

**IN THE SUPREME COURT OF INDIA  
(EXTRAORDINARY CIVIL WRIT JURISDICTION)  
WRIT PETITION (CIVIL) NO. 1011 OF 2022**

**IN THE MATTER OF:**

**SUPRIYO @ SUPRIYA CHAKRABORTHY** ... **PETITIONERS**  
**VERSUS**  
**UNION OF INDIA & ANR.** ... **RESPONDENTS**

**COUNTER AFFIDAVIT ON BEHALF OF  
RESPONDENT**

That I, K. R. Saji Kumar, son of Shri PKK Kurup, aged 57 years, working as Joint Secretary and Legislative Counsel, do solemnly affirm and state as follows:-

1. That in my official capacity I am acquainted with the facts of these cases, I have perused the record and am competent and authorised to swear this affidavit on behalf of the Union of India.
2. I state and submit that I am filing this preliminary affidavit in reply only in so far as is necessary for the purpose at this juncture. It is submitted that this affidavit does not deal with every contention raised in the petitions served and for dealing with all the petitions parawise, I reserve the liberty to file a further and a detailed affidavit hereinafter as and when I am so advised.
3. I hereby deny and dispute all the facts stated, contentions raised and grounds urged in all the petitions except those which are specifically and unequivocally admitted in this reply. I state and submit that the non-dealing with the petitions parawise may not be considered as my having admitted the truthfulness or otherwise of any of the contents thereof.

4. It is submitted that the present batch of petitions has been filed challenging certain provisions of the Hindu Marriage Act, Foreign Marriage Act and the Special Marriage Act and other marriage laws as unconstitutional on the ground that they deny same sex couples the right to marry or alternatively to read these provisions broadly so as to include same sex marriage. The prayers made and grounds relied on in these petitions are tabulated hereinbelow :

S. No	PETITION	NAME OF ACT CHALLENGED	RELEVANT PROVISIONS CHALLENGED
1.	Supriyo@Supriya Chakraborty and Another vs Union of India-W.P(C) 1011 of 2022	Special Marriage Act	Not stated in Prayer. Prayer is to read the act as applying to same sex marriage or else to declare it entirely Unconstitutional
2.	Zainab J Patel vs Union of India-W.P.(C)13535 of 2021	Foreign Marriage Act	Not stated in Prayer
3.	Utkarsh Saxena vs Union of India-W.P(c)1142 of 2022	Special Marriage Act, Foreign Marriage Act	<p><b>Special Marriage Act</b> Sections-2(b) to 4(c)-Petition prays for these sections to be broadly interpreted to include same sex marriage</p> <p>Sections 5,6,7,8,9, 10-Petition prays for sections to be declared unconstitutional</p> <p><b>Foreign Marriage Act</b> Section (4c)- Petition prays for this sections to be broadly interpreted to include same sex marriage</p>

S. No	PETITION	NAME OF ACT CHALLENGED	RELEVANT PROVISIONS CHALLENGED
			Sections 5,6,7,8,9, 10- Petition prays for sections to be declared unconstitutional
4.	Vaibhav Jain vs Union of India- W.P(C) 7657 of 2020	Foreign Marriage Act	Not stated in Prayer
5.	Udit Sood vs Union of India- W.P(C) 2574 OF 2021	Special Marriage Act	Section 4(c)-Petition prays for the section to be broadly interpreted
6.	Sameer Samudra and Another vs Union of India W.P(C) 1105 of 2022	Hindu Marriage Act Foreign Marriage Act	<b>Hindu Marriage Act</b> Section 5- Petition prays for the section to be broadly interpreted to include same sex marriage  <b>Foreign Marriage Act</b> Section 17- Petition prays for the section to be broadly interpreted to include same sex marriage
7.	Parth Pheroze Mehrohtra and Another vs Union of India W.P(C) 1020 OF 2022	Special Marriage Act	Section 4(c)-Petition prays for the section to be broadly interpreted or else for the Act to be declared entirely unconstitutional
8.	Nitin Karani and Another vs Union of India- W.P(C) 1150 OF 2022	Special Marriage Act Foreign Marriage Act	Sections 6,7,8,9- Petition prays for sections to be declared unconstitutional  Foreign Marriage Act-Petition prays for registration of petitioners marriage under the Act

S. No	PETITION	NAME OF ACT CHALLENGED	RELEVANT PROVISIONS CHALLENGED
9.	Nikesh PP and Another vs Union of India-W.P(C) 2186 of 2022	Special Marriage Act	<p>Section 4-Petition prays for Section to be declared Unconstitutional to the extent that it does not recognise same sex marriage</p> <p>Second, Third and Fourth Schedules of the Act-Petition prays for Schedules to be declared unconstitutional to the extent that they do not recognise same sex marriage</p>
10	Nibedita Dutta and Another vs Union of India-W.P(C) 13528 of 2021	Hindu Marriage Act	Petition prays for Act to be declared Unconstitutional or in the alternative read broadly to apply to any two Hindus irrespective of Gender
11	Melissa Ferrier vs Union of India-W.P(C) 13206 of 2021	Citizenship Act	Section 7A(1)(d)-declare the word spouse in this section to be gender neutral and hold that provisions of the section rely to all spouses of foreign origin regardless of sexual orientation
12	Dr Kavita Arora and Another vs Union of India and Another-W.P(C) 6792 of 2020	Special Marriage Act	Petition prays for Act to either be declared unconstitutional or for it to be made applicable to all couples irrespective of gender
13	Joydeep Sengupta vs Union of India-W.P(C) 6150 of 2021	Citizenship Act Special Marriage Act Foreign Marriage Act	<p><b>Citizenship Act</b> section 7A(1)(d)-Petition prays for Section to be declared as applying to same sex spouses</p> <p>Prayer made that spouses not be declared ineligible to apply for Act</p>

S. No	PETITION	NAME OF ACT CHALLENGED	RELEVANT PROVISIONS CHALLENGED
			<p>OCI cards on the ground that they are in a same sex marriage</p> <p><b>Foreign Marriage Act</b> Prayer made for act to be declared violative of Articles 14 and 21 of the Constitution or else Act to be read as being gender neutral</p> <p><b>Special Marriage Act</b> Prayer made for Act to be declared violative of Article 14, 15, 19 and 21 of the Constitution or alternatively Act to be read as being gender neutral</p>
14	Aditi Anand vs Union of India-W.P(C) No. 1141 of 2021	Special Marriage Act	Prayer made for Act to be held unconstitutional or in the alternative for it to be read as gender neutral in the
15	Abhijit Iyer-Mitra vs Union of India-W.P(C) 6371 OF 2020	Hindu Marriage Act	Prayer for Section 5 of the Act to be read as applying to all Hindus irrespective of gender

It is submitted that some other petitions have also been filed however, the contentions in the same have not been dealt with in the present affidavit.

#### *NATURE OF THE CONCEPT OF MARRIAGE*

5. It is submitted that at the outset the notion of marriage itself necessarily and inevitably presupposes a union between two persons of the opposite sex. This definition is socially, culturally and legally

ingrained into the very idea and concept of marriage and ought not to be disturbed or diluted by judicial interpretation.

