IN THE SUPREME COURT OF INDIA
EXTRAORDINARY CIVIL WRIT JURISDICTION
I.A., No. _____ OF 2013
IN
WRIT PETITION (CIVIL) NO. 1011 OF 2022

IN THE MATTER OF:

SUPRIYO @ SUPRIYA CHAKRABORTHY **… PETITIONERS**

VERSUS

UNION OF INDIA & ANR. **... RESPONDENTS**

APPLICATION ON BEHALF OF THE UNION OF INDIA FOR PRELIMINARY ADJUDICATION OF ISSUE OF VITAL IMPORTANCE

Advocate for the Applicant : AK Sharma

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MOST HUMBLY SHOWETH:

1. That the Applicant is filing the present application seeking prayer to decide the issue with regard to the maintainability of the present petitions, as a preliminary issue as the prayers made would entail the judicial creation of a social institution called "marriage" of a different kind than contemplated under the existing law. It is submitted that the said issue goes to the root of the present matter and has far reaching implications.

2. It is submitted that the question concerning legal recognition of same sex marriage and its parity with the existing concept of marriage, as an exclusively heterogenous institution, which is governed by the existing legal regime and has a sanctity attached to it in every religion in the country, seriously affects the interests of every citizen. It raises critical issues as to whether questions of such a nature, which necessarily entails the creation of new social institution, can be prayed for as a part of the process of judicial adjudication.

3. The Applicant- Union of India is making this Application praying that a preliminary issue be framed and adjudicated first for the grounds and reasons stated hereunder.

4. It is respectfully submitted that this Hon'ble Court was pleased to issue notices in various petitions in January, 2023 onwards and thereafter no hearing took place on merits. The respondents, therefore, did not get an opportunity to raise preliminary issue as regards the maintainability of the present group of petitions and granting of any reliefs either as prayed for or otherwise.

5. The Applicant respectfully submits that, in substance, the present group of petitions seeks the following broad reliefs-

(i) The recognition of a right of marriage amongst same sex persons, transgenders, queers, etc.

(ii) Challenging the constitutional validity of the provisions of Hindu Marriage Act, Special Marriage Act, Foreign Marriage Act etc. which restricts marriage only amongst a biological man and a biological woman.

6. The Applicant respectfully submits that marriage is a socio-legal institution which can be created, recognized, conferred with legal sanctity and regulated only [by making incidental provisions like divorce, alimony, etc.] by the competent legislature by way of an Act under Article 246 of the Constitution of India. It is submitted that such legislation depends upon the legislative policy of the appropriate legislature. It is the respectful submission of the Applicant-Union of India that recognition of human relations like that of a "marriage" is essentially a legislative function and the courts cannot either create or recognize any institution called "marriage" either by way of a judicial interpretation or striking down / reading down the existing legislative framework for the marriages, which undoubtedly occupies the field.

7. The Applicant respectfully submits that this Hon'ble Court vide judgment in ***National Legal Services Authority vs Union of India*** **[(2014) 5 SCC 438]** and ***Navtej Singh Johar vs Union of India*** **[(2018) 10 SCC 1]**, recognizes the following constitutional concepts:

(i) Autonomy of personal choice of every individual.

(ii) Freedom of sexual orientation of every individual

(iii) Choice of sexual orientation is a part of individual's' dignity.

8. The Applicant respectfully submits that the aforesaid judgments were necessarily dealing with the rights of transgenders in the first case of ***NALSA*** **[supra]** and the question as to whether an individual's choice of sexual orientation can be criminalized as was being done under Section 377 of the Indian Penal Code in ***Navtej Singh Johar*** **[supra]**.

9. This Hon'ble Court, therefore, very carefully made observations confining to the issues being adjudicated and not beyond them. As a matter of fact, this Hon'ble Court in ***Navtej Singh Johar*** [**supra**] specifically and unequivocally clarified that the judgments in ***Navtej Singh*** **[supra] [Para 167]** does not deal with any sexual union in the form of marriage or otherwise, which is reproduced hereunder:-

> *"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."*

10. The Applicant states and submits that the right of choice, right of choosing one's sexual orientation and a dignity attached with exercise of such

right is to be respected as a fundamental right and is fully protected and safeguarded by the competent legislature by enacting the Transgender Persons (Protection of Rights) Act, 2019. A copy of the Transgender Persons (Protection of Rights) Act, 2019 is enclosed herewith and is marked as **ANNEXURE A - 1**.

