

BEFORE THE HONOURABLE HIGH COURT OF KERALA
(Special Original Jurisdiction)

W. P. (C) No. _____ of 2020

Writ Petitioners:

1. Nimesh P.P.
Aged 35 years,
S/o Pushakaran PB,
Kent Mahal Apartment,
Tower 4, 11B1
Infopark Road, Brahmapuram,
Kakkanadu- 682 303.
2. Sonu M.S.
Aged 31 years,
S/o Soman MM,
Kent Mahal Apartment,
Tower 4, 11B1
Infopark Road, Brahmapuram,
Kakkanadu- 682 303.

Respondents:

1. Union of India
Through its Secretary
Ministry of Law and Justice,
Government of India,
Shastri Bhawan, New Delhi - 110 001.
2. State of Kerala
Represented by its Chief Secretary
to the Government of Kerala,
State Secretariat, Thiruvananthapuram 695 001.
3. Department of Law,
Government of Kerala
Represented By Secretary To Government,
Law Department, Government Secretariat,
Thiruvananthapuram- 695 001.
4. Registrar General of Births, Deaths and Marriages
Kerala
Department of Registration,
Vanchiyur P.O., Thiruvananthapuram.
Kerala – 695035.

5. Inspector General,
Department of Registration,
Vanchiyur P.O., Thiruvananthapuram
Kerala – 695 035.
6. Marriage Officer,
Thrissur District,
Chempukavu, Thrissur City P.O.,
Thrissur- 680 020.

All notices to the petitioner may be served on

M/s George Varghese Perumpallikuttiyil,
A.R. Dileep, P. J. Joe Paul, Manu Srinath & Rajan G. George
Advocates
2B, Kattikkaran Chambers, Opp. Central Police Station,
Near High Court, Kochi-18.

All notices to the respondents may be served on them at their above address

Writ Petition (Civil) filed Under Article 226 of the Constitution of India

The petitioners humbly submit as follows: -

1. The Petitioners are citizens of India and currently resident at Ernakulam District, Kerala. Petitioners are the first openly declared homosexual (gay) couple in Kerala. The Petitioners intend to get their marriage solemnised under the Special Marriage Act, 1954 and to get that marriage registered. The Petitioners are aggrieved by the impugned provisions of the Special Marriage Act, 1954 whereby the law provided therein only permits a heterosexual (opposite sex) couple to get married and a homosexual couple like that of the Petitioners is denied equal access to the institution of marriage. Petitioners state that the impugned provisions of the Special Marriage Act, 1954 violate the fundamental rights of the petitioners and are thus illegal and unconstitutional to that extent. Seeking declarations in this regard and to obtain the relief for getting married under the Special Marriage Act, 1954, this writ petition is being moved jointly by the Petitioners.
2. Petitioners belong to a class of persons usually referred to as LGBTIQ [Lesbian, Gay, Bisexual, Transgenders, Intersex and Queer] who form a sexual minority group. From a state of absolute non-existence of rights, the

LGBTIQ had fought many social battles till date for their emancipation and for treatment as equal citizens or human beings. The social reform movements that centred around LGBTIQ rights over the centuries won this persecuted class of persons near equal and equal rights in many jurisdictions and the reformation movements are still on, around the globe. From basic lodging rights to access to public employment to right to self determination of one's own sexual identity, the movement has started to capture the imaginations of decriminalisation of homosexuality, right to family and in some places even right of adoption. The religions, customs and cultures in most civilisations resisted the reform measures for LGBTIQ with stereotypes they are always armed with.

