Act extends for nullity of marriage or for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the husband is not resident in the said territories.**
Section 36	Alimony pendente lite.—Where in any proceeding under Chapter V or Chapter VI it appears to the district court **that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the court to be reasonable.**

	Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband.[13]
Section 37	37. Permanent alimony and maintenance.—(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, **order that the husband shall secure to the wife for her maintenance and support,** if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability 5[the conduct of the parties and other circumstances of the case], it may seem to the court to be just. (2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court

[13] Petitioners respectfully submit that provisions for alimony and/or maintenance are equally applicable to non-heterosexual settings, on account of the evolution of gender norms in modern India, and as such, the right to maintenance and alimony be retained by non-heterosexual couples.

	to be just. (3) **If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just.**[14]

ANNEXURE 3

Adoption	Regulation 5, Adoption Regulations, 2022 enacted under the Juvenile Justice (Care and Protection of Child) Act, 2015, stipulates only a **married couple or single individuals** as eligible candidates for adoption.
Surrogacy	Section 2(1)(h) read with Section 4 of the Surrogation (Regulation) Act, 2021 allows only a **married couple** or a single widow/divorcee woman to avail surrogacy.
Intestate succession	Intestate succession under the Indian Succession Act, 1925, Hindu Succession Act, 1956, as well as Muslim personal law only covers relations by marriage, consanguinity, or adoption.

[14] Petitioners respectfully submit that provisions for alimony and/or maintenance are equally applicable to non-heterosexual settings, on account of the evolution of gender norms in modern India, and as such, the right to maintenance and alimony be retained by non-heterosexual couples.

Tax exemption for gifts received from spouse	Under Section 56(2)(v) of the Income Tax Act, 1961, gifts made by a person to a **spouse** are exempt from income tax.
Tax deductions for diverse expenditures made for one's spouse	*For instance,* Section 80D of the Income Tax Act, 1961 allows an assessee to deduct expenditure on health premia made only for his **spouse or dependent children**. Similar provisions have also been enacted for other diverse expenditures.
Norms for compassionate appointments in government posts	*For instance,* the Scheme for Compassionate Appointment in the Registry of the Supreme Court of India, 2006 makes provisions for compassionate appointment of a **spouse** in case of the death of a Court Officer while in service. Similar provisions exist for numerous other posts in State institutions.
Compensation to dependents for death of kin under various legislations	*For instance,* under the Workmen's Compensation Act, 1923, **only persons related by marriage or lineage are considered 'dependents'** of the deceased entitled to compensation (*ref.* Section 2(1)(d), Workmen's Compensation Act, 1923).
Appointment of nominee for receipt of post-retirement benefits, pension, *etc.*	Rules 19, 21 of All India Services (Death-cum-Retirement) Benefit Rules, 1958 consider only persons **related by marriage, blood, or adoption as eligible nominees** for receipt of a

after the death of a government employee	deceased government employee's gratuity.
Privilege in spousal communication	Section 122 of the Indian Evidence Act, 1872 makes communication between a **married couple** made during the subsistence of the marriage, privileged.
Right to bodily remains of deceased kin	In case of death, police/other authorities are often reluctant to return the deceased's bodily remains to persons not in a 'legal' relationship (such as marriage or lineage) with the deceased.[15]
State protection from social harassment, violence, and 'honour killings' granted to couples *marrying* outside the pale of conventional morality	*For example,* the Rajasthan Prohibition of Interference with the Freedom of Matrimonial Alliances in the Name of Honour and Tradition Bill, 2019 was passed by the Rajasthan Legislative Assembly to protect **couples who are married or who intend to marry, from harassment by community/families.**
Family insurance coverage	Most insurance companies cover only the legally married spouse (and other blood/adoptive relations) of a policy-holder under family floater insurance policies.

[15] Sayantan Datta "We Refuse to be Subjects of Experiment for Those who do not Understand us: Transgender Persons Bill." 52(49) *Economic and Political Weekly* (2017) .