While interpreting statutory law, this court has in the past had occasion to define marriage. In *Reema Aggarwal v. Anupam*, (2004) 3 SCC 199 it has been held:

*8. In response, learned counsel for the respondents submitted that to constitute a marriage in the eye of the law, it has first to be established that the same was a valid marriage. Strong reliance was placed on Bhaurao Shankar Lokhande v. State of Maharashtra [AIR 1965 SC 1564 : (1965) 2 Cri LJ 544] in that context. Reference was also made to Sections 5(i), 11 and 16 of the Hindu Marriage Act, 1955 (for short "the Marriage Act") to contend that the stipulations of conditions of a valid marriage, the circumstances in which the marriage becomes void and the protection given to children of void and voidable marriages respectively makes the position clear that wherever the legislature wanted to provide for contingencies flowing from void or voidable marriages, it has specifically done so. It is latently evident from Section 16 of the Marriage Act. There is no such indication in Section 498-A IPC. The language used is "husband or relative of the husband". Marriage is a legal union of a man and a woman as husband and wife and cannot extend to a woman whose marriage is void and not a valid marriage in the eye of the law."*

Again in *Mr 'X' v. Hospital 'Z'*, (1998) 8 SCC 296 it has been held as follows:

*31. Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, life goes on and on on this planet.."*

6. It is submitted that codified and uncodified personal laws take care of all branches of every religion like Mitakshara, Dayabhaga etc. in Hindus

and similar differences in other religions. Depending upon the personal laws applicable, the nature of marriage as an institution is different. Amongst Hindus, it is a sacrament, a holy union for performance of reciprocal duties between a man and a woman. In Muslims, it is a contract but again is envisaged only between a biological man and a biological woman. It will, therefore, not be permissible to pray for a writ of this Hon'ble Court to change the entire legislative policy of the country deeply embedded in religious and societal norms.

7. It is submitted that despite the decriminalization of Section 377 of the Indian Penal Code [hereinafter referred to as "IPC"], the Petitioners cannot claim a fundamental right for same-sex marriage to be recognized under the laws of the country. It is submitted that the same has been adequately clarified by the Hon'ble Supreme Court in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 [hereinafter referred to as "*Navtej Singh Johar*"], wherein the Hon'ble Supreme Court held as under: :

*"167. The above authorities capture the essence of the right to privacy. There can be no doubt that an individual also has a right to a union under Article 21 of the Constitution. When we say union, we do not mean the union of marriage, though marriage is a union. As a concept, union also means companionship in every sense of the word, be it physical, mental, sexual or emotional. The LGBT community is seeking realisation of its basic right to companionship, so long as such a companionship is consensual, free from the vice of deceit, force, coercion and does not result in violation of the fundamental rights of others."*

8. It is submitted that the concept of marriage is a concept essentially emanating from the personal laws of citizens. With the evolution of jurisprudence, some of the aspects of marriage have been codified by the

competent legislature. It is submitted that in any society, conduct of the parties and their inter se relationship is always governed and circumscribed by personal laws, codified laws or in some cases even customary laws/religious laws. The jurisprudence of any nation, be it by way of codified law or otherwise, evolves based upon societal values, beliefs, cultural history and other factors. In case of issues concerned personal relationships like marriage, divorce, adoption, maintenance, etc., either the codified law or the personal law occupies the field.

9. It is submitted that such relationships can be governed, regulated, permitted or proscribed only by a law made by the competent legislature. It is a competent legislature which reflects the collective wisdom of the nation alone, which, based upon cultural ethos, social standards and such other factors defining acceptable human behavior regulates, permits or prohibits human relations. It is only in such competent legislature that the legislative wisdom to enact a law which would govern human relationships in the context of the societal values and national acceptability vests.

10. It is submitted that as pointed out hereinabove "*marriage*" is essentially a socially recognized union of two individuals which is governed either by uncodified personal laws or codified statutory laws. The acceptance of the institution of marriage between two individuals of the same gender is neither recognized nor accepted in any uncodified personal laws or any codified statutory laws. It must be kept in mind that granting recognition and conferring rights recognising human relations which has its consequences in law, and privileges, is in essence a legislative function and can never be the subject matter of judicial



adjudication. The prayer made by the petitioner before this Hon'ble Court, is, therefore, wholly unsustainable, untenable and misplaced.

11. It is submitted that by and large the institution of marriage has a sanctity attached to it and in major parts of the country, it is regarded as a sacrament, a holy union and a *sanskar*. In our country, despite statutory recognition of the relationship of marriage between a biological man and a biological woman, marriage necessarily depends upon age-old customs, rituals, practices, cultural ethos and societal values.

12. It is submitted that this particular human relationship, in its present form, i.e. between a biological man and a biological woman, is accepted statutorily, religiously and socially. Any recognised deviation of this human relationship can occur only before the competent legislature.

13. It is submitted that marriage between a biological man and a biological woman is solemnized, *inter alia* to give the relationship a formal character and to ensure that all statutory provisions governing the relationship and all other incidental matters [rights, liabilities, privileges and consequences], are thereby made applicable.

14. The term "marriage" is defined as under in Blacks Law Dictionary-  
"MARRIAGE.

*Marriage, as distinguished from the agreement to marry and from the act of be-coming married, is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. Bish.Mar. & Div. § 3; Collins v. Hoag & Rollins, 121 Neb. 716, 238 N.W. 351, 355; Allen v. Allen, 73 Conn. 54, 46 A. 242, 49 L.R.A.142.*

*A contract, according to the form prescribed by law, by which a man and woman, capable of entering into such contract,*

*mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and wife. Shelf. Mar. & Div. 1; Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668, 671, 95 A.L.R.1461.*

*The word also signifies the act, ceremony, or formal proceeding by which persons take each other for husband and wife. Davis v. Davis, 119 Conn. 194, 175 A. 574, 575."*

15. It is submitted that, while a marriage may be between two private individuals having a profound impact on their private lives, it cannot be relegated to merely a concept within the domain of privacy of an individual when the question of formalizing their relationship and the legal consequences flowing therefrom is involved. Marriage, as an institution in law, has many statutory and other consequences under various legislative enactments. Therefore, any formal recognition of such human relationship, cannot be regarded as just a privacy issue between two adults.

16. It is submitted that marriage, as a public concept, is also nationally and internationally recognized as a public recognition of relationship with which several statutory and other rights and obligations are attached. It is submitted that the relationship of marriage has more than personal significance because human beings are social beings [and are part of the society] whose humanity is expressed through their relationships with others. It is submitted that entering into marriage therefore is to enter into a relationship that has public significance as well as against a purely private domain of individuals.

17. It is submitted that the institutions of marriage and the family are important social institutions in India that provide for the security, support

and companionship of members of our society and bear an important role in the rearing of children and their mental and psychological upbringing also. It is submitted that the celebration of a marriage gives rise to not just legal but moral and social obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage and to ensure their proper mental and psychological growth in the most natural way possible.