3. In India as well, LGBTIQ rights were severely resisted. It was only in the 21st century, the LGBTIQ persons were started to be granted with some of the ordinary civil liberties enjoyed by heterosexuals. Transgenders had to wait till the Supreme Court ruling in **National Legal Services Authority v. Union of India, (2014) 5 SCC 438** for being recognised in law. It was only in 2018, homosexuality was decriminalised, following the Apex Court's judgment in **Navtej Singh Johar vs. Union of India 2018 (4) KLT 1 (SC)**. In 2019, the Transgender Persons (Protection of Rights) Bill, 2019 was passed by the Parliament and the President signed it into law. This is the first law passed by the Parliament to secure the rights of trans-genders in the country and to end all forms of discrimination against them. As per the estimates, the transgender population in India is 4.8 million while the declared and known homosexuals are estimated to be around 2.5 million as per the Government of India statistics. For both homosexuals and transgenders, though homosexuality was decriminalised in 2018 by virtue of Supreme Court ruling, other civil rights and liberties like, marriage, adoption, insurance etc are still not accessible.
4. The Petitioners, Nikesh and Sonu are a business man and an IT professional respectively. They had met each other in May, 2018 and they had fallen in love with each other. After a relationship of 2 months, they decided to get married. Being believers in god and in Hinduism, they explored the possibility of a religious marriage. Many, to whom they went for advice, turned them down, dis-encouraged them stating that believers would not take it lightly if they contract a temple wedding and that Hinduism does not recognise gay

marriages. Still to satisfy their own conscience and beliefs, they went to Guruvayoor Temple and got married to each other in a secret ceremony at the car parking area of the Temple on 5.7.2018. The ceremony was held in a secretive fashion as they feared violence and backlash from the other believers. The True Copy of the News Article dated 12.09.2019 which appeared in Times of India is herewith produced and marked as **Exhibit P1**.

5. Petitioners knew that the religious/temple authorities would not solemnise their marriage or issue a certificate of Celebration of Marriage. All their efforts to convince such persons went futile. That is why the Petitioners decided to solemnise and register their marriage under the Special Marriage Act, 1954 which is a secular legislation. It is submitted that the Petitioners had turned to this country's secular law and its Constitution after being discriminated by the religion and culture and the stereotypical homophobia that they carry. To petitioners' utter shock, the Special Marriage Act, 1954 and its provisions are found to be discriminatory as well because the Act recognises only marriages between persons belonging to opposite sex alone. Though the text of the Act does not exclude homosexual unions from its ambit expressly, Section 4 and Schedules 2-4 to the Act carry a heterosexual undertone in its language as it shows marriage as an affair between a male and a female or between bride and bridegroom. This is especially so because the forms appended to the Schedule Nos.2-4 of the Act prescribing the format of Notice of intended marriage, declarations to be made by the parties to the marriage and the certificate of marriage – all carry heterosexual nomenclature. Thus the statute in effect prevents a homosexual from applying for solemnizing or registration of marriage. An Appendix of the Impugned provisions- Section 4 & Schedule Nos. 2 to 4 of Special Marriage Act, 1954 are herewith produced and marked as **Exhibit P2**.

6. The Petitioners have suffered public humiliation after they made a disclosure of their love for each other. Internet trolls and other homophobic elements in the society have also attacked the petitioners. But greater is the insult and indignity the petitioners have suffered at the hands of law- the impugned provisions of Special Marriage Act, 1954- which refuse to recognise the Petitioners' union, causing immense pain and agony to the petitioners. Thus highly aggrieved by this unjust and unequal treatment and gross discrimination meted out by the impugned provisions of the Special Marriage

Act, 1954, the Petitioners are approaching this Hon'ble Court for appropriate remedies.

7. The institution of marriage affords certain rights and privileges to the persons in matrimony in the society and due to the aforesaid exclusion, the homosexual couples like the petitioners are denied an opportunity to enjoy similar rights and privileges. Being married carries along with it the right to maintenance, right of inheritance, a right to own joint bank accounts, lockers; nominate each other as nominee in insurance, pension, gratuity papers etc. All these are unavailable to the Petitioners due to their exclusion from the institution of marriage, making the said exclusion more discriminatory.