Renting homes	The housing market strongly prefers married couples and conventional families.
Opening of joint bank accounts	Most banks facilitate joint savings accounts for **legally married couples** and other recognised family types.
Bereavement or care-giving leave policies in private employment	For instance, bereavement leaves of many private companies only extend to death of loved ones recognised by the law as family, i.e. **married spouse and other members of the immediate conventional family**.[16]
Right to be involved in the partner's healthcare and right to make medical decisions in that regard	Hospitals and healthcare centres generally provide information about a patient's condition to, and consult in that regard with, only legally-recognised family members of the patient, including a **married spouse and other relations by blood/adoption.**

ANNEXURE 4

Surrogacy	Section 2(1)(h) read with Section 4 of the Surrogation (Regulation) Act, 2021 allows only a married couple or a single widow/divorcee woman to avail surrogacy.
Hindu Succession	8. General rules of succession in the case of

[16] VK, Vipashana & Anr. "Firms give bereavement leave to help staff cope with loss." *Times of India* (Sep. 12, 2017).

Act, 1956	males.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter— (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule; (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule; (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and (d) lastly, if there is no agnate, then upon the cognates of the deceased. 15. General rules of succession in the case of female Hindus.— (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,— (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (b) secondly, upon the heirs of the husband; (c) thirdly, upon the mother and father; (d) fourthly, upon the heirs of the father; and (e) lastly, upon the heirs of the mother. (2) Notwithstanding anything contained in sub-section (1),—

	(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.
Indian Succession Act, 1925	33. Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.—Where the intestate has left a widow— (a) if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained; (b) 2[save as provided by section 33A], if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his

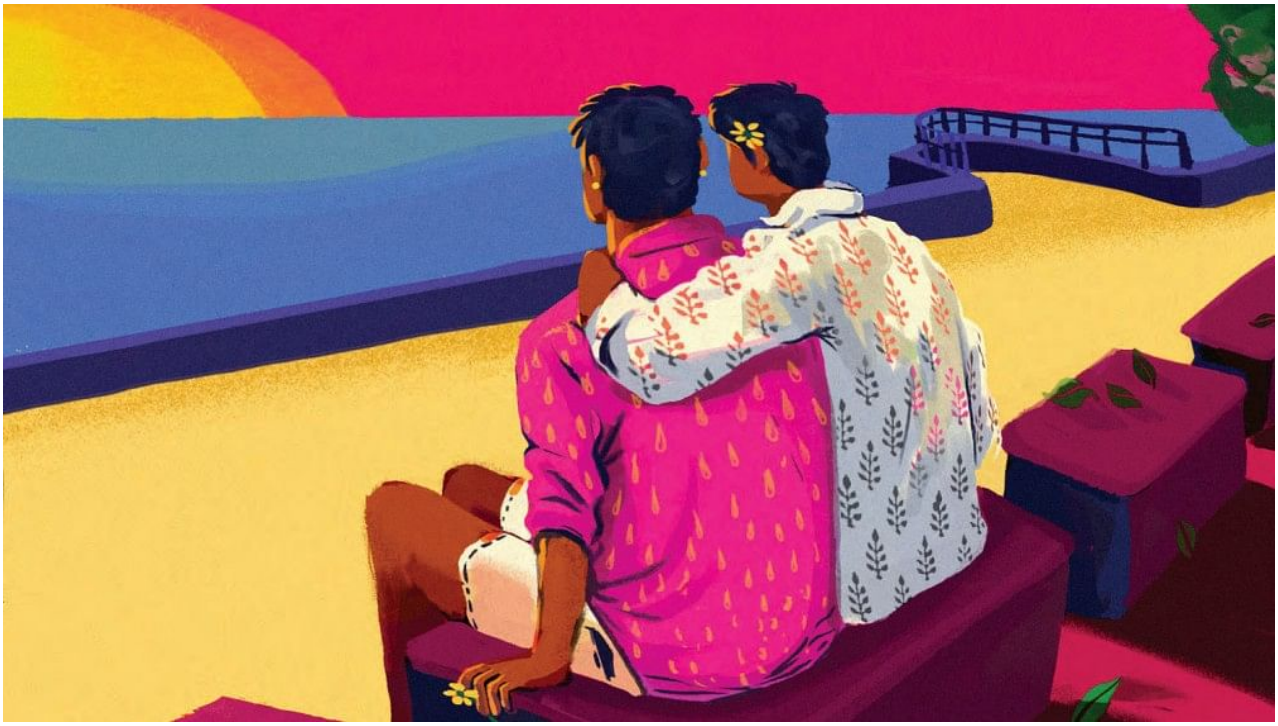
	property shall belong to his widow, and the other half shall go to those who are kindred to him, in the order and according to the rules hereinafter contained; (c)if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

Same-Sex Marriage: 'One barrier less to live a fuller life'

NH nationalheraldindia.com/national/same-sex-marriage-one-barrier-less-to-live-a-fuller-life

Rushati Mukherjee April 29, 2023

Fear, despair, joy and hope: what the ongoing marriage equality hearings mean to queer couples in India who live beyond the metro cities



An illustration of a queer couple at the beach witnessing a sunset (Illustration: Harmeet Rahal/ PinkList India)

Rushati Mukherjee

Published: 29 Apr 2023, 8:34 AM

The Indian Supreme Court has been hearing arguments in favour of, and against, legalising same-sex marriage in India. Lawyers arguing for the legalisation on behalf of the petitioners have referred to it as a hearing about marriage equality for all queer people rather than just same-sex marriage. This includes gender non-conforming, non-binary, gender fluid and gender queer people.