18. It is submitted that recognition of marriage necessarily brings with it right to adopt and other ancillary rights. It is therefore necessary that such issues are left for being decided by the competent Legislature where social, psychological and other impacts on society, children etc., can be debated. This will ensure that wide ranging ramifications of recognizing such sacred relationships are debated from every angle and legitimate state interest can be considered by the Legislature.

19. It is submitted that marriage between a biological man and a biological woman takes place either under the personal laws or codified laws namely, the Hindu Marriage Act, 1955, the Christian Marriage Act, 1872, the Parsi Marriage and Divorce Act, 1936 or the Special Marriage Act, 1954 or the Foreign Marriage Act, 1969. The parties entering into marriage creates an institution having its own public significance as it is a social institution from which several rights and liabilities flow. Seeking declaration for solemnisation/registration of marriage has more ramifications than simple legal recognition. Family issues are far beyond mere recognition and registration of marriage between persons belonging to the same gender. Living together as partners and having sexual relationship by same sex individuals [which is decriminalised now] is not

comparable with the Indian family unit concept of a husband, a wife and children which necessarily presuppose a biological man as a 'husband', a biological woman as a 'wife' and the children born out of the union between the two – who are reared by the biological man as father and the biological woman as mother.

20. It is submitted that registration of marriage of same sex persons also results in violation of existing personal as well as codified law provisions -such as 'degrees of prohibited relationship'; 'conditions of marriage'; 'ceremonial and ritual requirements' under personal laws governing the individuals. If marriage is to be solemnised and registered under any personal law; 'requirements for registration', if marriage is to be registered under the Special Marriage Act; 'restitution of conjugal rights'; 'judicial separation', 'divorce'; 'conditions of divorce'; 'alimony and maintenance pendente lite', 'permanent alimony and maintenance'; 'expenses of marriage proceedings'; 'disposal of property', 'adoption', 'guardianship', etc will be affected, which is the exclusive domain of the Legislature.

21. It is submitted that the Parliament has designed and framed the marriage laws in the country, which are governed by the personal laws/codified laws relatable to customs of various religious communities, to recognise only the union of a man and a woman to be capable of legal sanction, and thereby claim legal and statutory rights and consequences. It is submitted that any interference with the same would cause a complete havoc with the delicate balance of personal laws in the country and in accepted societal values.

22. It is submitted that in this light, conclusions of the limited majority opinion of J. Khehar [affirmed on this point in the opinion of J. Kurian

Joseph], in the case of *Shayara Bano v. Union of India*, (2017) 9 SCC 1, would be relevant. The said portion is quoted as under:

322. "Personal law" has a constitutional protection. This protection is extended to "Personal Law" through Article 25 of the Constitution. It needs to be kept in mind that the stature of "Personal Law" is that of a fundamental right. The elevation of "Personal Law" to this stature came about when the Constitution came into force. This was because Article 25 was included in Part III of the Constitution. Stated differently, "Personal Law" of every religious denomination is protected from invasion and breach, except as provided by and under Article 25.

xxx

350. The debates in the Constituent Assembly with reference to Article 25, leave no room for any doubt that the Framers of the Constitution were firm in making "Personal Law" a part of the fundamental rights, with the liberty to the State to provide for social reform. It is also necessary to notice at this stage that the judgment in *Valsamma Paul case* [*Valsamma Paul v. Cochin University*, (1996) 3 SCC 545 : 1996 SCC (L&S) 772] , cannot be the basis for consideration in the present controversy, because it did not deal with issues arising out of "Personal Law" which enjoy a constitutional protection. What also needs to be recorded is that the judgment in *John Vallamattom case* [*John Vallamattom v. Union of India*, (2003) 6 SCC 611] , expresses that the matters of the nature, need to be dealt with through legislation, and as such, the view expressed in the above judgment cannot be of any assistance to further the petitioners' cause."

23. It is submitted that the legislative understanding of marriage in the Indian statutory and personal law regime is very specific viz. marriage between a biological man and a biological woman only. According to penal laws also marriage is between a biological "man" and a biological "woman" only. It is submitted that the Hindu Marriage Act and other family laws and penal laws at numerous places, provide clear indications towards the same through specific references to opposite sexes referred to

as “husband” and “wife; “male” and female”; “bride” and “bridegroom”; “father” and “mother”; “minor son”, “minor daughter”; “him” and “her”; “himself”; “full blood” and “half-blood”; “uterine blood”; “ancestress”, etc. It is submitted that all these indicate that in India, marriage is a bond between a biological man and a biological woman only and that is the legislative policy of the law making body i.e. the competent Legislature. The Petitioners cannot pray for a mandamus of the Court to change the legislative policy.

#### **THE LEGISLATIVE POLICY AND EXPRESS PROVISIONS**

24. It is submitted that provisions and concepts under the General Clauses Act, 1897 cannot apply in view of the express and unequivocal legislative intent and the purpose of family laws and penal provisions narrated concerning marriage, etc. Any other interpretation except treating ‘husband’ as a biological man and ‘wife’ as a biological woman will make all statutory provisions unworkable apart from being completely contrary to the consistent legislative policy which is based upon the considered opinions of law makers which are based on cultural ethos and societal values in each country. In a same sex marriage, it is neither possible nor feasible to term one as “husband” and the other as “wife” in the context of legislative scheme of various Statutes. Resultantly the statutory scheme of many statutory enactments will become otiose.

The following are only some of the illustrations of the statutory provisions which will also show that the term “husband” and “wife” is used in terms of being a biological man and a biological woman respectively and a marriage between them.

25. The following statutory provisions of the Hindu Marriage Act, 1955 may be noted in this regard:

*“Section 3 (g) - “degrees of prohibited relationship” two persons are said to be within the degrees of prohibited relationship-*

*(i) if one is a lineal descendant of the other; or*

*(ii) if one was the wife or husband of a lineal ascendant or descendant of the other or*

*(iii) if one was the wife of the brother or of the fathers or mothers brother or of the grand fathers or grandmothers brother of the other; or*

*(iv) if the two are brother and sister, uncle and niece aunt and nephew, or children of brother and sister or of two brothers or of two sisters;*

**Section 5. Conditions for a Hindu marriage. —**

*A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—*

*(i) neither party has a spouse living at the time of the marriage;*

*(ii) at the time of the marriage, neither party—*

*(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or*

*(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or*

*(c) has been subject to recurrent attacks of insanity*

*(iii) **the bridegroom** has completed the age of twenty-one years and **the bride**, the age of eighteen years at the time of the marriage;*

*(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;*

*(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;*

**Section 7. Ceremonies for a Hindu marriage.—**

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps **by the bridegroom and the bride** jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

**Section 8. Registration of Hindu marriages.—**

(1) For the purpose of facilitating the proof of Hindu marriages, the State Government **may make rules** providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

**Section 9. Restitution of conjugal right.—**

**When either the husband or the wife has**, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

*Explanation.*—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

**Section 12. Voidable marriages.—**

(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—



(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(a) on the ground specified in clause (c) of sub-section (1) shall be entertained if—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

### Section 13. Divorce.

xxx

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the

husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) 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;

This gives additional grounds of divorces to the "wife" only

(iv) that **her marriage** (whether consummated or not) was solemnized **before she attained the age** of fifteen years and **she has repudiated** the marriage after attaining that age but before attaining the age of eighteen years.