Bereft of any alternate and efficacious remedy, the petitioners invoke the extraordinary jurisdiction of this Honourable Court under Article 226 of the Constitution of India and seek relief for the following:

REASONS

- A. It is submitted that the impugned provisions herein- Section 4 and Schedule Nos. 2 to 4 of the Special Marriage Act, 1954 restrict the process of application, solemnization and registration of marriages under the Act of 1954 to heterosexual couples alone and exclude homosexual couples like that of the petitioner from its ambit. The impugned provisions operate in favor of heterosexual couples only because of the usage or constructions like 'widow-widower', 'male- female' and 'bride-bridegroom'. This is an exclusion of homosexual couples from the ambit of the Act. The petitioners plead that such exclusion, even if not by express words but by implied intention, amounts to discrimination and thus is illegal and unconstitutional to that extent. Petitioners submit that the impugned provisions, to the extent that it portrays a heterosexual undertone, must be held unconstitutional and thus be struck or read down to that extent of illegality.
- B. The Hon'ble Supreme Court has, in **Navtej Singh Johar vs. Union of India (2018) 10 SCC 1: 2018 (4) KLT 1 (SC)**, recognized and declared that the person has a right to sexual identity and be treated with dignity for that identification. No matter how a person self-determines one's own

identity, that identity is to be protected and recognized by law equally and without discrimination. Any law that fails in its duty to protect one's self determination of sexual identity and treat that identity with dignity disrespects individual choice and thus is considered irrational and manifestly arbitrary, violating Article 14 of the Constitution of India.

The provisions of Special Marriage Act, 1954 which are impugned herein fails to respect the individuality and identity of homosexuals and discriminates them by excluding them from the institution of marriage, without any basis and by violating their constitutionally guaranteed fundamental rights. Thus the impugned provisions of the Act of 1954 must be held as irrational and manifestly arbitrary, thus violating Article 14 of the Constitution of India. Thus the impugned provisions, to the extent that they allow access to the institution of marriage to only heterosexual couples, be declared unconstitutional, null and void and be struck down to the extent of its illegality.

CJI Mishra in **Navtej Singh supra** opined that:

'9. It has to be borne in mind that search for identity as a basic human ideal has reigned the mind of every individual in many a sphere like success, fame, economic prowess, political assertion, celebrity status and social superiority, etc. But search for identity, in order to have apposite space in law, sans stigmas and sans fear has to have the freedom of expression about his/her being which is keenly associated with the constitutional concept of —identity with dignity. When we talk about identity from the constitutional spectrum, it cannot be pigeon-holed singularly to one's orientation that may be associated with his/her birth and the feelings he/she develops when he/she grows up. Such a narrow perception may initially sound to subserve the purpose of justice but on a studied scrutiny, it is soon realized that the limited recognition keeps the individual choice at bay... At the core of the concept of identity lies self-determination, realization of one's own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or

principles that are, to put in a capsule, –constitutionally permissible.

It is submitted that right to sexual identity will be incomplete and non-workable unless substantial rights are recognised as a consequence to identification. Identification must be supplemented with dignity and dignity cannot be attributed unless a person is given the right to choose his own way of life which includes selection of a partner to live with.

- C. The non-recognition of marriage among homosexuals violates the rights guaranteed under Article 15(1) of the Constitution of India.

Article 15(1) in the Constitution of India is reproduced as thus:

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

The impugned provisions of the Act of 1954 are based on irrational and discriminatory stereotype gender roles assigned by the society to man and woman and thus cannot pass the test of non-discrimination imposed by Article 15(1) of the Constitution. The majoritarian morality that dictates that a marital union shall be that of only of man and woman and never be comprised of a man and a man OR a woman and a woman has led to the construction of provisions which are impugned herein. Such provisions to the extent that they refuse to recognize unions that do not comprise of a man and a woman, fails the test of discrimination articulated by Article 15 of the Constitution of India.

Justice Chandrachud, in his concurrent opinion in **Navtej Supra**, had opined that: *'Section 377 criminalizes behaviour that does not conform to the heterosexual expectations of society. In doing so it perpetuates a symbiotic relationship between anti-homosexual legislation and traditional gender roles. The notion that the nature of relationships is fixed and within the 'order of nature' is perpetuated by gender roles, thus excluding homosexuality from the narrative.'* The Hon'ble Court went on to hold that laws that perpetuate stereotypes riddled with discrimination are unconstitutional.