The government of India has opposed the appeals, filed by many same-sex couples and other queer people to legally have their unions recognised. One of the arguments presented in a court document by the government is that these appeals are ‘urban elitist views’.

Chief Justice of India D.Y. Chandrachud observed on 26 April that the elitism argument is “just prejudice and has no bearing on how the Court will decide the case”.

We spoke to four queer couples from non-metropolitan and rural parts of India, to find out if marriage equality is indeed an urban elitist desire, and what the verdict would mean to them.

Also Read: The curious case of Saurabh Kirpal

Suresh and Chhaya *(names changed)*

Suresh, 22, and Chhaya, 20, are a couple from Uttar Pradesh. Suresh is a trans man, and Chhaya is a cis woman.

Suresh and Chhaya’s relationship was outed to their families by Chhaya’s relatives.

“Once our families found out, we were both locked into our homes,” says Suresh. “Our families tried to find *rishtas* for us to be married off to. I was taken to a psychiatrist, where I said very clearly that I knew I was a trans man, and I knew this was not illegal or madness. My family told me to stop wearing boy’s clothes and start dressing more like a girl. I was only let out of the house to go give my college exams.”

Suresh, who was then sitting for his university exams, managed to escape on the last day. He skipped the exam, met up with Chhaya and went to Delhi, where they sought help from the Delhi Commission for Women. The Commission helped them to find temporary accommodation, and Suresh found a job with the help of the LGBTQIA+ organisation PeriFerry, which helps queer people find jobs with accepting companies.

A few days later, they left for a major city in the south of India, having booked tickets with the money Suresh had saved, and with the hope that Suresh’s job would support them. Suresh later referred Chhaya to the same company, and they are now settled in that city.

Housing was a big worry. At first, they lived in a girl’s hostel. With the help of a journalist, Suresh began his medical and legal transition. They then shifted into an apartment.

“The landlady asked for documents and I showed them my PAN card, which doesn’t have gender,” said Suresh. “After I got my documents updated, I can show my Aadhaar card which now says I’m a man.”

But there is no changing Suresh’s birth certificate, which assigned him as female, and as the marriage equality hearings go on, that is his biggest fear.

“All the marriage acts, even The Special Marriage Act, imply that marriage is between a man and a woman,” he says. “Chhaya and I plan to get married later this year or early next year. I have not undergone sex reassignment surgery. What if our families legally object to our marriage based on our birth certificate, which shows that we are of the same sex?”

Courts have previously upheld marriages of transgender women. Citing the judgement passed by the Supreme Court in the 2014 case of the National Legal Services Authority (NALSA) vs. Union of India, the Madras High Court ruled in 2019 that under the Hindu Marriage Act, trans women can be legally recognised as brides. More recently, trans men in relationships with trans women have applied to get their marriages solemnised under The Special Marriage Act.

But the government, in its arguments during the ongoing hearings, is specifying that the act of marriage takes place between a biological man and a biological woman.

Also Read: Same sex marriage: How does India perceive homosexuality?

Dutee Chand and Monalisa Dash

Olympian Dutee Chand is well known for being the first openly gay athlete from India. The 27-year-old sprinter has previously posted about her relationship with Monalisa Dash on her social media accounts, declaring ‘Love is love.’ She spoke to us from Bhubaneswar, where she said Monalisa is with her.

“Monalisa and I met in 2017 during the Khudurukuni Osha festival in our village of Chaka Gopalpur in Odisha,” she says. “Monalisa said that was my fan. We exchanged phone numbers and that is how we started talking.”

After they became close, they discussed living together “as husband and wife”, she says. “I asked her, what if you need a man around the house? She said she liked me a lot and didn’t care about all that!” says Chand.