11. The statutory mechanism specifically, unequivocally and categorically recognizes, respects, codifies and protects all the fundamental rights recognized by this Hon'ble Court in the judgment of ***NALSA*** **[supra]** and ***Navtej Singh*** **[supra]** in case of Transgender Persons which are widely defined under the Act, except ofcourse, marriage, which is not a right except in heterosexual couples.

12. It is submitted that though India is a country of several divergent religions, castes, sub-castes and schools of religions, the personal laws and customs all recognise only marriage amongst heterosexual persons. The institution of marriage is necessarily a social concept and a sanctity to the said institution is attached under the respective governing laws and customs as it is given sanctity by law on the basis of social acceptance. It is submitted that social acceptance and adherence to societal ethos, common values, shared beliefs across religions, in case of recognition of "*socio-legal institution of marriage*" is not be confused with majoritarianism.

13. It is for this reason that framers of the Constitution have specifically provided for a separate Entry in the Concurrent List which is a part of the Seventh Schedule of the Constitution of India conferring a constitutional function of legislating with respect to this institution of "marriage", the requisite conditions for a valid marriage, regulations of such institutions like making provisions for divorce, alimony etc. Entry 5 of the Concurrent List in the Seventh Schedule reads as under:-

"List III—Concurrent List –

> *5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."*

14. It is submitted that every component of Entry V above is intrinsically interrelated and any change in any one will necessarily have an inevitable cascading effect on other. It may also have unforeseen consequential impacts on other statutes

15. It is submitted that this would necessarily follow that the Constitution has empowered only the competent legislature to decide a legislative policy as to which social relationship or "union" should be recognized, which necessarily includes a decision based on the legislative policy as to whether the marriage as an institution should be between a heterosexual couple or a same sex couple. The constituent intent behind making this subject a categorical part of legislative decision making is very clear.

16. It is submitted that the institution of marriage is a recognition of a social union of two people which will be conferred with a sanctity attached to the institution of marriage. It is submitted that any law recognizing persons' relationship and conferring legal sanctity thereupon, is essentially involves a codification of societal ethos, cherished common values in the concept of family across religions in a society and such other relevant factors, into legal norms. This would not in fact and cannot, in law, mean a majoritarian approach. This is the only constitutional approach permissible under the Constitution while recognizing any socio-legal relationship as an institution with sanction under the law. The competent legislature is the only constitutional organ which is aware of the above referred considerations. The petitioners do not represent the view of the entire population of the nation.

17. It is further submitted that it would be very relevant to consider that what is presented before this Hon'ble Court is a mere urban elitist views for the purpose of social acceptance. The competent legislature will have to take into account broader views and voice of all rural, semi-rural and urban population, views of religious denominations keeping in mind personal laws as well as and customs governing the field of marriage together with its inevitable cascading effects on several other statutes.

18. This Hon'ble Court, as a custodian of fundamental rights of citizens has already recognized the right of choosing one's sexual orientation as well as a right to Privacy. The said fundamental rights are fully protected under the Transgender Persons (Protection of Rights) Act, 2019 as per the legislative policy of the competent legislature prohibiting any form of discrimination against transgenders as defined under section 2[k] of the Act which reads as under:-

> *"(k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta."*

19. It is submitted that any further creation of rights, recognition of relationship and giving legal sanctity to such relationship can be done only by the competent legislature and not by judicial adjudication. In light of the aforesaid facts and the law enunciated hereunder, the Applicant respectfully submits that this Hon'ble Court may be pleased to decide the following question as a preliminary question first and rule upon the same before going into any other arguments:

> *"1. In view of the law-making power only being available with the competent legislature under Article 246 of the*

Constitution of India read with (Entry 5 List III) of VII Schedule of Constitution, can a constitutional court legislate to create a separate socio-legal institution of marriage between persons not contemplated by the existing legislation or interpret the existing legislation in such a way that it destroys the fundamental fabric of the existing legislations which necessarily presuppose a marriage between a biological man and a biological woman?

2. While creating an institution like marriage, which is essentially a socio-legal concept, is it not constitutionally imperative to leave the question to the appropriate legislature which represent the democratic mandate, which would decide the issues based on societal ethos, societal values and larger societal acceptability in the Indian context of understanding of marriage as an institution?"