*Explanation.*—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

**Section 17. Punishment of bigamy.**—

Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party **had a husband or wife living**; and the provisions of sections 494 and 495 of the Indian Penal Code, 1860 (45 of 1860), shall apply accordingly.

**Section 18. Punishment for contravention of certain other conditions for a Hindu marriage .**—

Every person who procures a marriage of **himself or herself** to be solemnised under this Act in contravention of the conditions specified in clauses (iii), (iv) and (v) of section 5 shall be punishable—

(a) in the case of contravention of the condition specified in clause (iii) of section 5, with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both;

(b) .....

**Section 19. Court to which petition shall be presented.**—

Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary 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

- (iii) 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 or more by those persons who would naturally have heard of him if he were alive.

**Section 24. Maintenance pendente lite and expenses of proceedings.** —

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.

**Section 25. Permanent alimony and maintenance.** —

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant the conduct of the parties and other circumstances of the case, it may seem to the court to be just,

and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the 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 the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, **if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock**, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just].

#### **Section 27. Disposal of property.—**

In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, **which may belong jointly to both the husband and the wife.**

#### **The Uttar Pradesh Hindu Marriage (Registration) Rules, 1973**

#### **Rule 4. Registration of Marriages.-**

(1) The parties to any marriage may, on payment of the fee specified in Rule 10, have the particulars relating to marriage entered in the Hindu Marriage Register kept for the purpose in the office of the Registrar.

(2) An application for registration of a marriage shall be made in duplicate to the Registrar within whose jurisdiction the marriage is solemnized or **within whose jurisdiction the husband permanently resides** and shall be in Form 'A' of the Schedule to these rules: Provided that, if the application is made to the Registrar within whose territorial jurisdiction the marriage is solemnized

*and the husband does not permanently reside within such jurisdiction, it shall be made in triplicate and the third copy of the application shall be forwarded by the Registrar receiving the application to the Registrar within whose jurisdiction the husband permanently resides: Provided further that the application for registration of marriage shall ordinarily be presented to a Sub-Registrar having jurisdiction, but the Registrar of the district may in his discretion also entertain any such application”*

26. From a reading of the above, it is clear that the intent of the Legislature was limited to the recognition of a legal relationship of marriage between a man and a woman, represented as a husband and wife. The prayers of the Petitioners, in PIL/Writ jurisdiction clearly seek to re-write the legislative text and intent under various codified statutes governing marriage and other issues ancillary thereto .

27. It is further submitted that there are numerous other laws in the country, like Section 498A of the IPC, which provide special rights to wives/woman who are part of such legally recognised relationship of marriage. It is submitted that any recognition over and above the conventional relationship of marriage between a man and woman, would cause irreconcilable violence to the language of the statute. The following provisions may be noted in this regard:

***“Section 376B. Sexual intercourse by husband upon his wife during separation.—***

*Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.*

*Explanation.—In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.*

Section 498. Enticing or taking away or detaining with criminal intent a married woman. —

Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 498A. Husband or relative of husband of a woman subjecting her to cruelty. —

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. — For the purposes of this section, “cruelty” means —

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Section 304B. Dowry death. —

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry

death”, and such husband or relative shall be deemed to have caused her death.

*Explanation.*—For the purposes of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

### **Indian Evidence Act**

#### **Section 113A. Presumption as to abetment of suicide by a married woman. —**

When the question is whether the commission of **suicide by a woman had been abetted by her husband or any relative of her husband** and it is shown that she had committed suicide within a period of seven years from the date of **her marriage and that her husband or such relative of her husband had subjected her to cruelty**, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

*Explanation.* — For the purposes of this section, “cruelty” shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).]

#### **Section 113B. Presumption as to dowry death. —**

When the question is whether a person has committed the dowry **death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry**, the court shall presume that such person had caused the dowry death. *Explanation.* — For the purposes of this section, “dowry death” shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860).

### **Dowry Prohibition Act, 1961**

**Section 6 - Dowry to be for the benefit of the wife or heirs.**

(1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman – if the dowry was received before marriage, within three months after the date of marriage; or if the dowry was received at the time of or after the marriage within three months after the date of its receipt; or if the dowry was received when the woman was a minor, within three months after she has attained the age of eighteen years, and pending such transfer, shall hold it in trust for the benefit of the woman.

**The Code of Criminal Procedure, 1973**

**Section 125 - Order for maintenance of wives, children and parents. –**

(1) If any person having sufficient means neglects or refuses to maintain-

- (a) his wife, unable to maintain herself, or
- (b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
- (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
- (d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the



**husband of such minor female child, if married, is not possessed of sufficient means.**

Explanation.- For the purposes of this Chapter,-

(a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875 ); is deemed not to have attained his majority;

**(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.**

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance. (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

**Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.**

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

**(4) No Wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this**

section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

### Domestic Violence Act, 2005

#### Section 2 - Definitions.-

In this Act, unless the context otherwise requires,-

(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

#### Section 3. Definition of domestic violence.-

For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Explanation I.-For the purposes of this section,-

(i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;

(ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise **violates the dignity of woman;**

(iii) "verbal and emotional abuse" includes-

(a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

(b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

(iv) "economic abuse" includes-

(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and **her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;**

(b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or **her children or her stridhan or any other property jointly or separately held by the aggrieved person; and**

(c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

*Explanation II.*-For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes "domestic violence" under this section, the overall facts and circumstances of the case shall be taken into consideration.

**Section 17 - Right to reside in a shared household.**

(1) Notwithstanding anything contained in any other law for the time being in force, **every woman in a domestic relationship** shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

**Section 19. Residence orders.**

(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order –

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

**(b) directing the respondent to remove himself from the shared household;**

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

*(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or*

*(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:*

*Provided that no order under clause (b) shall be passed against any person who is a woman."*

28. It is submitted that it is impossible to make the above quoted and other statutory provisions workable in a same-sex marriage. It is submitted that the question is not whether relationships in the nature of the ones pleaded by the Petitioner can be fitted in the present legal framework. Rather the question is that when the Legislative intent, with regard to limiting the legal recognition of marriage and the benefits associated with such legal recognition, are limited to heterosexual couples, it is impermissible for the Hon'ble Court to override the same.

Further, it is submitted that, if the prayer of the Petitioners is recognised, it may lead to further anomalies in other enactments governing marriages of persons belonging to Christian religion or Muslim religion. The provisions of the relevant enactments, may be noted as under:

**"Special Marriage Act, 1954.**

**Section 2 (b)** "degrees of prohibited relationship" - a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedules are within the degrees of prohibited relationship.