In 2018, after the overturning of Section 377 and the effective decriminalisation of same-sex relationships in India, they made the joint decision to inform their parents that they’d like to live together. Initially, both families were confused about the decision, but after they met each other, Chand says they agreed to let the two of them do as they saw best for their lives.

“She has finished her studies and is at home, and I’d like to look after her,” says Chand. “I want to work so that she can take care of the home.”

And what does the marriage equality verdict mean to her and Monalisa?

“It matters a lot to us in terms of our lives together,” she says. “Marriage certificates make it easier to deal with documents at banks, to adopt children, deal with property and just have legal rights towards each other, in case anything happens to either of us. It would also make it easier for me to take her for competitions, on partner visas, and even something as simple as staying in a hotel room together without being questioned.”

Also Read: Same-sex marriage: Urban fad or a question of rights?

Bhupen and Prantosh *(names changed)*

Dr. Bhupen, 35, met Dr. Prantosh, 26, when the latter was studying in Bhubaneswar. Prantosh is from the town of Pratapgarh in Uttar Pradesh, and is currently pursuing his MBBS, while Dr. Bhupen is from the town of Bokaro in Jharkhand and is a professor in a management studies institute in Odisha.

Bhupen says he became aware of being attracted to male stars in Bollywood from a young age. He never associated any shame with the feeling, until he hit puberty, “I distinctly remember an instance in class 6, when I laughed too loudly and a boy in my class called me *chhakka*,” he says.

“I felt like I was suffocating in India and all I wanted to do was run away, because I could not imagine a future for myself here,” adds Bhupen. “As a teenager, I would go to these big fat Indian weddings and come home and cry, knowing that this would never be an option for me, that I could never share my life with anyone. In college, all I could think was, if I have to live a full life, I have to get out of this country.”

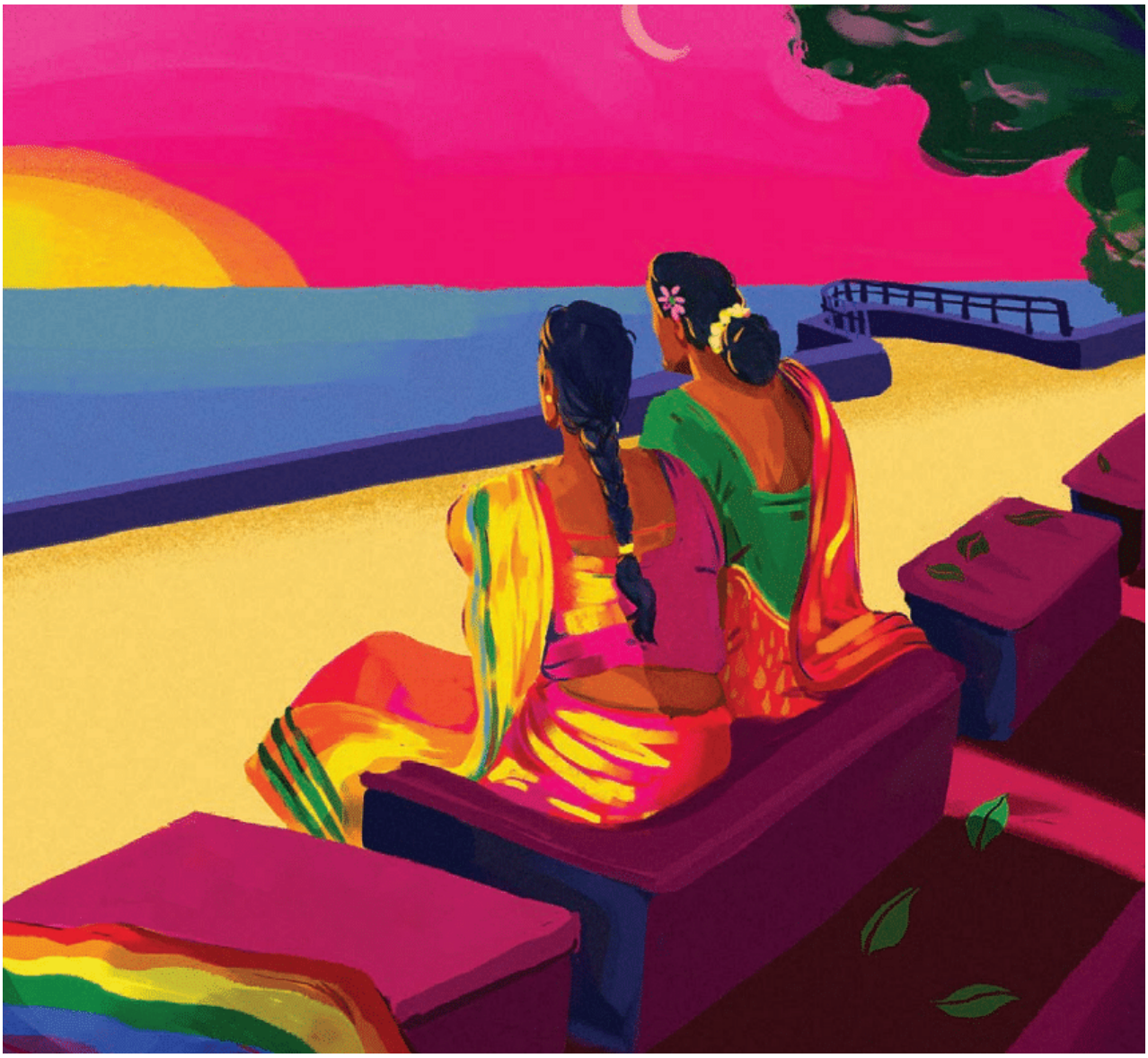
His meeting with Prantosh changed his life. “I never thought I would meet someone with the same ideas and values as me,” he says. “We used to daydream about running away together.”