20. It is submitted that further, recently in ***Ashwini Kumar Upadhyay Versus Union of India & Ors*, Writ Petition (Civil) Nos 1000, 1108 & 1144/2020 and 905, 480, 474, 707, 919, and 710/2021**, vide order dated 29.03.2023, while dismissing the petitions seeking "gender neutral and religion neutral laws" similar to the present prayers of gender neutral laws, this Hon'ble Court noted as under :

"5 On a considered view of the pleadings and the submissions, we are not inclined to entertain the petitions under Article 32 of the Constitution. The grant of relief in these proceedings would necessitate a direction for the enactment of law, a gender neutral and religion neutral legislation, as the petitioner has described it. Enactment of legislation lies exclusively within the domain of the legislature. It is a well settled position that a mandamus cannot be issued to the legislature to enact law.

6 As regards the prayer for a direction to the Law Commission to prepare a report, we see no reason to entertain the request since ultimately it is in aid of the enactment of legislation which falls in the legislative domain.

7 Hence, we are not inclined to entertain the Writ Petitions under Article 32 of the Constitution which shall accordingly stand disposed of.

8 Pending applications, if any, stand disposed of."

21. It is submitted that the said approach is attracted squarely in the present cases as well. A copy of the order dated 29.03.2023 in ***Ashwini Kumar Upadhyay Versus Union of India & Ors*, Writ Petition (Civil) Nos 1000, 1108 & 1144/2020 and 905, 480, 474, 707, 919, and 710/2021**, is attached herewith and marked as **ANNEXURE A – 2**.

BROAD SUBMISSIONS

22. It is submitted in light of the constitutional scheme in existence, the legal regime holding the field on the socio-legal institution of marriage and the above referred facts that whether or not same sex marriage is to be recognised or not is purely a matter of legislative policy under Entry 5 of List III of Schedule VII of the Constitution which ought to be determined by the appropriate Legislature ***only***. The following illuminating paragraph from ***His Holiness Keshvananda Bharati vs State of Kerala*** **1973 4 SCC 225** will be a guiding light in the present case

1107. On the desirability of drawing heavily or relying on the provisions of the Constitutions of other countries or on the decisions rendered therein, a word of caution will be necessary. It cannot be denied that the provisions of the Constitutions of other countries are designed for the political, social and economic outlook of the people of those countries for whom they have been framed. The seed of the Constitution is sown in a particular soil and it is the nature and the quality of the soil and the climatic conditions prevalent there which will ensure its growth and determine the benefits which it confers on its people. We cannot plant the same seed in a different climate and in a different soil and expect the same growth and the same benefit therefrom. ***Law varies according to the requirements of time and place. Justice thus becomes a relative***

> ***concept varying from society to society according to the social milieu and economic conditions prevailing therein.*** *The difficulty, to my mind, which foreign cases or even cases decided within the Commonwealth where the Common Law forms the basis of the legal structure of that unit, just as it is to a large extent the basis in this country, is that they are more often than not concerned with expounding and interpreting provisions of law which are not in pari materia with those we are called upon to consider.* ***The problems which confront those Courts in the background of the State of the society, the social and economic set-up, the requirements of a people with a totally different ethics, philosophy, temperament and outlook differentiate them from the problems and outlook which confront the courts in this country. It is not a case of shutting out light where that could profitably enlighten and benefit us. The concern is rather to safeguard against the possibility of being blinded by it.*** *At the very inception of a constitutional democracy with a Federal structure innovated under the Government of India Act, 1935, a note of caution was struck by the Chief Justice of India against following even cases decided on the constitutions of the Commonwealth unite, which observations apply with equal force, if not greater, to cases decided under the American Constitution. Gwyer, C.J., in In re: The Central Provinces and Berar Act No. 14 of 1938, [AIR 1939 FC 1 : (1939) 1 FCR 18] which was the very first case under the 1935 Act, observed at p. 38: "But there are few subjects on which the decisions of other Courts require to be treated with greater caution than of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another". This observation was approved and adopted by Gajendragadkar, C.J. (speaking for seven Judges) in Special Reference 1 of 1964. [AIR 1965 SC 747 : (1965) 1 SCR 413 at 487 : (1965) 1 SCJ 847]"*

23. It is submitted that the creation or recognition of a new social institution altogether, cannot be claimed as a matter of right/choice, much less a fundamental right. Therefore, it necessarily follows that the right to personal autonomy does not include a right for the recognition of same sex marriage and

that too by way of judicial adjudication. It is submitted that the question as to which social relationships will be recognised by the appropriate Legislature is part of the legislative policy to be decided by the representatives of the people. The representative of people are the appropriate democratic institution to under Article 246 keeping in mind, inter alia, the sanctity attached to the institution of marriage in the country, the societal ethos, cherished values in the concept of family and other such relevant considerations. The petitions which merely reflect urban elitist views cannot be compared with the appropriate legislature which reflects the views and voices of far wider spectrum and expands across the country.