Similar is also the case with bar on marriages of homosexual couples. Petitioners are denied access to marriage because of the prevalent discriminatory societal notion/ construct that marriage is a union of a man and a woman. Such definition which is also the common law definition of a marriage must attract the rage of Article 15(1) of the Constitution.

- D. Equality would remain a distant dream for homosexuals if the law doesn't allow all the civil liberties enjoyed by heterosexuals for the homosexuals as well. Anything less would be grossly discriminatory and violative of both Article 14 and 15(1) of the Constitution of India right to equality and equal protection of law guaranteed to members of LGBTIQ. The Hon'ble Court had held, in **Navtej Supra**, that: '*Members of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution.*'
- E. Denial of the institution of marriage to the Petitioners and the refusal of law to recognize and accept homosexual marital unions is also a violation of their right to freedom of expression guaranteed to them by the Constitution of India under Article 19(1)(a) and are thus illegal and constitutional. The petitioners' right to expression of love in the form that they aspire to conduct will be meaningless if their marital union is not recognized by law. Expression of love, growth of one's personality within a relationship and development of an identity of union will be incomplete if the law refuses to recognize same sex marriages and thereby it affects the Article 19(1) rights of the petitioners guaranteed by Article 19(1)(a) of the Constitution of India.
- F. Article 19 (1)(c) of the Constitution protects any citizen's right to form an association or union as far as the manifestation of that right does not vitiate the reasonable restrictions imposed under Article 19(4) of the Constitution. It is submitted that Article 19 (1)(c) of the Constitution also protects marital unions among citizens within its ambit. The impugned provisions herein violate fundamental rights guaranteed under Article 19 (1)(c) of the Constitution to the same sex couples, by singling them out from enjoying the protection and recognition of law with respect to marital unions.

Article 19(1)(c), as it existed at the time of Constitution coming into being, is reproduced thus:

19. Protection of certain rights regarding freedom of speech etc
(1) All citizens shall have the right
(c) to form associations or unions;

The aforesaid right to form a union extends to marital unions as well. 'Union' is more than one person coming together and acting in consonance for a common purpose. Like any other body corporate, marital union/ married couple also carries rights and obligations of being legal entity in itself. A married couple is a recognised legal personality. Thus there exists no reason to not include married couples from the scope of 'union' as it appears in Article 19(1)(c).

Man requires company or a partner and cannot progress in isolation. The ancient Greek Philosopher **Aristotle** had remarked: "*Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. Society is something that precedes the individual. Anyone who either cannot lead the common life or is so self-sufficient as not to need to, and therefore does not partake of society, is either a beast or a god.*"

Right to companionship or a partner or otherwise put as Right to family is a pre-existing natural law right. Family as a basic building block of the society is recognized in Constitutions all over the world and in India, the same can be traced to Article 19(1)(c)'s guarantee of a citizen's right to form a union and Article 21's right to life guaranteed to any person.

- G. The Petitioners are denied their right to privacy which is implicit under Article 21 of the Constitution of India by denying them access to the institution of marriage recognized by law. Non recognition of marriage of homosexuals is an attack on individuality and autonomy which are essential to the right to privacy guaranteed to an individual. The Hon'ble Supreme Court, in **K.S.Puttuswamy vs. Union of India (2017) 10 SCC 1**, had held that:

"Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being". Right to Privacy also was held to be inalienable even if it concerns only a minority of the populace.

- H. In **National Legal Services Authority v. Union of India, (2014) 5 SCC 438**, the Hon'ble Supreme Court had held that the gender identity is intrinsic to one's personality and the denial of the said identity which one is entitled to self-determine is a violation of his/her dignity.

It is submitted that the right to self determination of sexual identity is a natural pre-cursor to one's right to choose one's own partner and these are concepts which are so related and inter-twined that one cannot outlive the other.

Petitioners, having the right of self determination of one's own sexual identity, aspire to live with the partner of their choice and for the law to recognise that choice. If the law refuses to respect that choice of partner a homosexual would make, it amounts to negation of the right to self determination of sexual identity of that person.