Explanation I.- Relationship includes,- a) relationship by half or uterine blood as well as by full blood: b) illegitimate blood relationship as well as legitimate; c) relationship by adoption as

well as by blood; and all terms of relationship in this Act shall be construed accordingly.

Explanation II.- "Full blood" and "half blood"- two persons are said to be related to each other by full blood when they are descended from a common ancestor **by the same wife and by half blood when they are descended from a common ancestor but by different wives.**

Explanation III.- "Uterine blood"- two persons are said to be related to each other by uterine blood when they are descended from a **common ancestress but by different husbands.**

Explanation IV.-In Explanations. II and III. "ancestor" includes **the father and "ancestress" the mother;**

#### **4. Conditions relating to solemnization of special marriages.—**

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—

(a) neither party has a spouse living;

(b) neither party—

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity;

**(c) the male has completed the age of twenty-one years and the female the age of eighteen years;**

(d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.

*Explanation.*—In this section, “custom”, in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family:

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied—

- (i) that such rule has been continuously and uniformly observed for a long time among those members;
- (ii) that such rule is certain and not unreasonable or opposed to public policy; and
- (iii) that such rule, if applicable only to a family, has not been discontinued by the family.

### **Section 12. Place and form of solemnization.-**

(1) The marriage may be solemnized at the office of the Marriage Officer or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payments of such additional fees as may be prescribed.

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties, - **“I (A) take the (B), to be my lawful wife (or husband)”**.

### **Section 15. Registration of marriages celebrated in other forms.-**

Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under

the Special Marriage Act, 1872 or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely:

(a) a ceremony of marriage has been performed between the parties and they have been living together **as husband and wife ever since**

(b) neither party has at the time of registration more than one spouse living;

(c) neither party is an idiot or a lunatic at the time of registration:

(d) the parties have completed the age of twenty-one year at the time of registration;

(e) the parties are not within the degrees of prohibited relationship:

*Provided that in case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and*

(f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

### **Section 22. Restitution of conjugal rights.-**

When either the **husband or the wife** has, without reasonable excuse, withdrawn from the society of the other the aggrieved party may apply by petition to the District Court for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

*Explanation- Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.*

### **Section 23. Judicial separation.**



(1) A Petition for judicial separation may be presented to the District Court either by the **husband or the wife**:-

(a) on any of the grounds specified in sub-section (1) and sub-section (1-A) of Sec. 27 on which a petition for divorce might have been presented; or

(b) on the ground of failure to comply with a decree for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

(2) Where the Court grants a decree for judicial separation, it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition rescind the decree if it considers it just and reasonable to do so.

### **Section 27. Divorce.-**

(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the District Court **either by the husband or the wife** on the ground that the respondent-

(a) has, after the solemnization of the marriage had voluntary sexual intercourse with any person other than his or her spouse; or

(b) has deserted the petitioner for a continuous period of not less than two years immediately proceeding the presentation of the petition; or

(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860); or

(d) has since the solemnization of the marriage treated the petitioner with cruelty; or

(e) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind, and to such an extent that the

petitioner cannot reasonably be expected to live with the respondent.

(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 Sec. 125 of the Code of Criminal Procedure, 1973 (2 of 1974), or under the corresponding Sec. 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.-**

xxx

(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.

**Section 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, 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 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.

**Muslim Personal Law (Shariat) Application Act, 1937.**

**Section 2. Application of Personal Law to Muslims.** —

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of

decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

**Muslim Women (Protection of Rights on Divorce) Act, 1986.**

**Section 2. Definitions.—**

*In this Act, unless the context otherwise requires,—*

**(a) “divorced woman” means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law;**

**(b) “iddat period” means, in the case of a divorced woman,—**

**(i) three menstrual courses after the date of divorce, if she is subject to menstruation;**

**(ii) three lunar months after her divorce, if she is not subject to menstruation; and**

**(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;**

**Section 3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.—**

(1) Notwithstanding anything contained in any other law for the time being in force, **a divorced woman** shall be entitled to—

(a) a reasonable and fair provision and maintenance to be made and paid to her within the idda tperiod by her former husband;

(b) where **she herself maintains the children** born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) *an amount equal to the sum of mahr or dower agreed to be **paid to her** at the time of her marriage or at any time thereafter according to Muslim law; and*

(d) *all the properties **given to her** before or at the time of marriage or **after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.***

(2) *Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a **divorced woman** on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.*

(3) *Where an application has been made under sub-section (2) by a **divorced woman**, the Magistrate may, if he is satisfied that —*

*(a) **her husband having sufficient means**, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and **maintenance for her and the children**; or*

*(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing **her former husband** to pay such reasonable and fair provision and maintenance to **the divorced woman** as he may determine as it and proper having regard to the needs of **the divorced woman**, the standard of life enjoyed by her during **her marriage and the means of her former husband** or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) the divorced woman:*

*Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.*

(4) If any person against whom an order has been made under subsection (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

**Section 4. Order for payment of maintenance. —**

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that **a divorced woman has not re-married** and is not able to **maintain herself** after the **iddat period**, he may make an order directing such of her relatives as would be entitled to **inherit her property** on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the **divorced woman**, the standard of life enjoyed by her **during her marriage** and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would **inherit the property and at such periods as he may specify in his order**:

Provided that where such **divorced woman has children**, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such **divorced woman to pay maintenance to her**:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the

*Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.*

*(2) **Where a divorced woman** is unable to **maintain herself** and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."*

29. It is submitted that a plain reading of the impugned laws makes plain that the legislative intent was to recognise marriage as being the union of one man and one woman only. The language employed in the provisions thereof e.g. "female". "woman", "husband", "wife" etc is proof positive that legislature in making these laws never intended that they should apply to any union other than heterosexual marriages. The terms used are specific, being capable of only one possible definition. Using such gender specific language was a conscious decision of Parliament and shows that gender specific application of these laws is part of the legislative policy. It is respectfully stated that given the clear intent of parliament expressed in the Acts, the court ought not to adopt a construction that would defeat such intent not should it expand the definition of marriage to such classes who were never meant to be covered under it. To do so would completely distort the language of the statute. *In*

*Raghunath Rai Bareja v. Punjab National Bank*, (2007) 2 SCC 230 it has been held:

*40. It may be mentioned in this connection that the first and the foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB v. Securities and Exchange Board of India [(2004) 11 SCC 641 : AIR 2004 SC 4219] . As held in Prakash Nath Khanna v. CIT [(2004) 9 SCC 686] the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide Delhi Financial Corpn. v. Rajiv Anand [(2004) 11 SCC 625] . Where the legislative intent is clear from the language, the court should give effect to it, vide Govt. of A.P. v. Road Rollers Owners Welfare Assn. [(2004) 6 SCC 210] and the court should not seek to amend the law in the garb of interpretation."*

30. It is likewise submitted that reading down of the impugned provisions so as to expand their meaning is also not permissible. Reading down is an interpretative technique which can be employed only when the reading of a provision as is produces an absurd or unworkable result. The court reads down laws in order to give effect to the legislative intent and not to give a meaning to the provision which would be in complete conflict with such intent. In *Subramanian Swamy v. Raju*, (2014) 8 SCC 390 it has been held:



61. *Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the “reading down” doctrine can be summarised as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. The above is a fairly well-established and well-accepted principle of interpretation which having been reiterated by this Court time and again would obviate the necessity of any recall of the huge number of precedents available except, perhaps, the view of Sawant, J. (majority view) in DTC v. Mazdoor Congress [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] which succinctly sums up the position is, therefore, extracted below: (SCC pp. 728-29, para 255)*

*“255. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is where the statute requires extensive additions and deletions. Not only is it*

*no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."*

31. It is submitted that therefore, there exists a clear larger legislative framework around the legislative understanding of marriage between opposite sexes i.e. between a woman and a man. It is submitted that, considering the larger statutory framework, it is clear that there exists a *legitimate state interest* in limiting the legal recognition of marriage to persons of opposite sexes only.