24. It is submitted that marriage is considered to be an aspect of social policy of the nation across the world. It is within the remit of the appropriate legislature, as the elected representatives of the people, to define it, recognise it and regulate it and the choice not to recognise same-sex marriage is simply a facet of the legislative policy. Reference here may be made to the decision of the Supreme Court in ***Secretary to Government of Madras vs P.R Sriramulu*** **(1996) 1 SCC 345 [Para 15].**

25. It is submitted that the ripple effects of such decisions are difficult to anticipate. It is submitted that former Chief Justice Antonio Lamer of the Supreme Court of Canada has appropriately addressed the difficulties Courts face in deciding such issues:

> *"I sometimes think of these sorts of cases as being somewhat like a spider's web. If you pull on one strand of the web, the entire structure moves, but not necessarily all in the same direction. The implications are widespread and, at times, hard to foresee*[1]*."*

[1] Beverley Mclachin, The Role of Judges in Modern Society, Supreme Court of Canada, Retrieved from: https://www.scc-csc.ca/judges-juges/spe-dis/bm-2001-05-05-eng.aspx

26. It is submitted that under the scheme of our Constitution, the Hon'ble Courts do not replace the policy of Legislature with its own. The exercise should only be "what is the law" and not "what the law should have been". It is submitted that personal laws and the laws recognizing personal relationships, are essentially those social norms which have been codified into legal norms by the Legislature. Hence, questions of such personal relationships ought not to be decided without accounting for the views of the society at large which can be done only by the competent legislature. It is submitted that in ***Jit Ram Shiv Kumar v. State of Haryana*, (1981) 1 SCC 11**, it was held as under :

> *"**52.** In a fervent plea for the doctrine to speak in all its activist magnitude the learned Judge observes [(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641] (SCC pp. 430-31, para 13)*
>
> > *"That is no reason why this new principle, which is a child of equity brought into the world with a view to promoting honesty and good faith and bringing law closer to justice should be held in fetters and not allowed to operate in all the activist magnitude, so that it may fulfil the purpose for which it was conceived and born."*
>
> *It is no doubt desirable that in a civilised society man's word should be as good as his bond and his fellow men should be able to rely on his promise. It may be an improvement if a cause of action would be based on a mere promise without consideration. 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 a static one. It differs from time to time and from society to society. It is hazardous for a 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 power of the Court to legislate is strictly limited. "Judges ought to remember that their office is jus dicere and not jus dere to interpret law, and not to make law or give law."*** *Chandrachud, C.J. speaking for a Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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: (SCC p. 580, para 13)*

> *"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: (SCC p. 581, para 15)

"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 guide lines and cannot compel blind adherence."*

(IMP : ANTICIPATORY BAIL ARTICLE 21 IS A LIBERTY CONTENT)

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 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."

27. It is submitted that further in ***P. Rathinam v. Union of India,*** **(1994) 3 SCC 394**, it was held as under :

"92. *The concept of public policy is, however, illusive, varying and uncertain. It has also been described as "untrustworthy guide", "unruly horse" etc. The leading judgment describing the doctrine of public policy has been accepted to be that of Parke, B. in Egerton v. Brownlow [(1853) 4 HLC 121] in which it was stated as below at p. 123, as quoted in paragraph 22 of Gherulal Parakh v. Mahadeodas Maiya [AIR 1959 SC 781 : 1959 Supp (2) SCR 406] :*

" 'Public policy' is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education habits, talents and dispositions of each person, who is to decide whether an act is against public policy or not. ***To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer, to discuss, and of the Legislature to determine what is best for the public good and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community.*** *Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and*

we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.""

It is submitted that the same has been reiterated by this Hon'ble Court in the case of ***Subramaniam Swamy vs CBI*** **(2014) 8 SCC 682 [Para 49].**

28. It is thus clear that a decision by the Court in recognising the right of same sex marriage would mean a virtual judicial rewriting of an entire branch of law. The Court must refrain from passing such omnibus orders. The proper authority for the same is appropriate Legislature.