- I. The Supreme Court had held, in **Navtej Singh Supra**, that members of the LGBT community are entitled to full protection of all the civil liberties available to others. While doing so, the Hon'ble Court held that all are entitled to equal treatment and equal rights under the Indian Constitution. It declared:

"251. It is through times of grave disappointment, denunciation, adversity, grief, injustice and despair that the transgenders have stood firm with their formidable spirit, inspired commitment, strong determination and infinite hope and belief that has made them look for the rainbow in every cloud and lead the way to a future that would be the harbinger of liberation and emancipation from a certain bondage indescribable in words – towards the basic recognition of dignity and humanity of all and towards leading a life without pretence eschewing duality and ambivalence. It is their momentous –walk to freedom and journey to a constitutional ethos of dignity, equality and liberty and this freedom can only be fulfilled in its truest sense when each of us realize that the LGBT community possess equal rights as any other citizen in the country under the magnificent charter of rights – our Constitution."

The manifestation of the aforesaid ratio would be meaningless and incomplete unless the sexual minorities are afforded equal access to the institution of marriage and by enabling them to profess love in the way they deem fit.

- J. It is also worthy to point out that Justice Indu Malhotra had, in **Navtej Supra**, held that: '*A person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality.*'

It is submitted that without the ability to contract marriage and love, the right to self determination of one's own gender and right to sexuality are lost. The Petitioners' innate nature is what causes the impugned provisions to deny equal access to marriage for the petitioners and thus going by the above declaration of law made by the Supreme Court, such classification made by law or treatment afforded by law based on innate nature of a person (except for affirmative action) amounts to discrimination and is illegal and unconstitutional.

- K. It is submitted that the right of an adult to choose one's own partner is a recognized fundamental right under Article 14 and 21 of the Constitution of India. In the landmark verdicts of **Shafin Jahan vs Asokan K.M.**

(2018) 16 SCC 368 and **Shakti Vahini v. Union of India, (2018) 7 SCC 192**, the Hon'ble Supreme Court had held that the right of an adult to choose one's own partner is a crucial aspect of individual liberty and the state is powerless to negotiate upon the said liberty.

The Supreme Court had held, in **Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014 (2014)4 SCC 786**, that *the State is duty-bound to protect the fundamental rights of its citizens; and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage.* Similarly, in **Asha Ranjan v. State of Bihar and others (2017) 4 SCC 397**, it was held that *choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognised in the Constitution under Article 19.* In **Shakti Vahini Supra**, the Court went a step further and specifically ruled that *the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock.*

The law declared by the Apex Court in **Shakti Vahini Supra** is reproduced thus:

"It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy."

Thus it can be safely concluded that the right to form a union of family is one's inalienable right and the society or mob has no legitimate interest to meddle in that decision making. Thus the impugned provisions in so far as to portrays the societal or group thinking that a marriage is only for a man and a woman is discriminatory and vitiates Articles 19 and 21 of the Constitution.

- L. In **Arun Kumar & Anr. vs. Inspector General of Registration & Ors. WP(MD)No.4125 of 2019**, the Madras High Court, referring to **NALSA Supra**, held that every person has a right to self-identify one's own gender and thus the expression 'bride' occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman but also a transwoman as the petitioner no.2 in the said case had self-determined herself as a woman and it was held that the State cannot stand in its way. Thus it was held by the Hon'ble Court that marriage solemnized between a male and a transwoman, both professing Hindu religion, is a valid marriage in terms of Section 5 of the Hindu Marriage Act, 1955 and the Registrar of Marriages is bound to register the same.
- M. It is submitted that any restrictions or curbs or bans on same sex marriages would be unreasonable and illegal per se. This is because notwithstanding the legal infirmity in the unequal treatment meted out to sexual minorities in access to institution of marriage, there also exists no credible basis or scientific evidence or expert opinion which supports the exclusion of homosexuals from access to marriage. In fact, the Courts in US, while scrutinizing the laws that barred homosexuals from registering their marriage, had considered scientific evidence and expert opinions regarding the effect of permitting homosexual marriages and have come to the conclusion that allowing homosexuals to marry would have a positive effect on their children as it would promote their well being. There is a scholarly consensus all over the world in favour of marriage equality and against discriminating laws that bar equal access to marriage for homosexuals.
- N. Under Part IV of the Constitution, the State is made duty bound to observe some principles of governance and many such principles, when read in the context of bringing equality and welfare to LGBTQI persons, posits an obligation on the government to end discrimination towards such persons. Article 38(2) of the Constitution puts a positive obligation on the State to eliminate inequalities in status, facilities and opportunities for its citizens. Article 39(a) mandates the State to treat citizens equally while Article 44 inspires the State to codify a uniform civil code for all its citizens. When one reads Part IV mandated duties of the State with the justiciable rights under Part III of the Constitution, it can be safely