32. It is submitted that the Hon'ble Supreme Court has also taken note of this limited recognition in Indian personal laws. In *Indra Sarma v. V.K.V. Sarma*, (2013) 15 SCC 755, the Hon'ble Supreme Court held as under :

*"33. Married couples who choose to marry are fully cognizant of the legal obligation which arises by the operation of law on solemnisation of the marriage and the rights and duties they owe to their children and the family as a whole, unlike the case of persons entering into live-in relationship. This Court in Pinakin Mahipatray Rawal v. State of Gujarat [Pinakin Mahipatray Rawal v. State of Gujarat, (2013) 10 SCC 48 : (2013) 4 SCC (Civ) 616 : (2013) 3 SCC (Cri) 801] held that marital relationship means the legally protected marital interest of one spouse to another which include marital obligation to another like companionship, living under the same roof, sexual relation and the exclusive enjoyment of them, to have children, their upbringing, services in the home, support, affection, love, liking and so on.*

*34. Modern Indian society through the DV Act recognises in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood. Section 2(f), as already indicated, deals with a relationship between two*

persons (of the opposite sex) who live or have lived together in a shared household when they are related by:

(a) Consanguinity

(b) Marriage

(c) Through a relationship in the nature of marriage

(d) Adoption

(e) Family members living together as joint family.

35. The definition clause mentions only five categories of relationships which exhausts itself since the expression “means”, has been used. When a definition clause is defined to “mean” such and such, the definition is prima facie restrictive and exhaustive. Section 2(f) has not used the expression “include” so as to make the definition exhaustive. It is in that context we have to examine the meaning of the expression “relationship in the nature of marriage”.

36. We have already dealt with what is “marriage”, “marital relationship” and “marital obligations”. Let us now examine the meaning and scope of the expression “relationship in the nature of marriage” which falls within the definition of Section 2(f) of the DV Act. Our concern in this case is of the third enumerated category, that is, “relationship in the nature of marriage” which means a relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognised, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage.

**38.5.(e) Domestic relationship between same sex partners (gay and lesbians).—The DV Act does not recognise such a relationship and that relationship cannot be termed as a relationship in the nature of marriage under the Act.** The legislatures in some countries, like the Interpretation Act, 1984 (Western Australia), the Interpretation Act, 1999 (New Zealand), the Domestic Violence Act, 1998 (South Africa), the Domestic Violence, Crime and Victims Act, 2004 (UK), have recognised the relationship between the same sex couples and have brought these relationships into the definition of domestic relationship.

39. Section 2(f) of the DV Act though uses the expression "two persons", the expression "aggrieved person" under Section 2(a) takes in only "woman", hence, the Act does not recognise the relationship of same sex (gay or lesbian) and, hence, any act, omission, commission or conduct of any of the parties, would not lead to domestic violence, entitling any relief under the DV Act."

33. It is submitted statutory recognition of marriage limited to marriage/union/relation as being heterosexual in nature, is the norm throughout history and are foundational to both the existence and continuance of the State. Hence, considering its social value the State has a compelling interest in granting recognition to Heterosexual Marriage only to the exclusion of other forms of marriage/unions. It is submitted that at this stage it is necessary to recognise that while there may be various other forms of marriages or unions or personal understandings of relationships between individuals in a society, the State limits the recognition to the heterosexual form. The State does not recognise these other forms of marriages or unions or personal understandings of relationships between individuals in a society but the same are not unlawful.

34. It is submitted that on a normative level, the society consists of smaller units of family, which in turn are predominantly organised in a heterogenous fashion. This organisation of the building block of society is premised on further continuance of the building blocks i.e. the family unit. While other forms of unions may exist in the society which would not be unlawful, it is open for a society to give legal recognition of the form of union which a society considers to be quintessential building block for its existence.

*DENIAL OF LEGAL RECOGNITION DOES NOT BREACH OF PART III OF THE CONSTITUTION*

35. It is submitted that this means that in terms of Article 14, same sex relationships and heterosexual relationships are clearly distinct classes which cannot be treated identically. Hence, there is an intelligible differentia (normative basis) which distinguishes those within the classification (heterosexual couples) from those left out (same sex couples). This classification has a rational relation with the object sought to be achieved (ensuring social stability via recognition of marriages). It is submitted that in light of the above all the impugned laws pass the Article 14 test and must be declared constitutionally sound

36. It is submitted that this special status, which is granted to Heterosexual Marriage cannot be construed as a discrimination against same sex couples under Article 15(1) or as a privileging of Heterosexuality. This is because no other form of cohabitation enjoys the same status as heterosexual marriage including Heterosexual live-in relationships. Indeed, in live-in relationships even the presumption of marriage is rebuttable as held in *Badri Prasad vs Director of Consolidation (1978) 3 SCC 527*. Thus, it can be clearly seen that not every heterosexual union has a status at par with marriage. To fall foul of Article 15(1), there should be discrimination *only* on the basis of sex. It is evident that this condition precedent is not at all satisfied in the present case. Article 15 is therefore inapplicable and cannot be used to assail the concerned statutory provisions.

37. It is submitted that there can be no fundamental right for recognition of a particular form of social relationship. While it is certainly true that all citizens have a right to association under Article 19, there is no concomitant right that such associations must necessarily be granted legal recognition by the State. Nor can the right to life and liberty under Article 21 be read to include within it any implicit approval of same sex marriage. After the decision in *Navtej Singh Johar (supra)* the only change is that persons of the same sex can engage in consensual sexual intercourse without being held criminally liable under Section 377 of the Indian Penal Code. This, and no more than this, is what has been held in that case. While the aforesaid conduct has been decriminalised, it has by no means been legitimised. In fact, the reading of Article 21 in *Johar* expressly does not include marriage, as seen from the above cited extract.

38. It is submitted that the fundamental right under Article 21 is subject to the procedure established by law and the same cannot be expanded to extend to include the fundamental right for a same sex marriage to be recognized under the laws of the country which in fact mandate the contrary.