29. It is further submitted that it is not discrimination to grant recognition to heterogenous institution of marriage alone to the exclusion of same sex marriage. This is because conventional and universally accepted socio-legal relationships like marriages across all religions, is deeply rooted in the Indian social context and indeed is considered a sacrament in all branches of Hindu law. Even in Islam, though it is a contract, it is a sacred contract and a valid marriage is only between a biological male and biological woman. It is submitted that same is the position across all religions existing in India. It is submitted that this deep-rooted social context is also imbibed in the Special Marriage Act, 1954. It is submitted that while permitting inter-religious and inter-caste marriage, even the Special Marriage Act, 1954, reflects a clear legislative policy of marriage between a biological man and a biological woman and recognise elements of personal laws and customs.

30. The sanctity of marriage in every religion is therefore simply a legal recognition of a longstanding sociohistorical reality. To give parity to same sex marriage would amount to conferring it with the same sanctity and legal status would not only be comparing two non-comparable classes but can be done only by Legislature.

31. It is also to be seen that privacy-based arguments are of very limited utility in deciding this question. It is submitted that marriage is not and has never historically been confined to the private sphere. The regulation of marriage is very much an issue of acceptance by the society and as such ought to be debated only by the competent legislature, being a body, which is the repository of democratic representation and reflects the will of the people.

32. It is submitted that this rationale is the very basis for state recognition of a marriage across jurisdictions. It is submitted that marriage, thus becomes the condition precedent for the State's very existence. Given this fact, it is but natural that there would exist a *Legitimate State Interest* adhering to the existing concept of marriage and preventing its dilution except by legislation, if passed.

33. It is submitted that a plain reading of the impugned laws makes clear that the legislative intent was to recognise marriage as being the union of one man and one woman only, for the reasons set out in the foregoing paragraphs. 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 and destroy the language and the spirit of the statutes in question.

34. Given the clear legislative policy and the compelling state interest underlying heterogenous institution of marriage, the Hon'ble Courts should refrain from addressing the issue. The question of what marriage ought to be is a normative one and requires to be addressed by Parliament. It not a dispute fit for the Court to adjudicate upon. Additionally, the principles of marriage, inheritance, succession etc. are all social norms which have been given the sanction of law which are also governed by personal laws. The personal laws of any nation necessarily depend upon what that nation's society considers apposite. India is no exception. Given the fundamentally social origin of these laws, any change in order to be legitimate would have to come from the bottom up and through legislation.

35. It is submitted that further, this understanding of the legislative bodies being the appropriate forum for decision on such issues is near universal. It is submitted that even in the countries where same sex marriage has been recognised, the vast majority of countries have done so through the legislative route. This understanding has also come to be judicially accepted even in the United States which had earlier permitted same sex marriage by a judicial decision. The United States Supreme Court in ***Dobbs vs Jackson Women's Health Organization***[2] has held that fundamental rights must be "objectively, deeply rooted in this Nation's history and tradition". Justice Clarence Thomas in his concurrence in Dobbs noted specially that this meant that the court should reconsider ***Obergefell vs Hodges*** **576 U.S. 644 (2015)** which granted recognition to same-sex marriage. It is submitted that his ruling in that regard was as follows:

> *"The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific*

[2] 597 U.S. ___ (2022)

contexts. Cases like Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives)[1]; Lawrence v. Texas, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts); and Obergefell v. Hodges, 576 U.S. 644 (2015) (right to same-sex marriage), are not at issue. The Court's abortion cases are unique, see ante, at 31–32, 66, 71–72, and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised," McDonald, 561 U. S., at 813 (opinion of Thomas, J.). Thus, I agree that "[n]othing in [the Court's] opinion should be understood to cast doubt on precedents that do not concern abortion." Ante, at 66.*

***For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," Ramos v. Louisiana, 590 U. S. ___, ___ (2020) (Thomas, J., concurring in judgment) (slip op., at 7), we have a duty to "correct the error" established in those precedents, Gamble v. United States, 587 U. S. ___, ___ (2019) (Thomas, J., concurring) (slip op., at 9). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated**. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. Amdt. 14, §1; see McDonald, 561 U. S., at 806 (opinion of Thomas, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights. See id., at 854. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See ante, at 15, n. 22."*

36. It is respectfully submitted that the Constitution does not give power to Courts to direct the framing of a law, which is settled by a judgment of Hon'ble Supreme Court in the case of ***Lok Prahari vs Union of India***, reported as **(2018) 4 SCC 699 [Para 63, 64].** It is submitted that where the Hon'ble Court is directly prohibited from compelling the legislature to make a law, it cannot do the same

indirectly by so reading the existing law as to negate the very purpose and intent behind it. [See ***Ashwini Kumar vs. Union of India & Anr,*** reported as **(2020) 13 SCC 585** (Para 13)]