Prantosh’s parents caught him talking on the phone with Bhupen during the pandemic. “They brought up questions of the family losing respect in society,” he says. “They blamed my education for ‘turning me gay’ and at one point, my mother suggested corrective rape for me.”

Reading about the marriage equality hearing, Prantosh and Bhupen cried together.

“The judgement will remove one barrier for queer people to live a fuller life, if not all barriers,” adds Prantosh. “I also think it will help my parents accept me as I am.”

“I didn’t think I would see this in my lifetime,” says Bhupen. “Given that we’re both based in small-town India, for us we cannot think of marriage or even co-habiting. Life seemed very bleak when I thought it couldn’t be shared. At one point, I couldn’t even get out of bed in the mornings. Now, I can see hope.”



An illustration of a queer couple at the beach witnessing a sunset (Illustration: Harmeet Rahal/ PinkList India)
(Illustration: Harmeet Rahal/ PinkList India)

Also Read: Law students of 36 colleges condemn BCI resolution against same-sex marriage

Vijin and Angel *(names changed)*

Vijin (32) is a cis gay man from Kanniyakumari district in Tamil Nadu. He was raised in a Christian family.

“I became aware that I’m attracted towards men in class 9,” he says. “But I first heard the term ‘gay’ in college, in a Tamil movie called Goa, which had two gay characters that my friends laughed at.”

Vijin could not accept his sexuality at first. For three years, he immersed himself in prayers, fasting and worshipping to try and convert himself into a heterosexual individual. He even asked his parents to find a woman for marriage—but it only made things worse.

“After three months of being married, I was still not able to love or have affection towards my partner,” he says. “I started visiting hospitals, [trying] ayurvedic treatment to cure ‘less manliness’. I lost a lot of money.”

When nothing worked, Vijin knew he was coming to the end of his endurance. He decided to opt for a job in a different city, with the idea that he would inform his wife, Angel, about his identity. Depending on her reaction, he thought he would either move away, or take his own life.

To his enormous surprise and relief, she understood.

“She tried to support me, and we decided to inform her father that we wanted to separate,” says Vijin. “But her father begged me to stay in the marriage and not talk about divorce.”

Vijin and Angel came to the conclusion that if they stayed on in India, neither of them would have a chance of happiness. So together, they planned to work towards leaving. “I tried for Canada and Germany, because I had learnt some German in a previous job,” says Vijin. “Then I got the chance to work in Germany.”

Vijin now works in the automotive industry in Munich, where he has met other queer people and, for the first time, has a community.

“Now I’m here, Angel will soon join me,” he says. “After that, I will help her to find another partner. I know it’s difficult to understand. But it’s our way of dealing with the cards we were dealt.”

For Vijin, the marriage equality verdict would mean a chance for future generations to avoid all this pain and despair.

“I hope it will create more awareness, especially in villages, that attraction towards the same sex is not a crime,” he says. “All my life I felt like I was possessed by a demon I could not get rid of. I always felt insecure and inferior to others, and that I could not live a life close to God. I don’t want anyone else to feel this way.”

RUSHATI MUKHERJEE is a journalist based in Kolkata

Also Read: Open letter to CJI from queer Indian students of 10 IITs and 42 other colleges re same-sex marriage

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