39. It is submitted that the dictum of *Navtej Singh Johar supra*, does not extend the right to privacy to include a fundamental right in the nature of a right to marry by two individuals of the same gender in contravention of prevailing statutory laws. It is submitted that at its very core, the dictum of the judgment stated above, applies to aspects which would be covered within the personal private domain of individuals [*akin to right to privacy*] and cannot include public right in the nature of recognition of same-sex marriage and thereby legitimizing a particular human conduct.

40. It is submitted that the observations of the Hon'ble Supreme Court in *Puttaswamy case* (supra) and *Navtej Singh Johar* cannot be treated as conferring a fundamental right of being recognised in a marriage under Indian personal laws whether codified or otherwise. It is submitted that even if such right is claimed under Article 21, such right can be curtailed by competent legislature on permissible constitutional grounds including *legitimate state interest*. It is submitted that there cannot be an untrammelled right under Article 21 and cannot override other constitutional principles. In the said context, in '*X v. Hospital 'Z,'*' (supra), it was observed as follows:

*"26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.*

*Right of privacy may, apart from contract, also arise out of a particular specific relationship which may be commercial, matrimonial, or even political. As already discussed above, doctor-patient relationship, though basically commercial, is, professionally, a matter of confidence and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even true private facts may amount to an invasion of the right of privacy which may sometimes lead to the clash of one person's "right to be let alone" with another person's right to be informed...*

*In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others."*

*[Emphasis Supplied]*

41. It is submitted that in *Javed v. State of Haryana*, (2003) 8 SCC 369 (389) Pa 39-41, the Hon'ble Supreme Court upheld restrictions on candidates having more than two children from contesting certain local elections. It was observed as follows:

*"39. Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51 A. Under Article 38 the State shall strive to promote the welfare of the people and developing a social order empowered at distributive justice - social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally down-trodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and the claimants are many. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51A too dictates the expansion of population being kept within reasonable bounds.*

40. *The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in Air India v. Nergesh Meerza and Ors. (1981)IILLJ314SC. The Court found no fault with the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons - "In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet*



*the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."*

**41.** *To say the least it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be."*

*[Emphasis Supplied]*

42. It is submitted that the principles of *legitimate state interest* as an exception to life and liberty under Article 21 would apply to the present case. It is submitted that the statutory recognition of marriage as a union between a "man" and a "woman" is intrinsically linked to the recognition of heterogeneous institution of marriage and the acceptance of the Indian society based upon its own cultural and societal values which are recognized by the competent legislature.

43. It is submitted the judgement in *Shafin Jehan vs Asokan K.M (2018) 16 SCC 638* is of no aid to the petitioners. The words "person of one's own choice" used therein cannot be read in absolute terms and must be circumscribed by the law laid down by Parliament. This much is clear from the judgement itself where it has been held that "*The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled.*" The term "person of one's own choice" has to be restricted by the principle that the court can only expand on existing rights, it cannot create new rights. In *Common Cause (A Regd. Society) v. Union of India, (2008) 5 SCC 511* it has been held

*22. As observed by Hon'ble Dr. Justice A.S. Anand, former Chief Justice of India [Ed. : Quoting from Divl. Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683, p. 693, para 29.] :*

*“Courts have to function within the established parameters and constitutional bounds. Decisions should have a jurisprudential base with clearly discernible principles. Courts **have** to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. Policy matters, fiscal, educational or otherwise, are thus best left to the judgment of the executive. **The danger of the judiciary creating a multiplicity of rights without the possibility of adequate enforcement will, in the ultimate analysis, be counterproductive and undermine the credibility of the institution. Courts cannot ‘create rights’ where none exists nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles.** With a view to see that judicial activism does not become ‘judicial adventurism’, the courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile—failure to bear this in mind would lead to chaos. Public adulation must not sway the Judges and personal aggrandisement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process. It needs to be remembered that courts cannot run the Government. The judiciary should act only as an alarm bell; it should ensure that the executive has become alive to perform its duties.. “*

44. It is submitted that in *M/s Jit Ram Shiv Kumar & Ors. v. State of Haryana & Ors.* (1981) 1 SCC 11 (42-43) Pa 52 - 53 it was held as under:

*“The law should as far as possible accord with the moral values of the society, and efforts should be made to bring the law in conformity with the moral values.*

*What are the moral values of the Society? This is a very complex question because the concept of moral values amongst different persons and classes of persons is not always the same. **The concept of moral values is not static one. It differs from time to time and from society to society. It is hazardous for the Court to attempt to enforce what according to it is the moral value.** As pointed out by Roscoe Pound: “It leads to an attempt to enforce overhigh ethical standards and to make legal duties out of moral duties which are not sufficiently tangible to be made ‘effective by*

*the machinery of the legal order. A more serious difficulty is that the attempt to identify law and morals gives too wide a scope to judicial discretion". The question is how should it be brought about. The learned Judge says that it should be the constant endeavour of the Courts and the legislature to close the gap between the law and morality and bring about as near an approximation between the two as possible. Lord Denning might have exhorted the Judges not to be timorous souls but to be bold spirits, ready to allow a new cause of action if justice so requires. These are lofty ideals which one should steadfastly pursue. But before embarking on this mission, it is necessary for the Court to understand clearly its limitations. The powers of the Court to legislate is strictly limited. "Judges ought to remember that their office is jus dicere and not jus dare, to interpret law, and not to make law or give law". Chandrachud C.J. speaking for a Constitution Bench in Criminal Appeals Nos. 335, 336 etc. etc. of 1978 Reported in 1980 CUR LJ (Cri)95 (SC) Gurbaksh Singh Sibbia v. State of Punjab, has clearly pointed out the limited powers of the Courts to make laws in construing the provisions of the statutes. The learned Chief Justice has observed:*

*The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein \* \* \* Our answer, clearly and emphatically is in the negative.*

*Again the learned Chief Justice warned "Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket". - "Therefore, even if we were to frame a 'code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence".*

**53. The Courts by its very nature are most ill-suited to undertake the task of legislating. There is no machinery for the Court to ascertain the conditions of the people and their**

*requirements and to make laws that would be most appropriate. Further two Judges may think that a particular law would be desirable to meet the requirements whereas another two Judges may most profoundly differ from the conclusions arrived at by the two Judges. Conscious of these handicaps, the law requires that even an amendment of the Supreme Court Rules which govern the procedure to be adopted by it for regulating its work, can only be effected by the whole Court sitting and deciding.” [Emphasis Supplied]*

Similarly, in *Dalmia Cement (Bharat) Ltd. v. Union of India* (1996) 10 SCC 104 (120) Pa 21, it was observed as follows:

*“As stated earlier, the rights, liberties and privileges assured to every citizen are linked with corresponding concepts of duty, public order and morality. Therefore, the jural postulates form the foundation for the functioning of a just society. The fundamental rights ensured in Part III are, therefore, made subject to restrictions i.e., public purpose in Part IV Directives, public interest or public order in the interest of general public. In enlivening the fundamental rights and the public purpose in the Directives, Parliament is the best Judge to decide what is good for the community by whose suffrage it comes into existence and the majority political party assumes governance of the country. The Directive Principles are the fundamentals in their manifestoes. Any digression is unconstitutional. The Constitution enjoins upon the Executive, Legislature and the Judiciary to balance the competing and conflicting claims involved in a dispute so as to harmonise the competing claims to establish an egalitarian social order. It is a settled law that the Fundamental Rights and the Directive Principles are two wheels of the chariot; none of the two is less important than the other. Snap one, the other will lose its efficacy. Together, they constitute the conscience of the Constitution to bring about social revolution under rule of law. The Fundamental Rights and the Directives are, therefore, harmoniously interpreted to make the law a social engineer to provide flesh and blood to the dry bones of law. The Directives would serve the Court as a beacon light to*

*interpretation. Fundamental Rights are rightful means to the end, viz., social and economic justice provided in the Directives and the Preamble. The Fundamental Rights and the Directives establish the trinity of equality, liberty and fraternity in an egalitarian social order and prevent exploitation."*

*[Emphasis Supplied]*

45. It is respectfully submitted that it is clear from the above- cited Paragraphs that considerations of societal morality are relevant in considering the validity of the legislature and further, that it is for the legislature to judge and enforce such societal morality and public acceptance based upon Indian ethos. It is submitted that in *State of Punjab v. Devans Modern Breweries Ltd. (2004) 11 SCC 26* (Pg 111 Para 141), Hon'ble Supreme Court held that the freedom guaranteed by Article 301 of the Constitution was not available to the liquor trade because liquor is a noxious substance injurious to public health, order and morality. This Hon'ble Court held as follows: (Supra, Pg. 111 Para 141)

*"We shall now consider the cases on the freedom guaranteed by Article 301 which is not available to liquor because it is a noxious substance injurious to public health, order and morality. The following cases can be usefully referred:*

*In the case of Sat Pal and Co. v. Lt. Governor of Delhi this Court held [1979] 3 SCR 651 , this Court held that the Ordinance does not infringe any right under Article 19(1)(g) or Article 301 there being no fundamental right to trade in liquor and that the ordinance was both a fiscal measure and one for safeguarding public health and public morals and hence it could validly be made retrospective and that the test of reasonable restrictions has to be judged in the light of the purpose for which the restriction is imposed, that is, as may be required in the public interest and restrictions that may validly be imposed under Article 304(b) are those which seek to protect public health, safety, morals and property within the*

*territory and the present levy under the amended provisions of the Act in its application to Delhi could certainly be said to be one enacted both with the object of regulating the trade or business in intoxicants and with a view to realising the goal fixed in Article 47 of the Constitution.” [Emphasis Supplied]*

xxx

*“We have already noticed that the regulation in the interest of public health and order takes the case out of Article 301, and regulation for the purpose of Article 301 is not confined to regulations which will facilitate the trade.”*

46. It is submitted that further, western decisions sans any basis in Indian constitutional law jurisprudence, cannot be imported in this context. In the above context, in *The Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr.* AIR 1962 SC 316 (Para 32, 33), it was observed as follows:

*“32. In regard to the American decisions of which only a few were cited, including those just now set out, the principle underlying them is to be found summarized in Rottschaefers’ Constitutional Law at p. 835, where the learned author says:*

*“The power of a legislature to prescribe the rules of evidence is universally recognised, but it is equally well established that due process limits it in this matter. It may establish rebuttable presumptions only if there is a rational connection between what is proved and what is permitted to be inferred therefrom”.*

*33. It would be seen that the decisions proceed on the application of the “due process” clause of the American Constitution. Though the tests of ‘reasonableness’ laid down by clauses (2) to (6) of Article 19 might in great part coincide with that for judging of ‘due process’, it must not be assumed that these are identical, for it has to be borne in mind that the Constitution framers deliberately avoided in this context the use of the expression ‘due process’ with its comprehensiveness, flexibility and attendant vagueness, in favour of a somewhat more definite word “reasonable”, and caution has, therefore to be exercised before that literal*

*application of American decisions.* In making these observations we are merely repeating a warning found in the judgment of this Court *A. S. Krishna v. The State of Madras* 1957CriLJ409, where Venkatarama Ayyar, J., speaking with reference to the point now under discussion after quoting the passage already extracted from Rottschaefers treatise stated:

*"The law would thus appear to be based on the due process clause, and it is extremely doubtful whether it can have application under our Constitution".* [Emphasis Supplied]

47. It is submitted that yet again in *Santokh Singh v. Delhi Administration* (1973) 1 SCC 659 at 664, Para 11 it was held as under:


*"Learned counsel also tried to refer us to some American decisions for developing the argument that the guaranteed freedom of speech and expression should be broadly construed but we "did not consider it necessary to go into the American decisions, notwithstanding the fact that in Express Newspapers (P.) Ltd. v. Union of India (1961)ILLJ339SC it was observed that American decisions were relevant for the purpose of understanding the scope of Article 19(1)(a). In our opinion, it is hardly fruitful to refer to the American decisions particularly when this Court has more than once clearly enunciated the scope and effect of Article 19(1)(a) and 19(2). The test of reasonableness of the restriction has to be considered in each case in the light of the nature of the right infringed, the purpose of the restriction, the extent and the nature of the mischief required to be suppressed and the prevailing social and other conditions at the time. There can be no abstract standard or general pattern of reasonableness. Our Constitution provides reasonably precise, general guidance in this matter. It would thus be misleading to construe it in the light of American decisions given in different context. Section 9 of the Act is, in our view, plainly within the legislative competence of the Punjab Legislature and it would be for the court in which the appellant is being tried to decide as to how far the appellant's speech is covered by this section."* [Emphasis Supplied]

48. In light of the above, the said petition ought to be dismissed as there exists no merit in the same.

**VERIFICATION**

I, the deponent above-named, do hereby verify the contents of the above affidavit to be true to the best of my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this \_\_\_ day of March, 2023.

  
**DEPONENT**  
 (के. आर. साजीकुमार/K. R. SAJI KUMAR)  
 संयुक्त सचिव एवं विधायी परामर्शी  
 Joint Secretary & Legislative Counsel  
 विधि और न्याय मन्त्रालय  
 Ministry of Law & Justice  
 (विधायी विभाग/Legislative Deptt.)  
 नई दिल्ली/New Delhi

  
**DEPONENT**  
 (के. आर. साजीकुमार/K. R. SAJI KUMAR)  
 संयुक्त सचिव एवं विधायी परामर्शी  
 Joint Secretary & Legislative Counsel  
 विधि और न्याय मन्त्रालय  
 Ministry of Law & Justice  
 (विधायी विभाग/Legislative Deptt.)  
 नई दिल्ली/New Delhi

**SETTLED BY:**

**Mr. Tushar Mehta,  
 Solicitor General of India**

**DRAFTED BY:**

**Mr. Kanu Agrawal, Advocate  
 Mr. Gaurang Bhushan**