concluded that the State is powerless to deny homosexuals and other sexual minorities access to matrimony and also that State has positive duty to protect these classes of persons from all forms of discrimination based on their sexual orientation or gender.

- O. The impugned provisions of the Act of 1954 are regressive and outdated as they remain closed and opaque to sexual minorities and recognize marital unions as a composite of only heterosexuals. These provisions kill the idea of transformative constitutionalism which, as held by the Hon'ble Supreme Court, in **Navtej Singh Supra**, *'not only includes within its wide periphery the recognition of the rights and dignity of individuals but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically and politically. Discrimination of any kind strikes at the very core of any democratic society.'*

It has been held by the Hon'ble Supreme Court that the Courts are duty-bound to assume a pro-active role in keeping the Constitution organic and alive.

- P. The impugned provisions vitiate constitutional morality and try to fixate the majoritarian morality on the LGBTQI persons who form a minority. This is impermissible and unconstitutional. As concluded by the Hon'ble Supreme Court in **Navtej Singh Supra**, *'the concept of constitutional morality urges the organs of the State, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller or minuscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.'*
- Q. In **Anuj Garg vs. Hotel Association of India (2008) 3 SCC 1**, the Supreme Court quoted literature to emphasis on the role played by the cultural stereotypes that centre around sex and gender which together

influences or manifests legislations to discriminate. It was discussed therein:

'39. Professor Williams in "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism" published in 7 WOMEN'S RTS. L. REP. 175 (1982) notes issues arising where biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes. She characterizes them as "hard cases". In hard cases, the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.'

In **Anuj Garg Supra**, the Supreme Court also held that personal freedom being a fundamental tenet, the judicial scrutiny to weave out discrimination must be strict. It is submitted under the strict lens of judicial review, the impugned provisions, to the extent that it excludes petitioners (or any homosexual couple) from the access to marriage under the Act, would not survive the test of non-discrimination and reasonableness and thus will have to be declared unconstitutional and illegal to that extent.

- R. Internationally as well, instruments and covenants exist that require Member States to observe and respect essential rights of LGBTIQ people which includes the family rights of such people. With many Member States having adopted it in their domestic legislation, the rights of LGBTIQI had been, though slowly, acquiring the colors of international law. The United Nations Human Rights Committee [UNHRC] had, vide its Communication No.488/1992, ruled that the International Covenant on Civil and Political Rights guarantees sexual minorities the right to privacy under Article 17 and the right to sexual orientation and identity under Article 26 of the Convention and thus the Tasmanian law that criminalized consensual sexual activity between consenting homosexual adults was sought to be

repealed. Similarly, the Declaration of Montreal adopted on July 29, 2006, by the International Conference on LGBT Human Rights recognized the family rights of LGBT persons as being essential and considered them to be inalienable human rights. Beyond the right of equal access of homosexuals to institution of marriage, the Convention also demanded adoption rights for the LGBT as well.

Article 16 of the Universal Declaration of Human Rights (UDHR) as proclaimed by the United Nations General Assembly in Paris on 10 December 1948 vide General Assembly Resolution No. 217 (III) endorses right to family as indispensable right of any person. It is reproduced as thus:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Similarly, European Convention of Human Rights vide its Article 8 (right to respect for private and family life) and Article 12 (right to marry and to found a family) embodies the same principles as are present in Article 16 UDHR.

- S. In the United States, the federal Supreme Court in **Obergefell v. Hodges, 576 U.S. (2015)** had ruled
- i. that homosexual couples have equal right to have their marriage recognized and registered,
 - ii. that the homosexual couples have a fundamental right to marry under the Equal Protection Clause of Fourteenth Amendment to the US Constitution and

- iii. the said right of equal access to marriage is also ensured under the Due Process Clause. It held that all the State laws that ban homosexual marriages are unconstitutional.
- T. Federal and Supreme Court of many other countries have also either struck down such marriage ban laws or have recommended to its Governments or Houses of Legislatures to enact laws to provide equal access of marriage to homosexuals as well. Some notable instances are:
- i. South African Constitutional Court was presented with a very similar situation like the facts in this case. The Constitutional Court of South Africa had ruled in, **Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others [2005] ZACC 19**, that non-recognition of same sex unions by the law is inconsistent with the Section 9 of the Constitution of South Africa and held that the heterosexual language employed by the Marriage Act, 1961 in its Section 30 to the extent that it permits only unions between a man and a woman is unconstitutional and invalid.
 - ii. In **Halpern v Canada (AG), [2003] O.J. No. 2268**, the Court of Appeal for Ontario held that the common law definition of marriage as a union of a man and a woman offended the Section 15 of the Canadian Charter of Rights and Freedoms and any legal bar on marriage of homosexual couples is illegal and invalid. The decision led to the registration of marriage of the first same sex couple in Canada and ultimately culminated in the Parliament of Canada passing the Civil Marriage Act, 2005.
 - iii. The Constitutional Court, Republic of China had vide a ruling on 24th May, 2017 declared that the civil code, to the extent that it does not permit two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together, are in violation of the provisions of their Constitution.

- iv. In a decision dated 12.6.2019, the Supreme Court of Ecuador found that the civil code which defined marriage as a solemn contract between a man and a woman serves no constitutional purpose and the same is discriminatory and unconstitutional as far as it excludes homosexual couples are excluded from the ambit of marriage.
 - v. In Brazil, on May 2013, the National Justice Council legalized same sex marriage throughout the country.
- U. It is thus submitted that the impugned provisions of the Special Marriage Act, 1954 to the extent that they prevent equal access to the institution of marriage for homosexual couples like that of the petitioners are unconstitutional and must be declared so and are liable to be struck down to that extent.

For these and other reasons that may be urged at the time of hearing, it is most humbly prayed that this Honourable Court be pleased to:-

- i) declare that Section 4 of the Special Marriage Act, 1954, to the extent that it restricts solemnization of marriages only between a man and a woman, is unconstitutional and void;
- ii) declare that the Second, Third and Fourth Schedule to the Special Marriage Act, 1954, to the extent that it restricts marriages only between a bridegroom and a bride, is unconstitutional and void;
- iii) declare that any provision or words or phrases in Special Marriage Act, 1954, to the extent it excludes or implies an intention to not recognize or solemnize or register marriage between homosexual couples, is unconstitutional and void;
- iv) declare that the homosexual couples are entitled to solemnize and register their marriage under the Special Marriage Act, 1954;

- v) issue a writ of Mandamus or any other appropriate writ, direction or order to Respondents Nos. 2-6 and all authorities thereunder or their agents acting under them, directing them to accept and process the Notice to be given by the Petitioners under Section 5 of the Special Marriage Act, 1954 and to register their marriage and issue a certificate of marriage within the time limits prescribed by the Act of 1954;
- vi) issue such other further writ, direction or order as deemed fit and necessary in the circumstances;

INTERIM RELIEF

For the reasons stated in the writ petition and the affidavit accompanying the same, it is humbly prayed that the Honourable Court may be pleased to direct Respondents Nos. 2-6 and all authorities thereunder or their agents acting under them, directing them to accept and process the Notice to be given by the Petitioners under Section 5 of the Special Marriage Act, 1954, pending final disposal of this writ petition.

Dated this 24th day of January, 2020.

Petitioners

Counsel for the Petitioners