37. It is submitted that the Hon'ble Court's own view of what is right and wrong cannot lead to it supplanting the Legislature and becoming a third chamber of law-making. [See ***Common Cause v. Union of India,*** **reported as (2017) 7 SCC 158 (Para 18)]**

38. It is humbly submitted that the present petition is an attempt to enforce the social institution in the personal understanding of the Petitioner by way of an order of this Hon'ble Court. It is submitted that the Petitioners through this petition are trying to circumvent the parliamentary procedure and the concept of separation of powers and trying to do indirectly what they cannot do directly, which is not permissible under law.

39. It is submitted that any encroachment on the legislative powers solely reserved for the elected representatives would be against the well-settled principles of *"separation of powers"* which is held to be a part of the basic structure of the Constitution. Any such deviation from the concept of separation of powers would be thus, contrary to constitutional morality. It is submitted that the doctrine of separation of powers, is undoubtedly a part of the basic structure of the Constitution and is a constitutional necessity for a healthy working of the democratic Constitution.

40. It is submitted that the Parliament, being a body directly elected by the people, is democracy itself in function. It is submitted that to override that function or to bring in something in that process where none was envisaged, would amount to judicial overreach. In ***P. Ramachandra Rao v. State of Karnataka,*** **(2002) 4 SCC 578** it has been held that the making of an entirely new law through directions is not a legitimate judicial function [Para 26].

41. It is submitted that the interpretive powers of the Court are not unbound. They are guided by well-established principles governing judicial discipline. It is submitted that one such principle is that the Judiciary ought not to give a construction to any law which is expressly at odds with the purpose and intent of that law. In ***Union of India v. Deoki Nandan Aggarwal*, 1992 Supp (1) SCC 323**, it was held that the courts cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate [Para 14].

42. Where the provision of a law is clear and direct, it would not be open for the Court to give that provision another meaning because in the Court's opinion such meaning would better effectuate the law. In ***V. Jagannadha Rao v. State of A.P.*, (2001) 10 SCC 401**, it was held that a court cannot reframe the legislation and it always has to presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have an effect [**Para 18]**.

43. It is submitted that the cases where a departure may be made from the plain meaning of a provision are specific and limited. If an absurdity would result from the plain meaning, the same can be varied. However, the present case regarding definition of marriage is not one of absurdity but a clear, conscious and deliberate legislative choice based on societal consensus on the issue. The Court ought to give due respect to the same. In ***Boddington v. Wisson*, [1951] 1 K.B. 606,** the Court Of Appeal in the UK, held as under ¨

> *"In modern times it has been found convenient, and I do not doubt that it is most useful, to give to ministers the power, subject to Parliamentary supervision, to legislate by regulation, as it is sometimes called. It is not for this court to question the wisdom of what Parliament has quite plainly authorized ministers to do. It is one result of that policy that instruments of this kind, which affect the rights of many citizens, may not have the advantage of consideration in Parliamentary debate upon their terms; and therefore there may be cases (and this may be one) in*

which there is a lacuna in the provisions of the instruments. ***But it is not, I conceive, the function of this court in these cases to do the work of Parliament and indulge in what is referred to as "judicial legislation". It was, I think, Cardozo, C.J, who said that in modern times, when the legislative body is more or less in continuous session and therefore able quickly to remedy any defects in its enactments, there is less room for such judicial legislation than in the past. In the case of statutory instruments that is certainly more rather than less true, for the means of remedying a defect in a statutory instrument is always to hand. I should not like it to be thought that I was criticizing the draftsman of these regulations. We are fortunate in that the drafting is carefully and most skilfully done; but that there may be sometimes a casus omissus is not surprising.***

I am comforted in making these observations by one circumstance. After May, 1948, In re Kendrick's Agreement 9 showed quite clearly what was the true meaning of the proviso to reg. 62 (4A). It may be that until that decision it had not been fully appreciated that the language used, whether intentionally or not, had the effect that the ministerial consent could be given at any time up to the expiry of the notice. After that decision, the Ministry concerned proceeded to deal with the excepted cases in Defence Regulations (No. 3), 1948 , that is to say, they proceeded to deal with Scotland, and S.I No. 2343 of November 1, 1948, took this form: "Paragraph … (4A) … of reg. 62 of the Defence (General) Regulations …", is revoked, following exactly the language of the earlier revoking instrument. Then there was this proviso: "Provided that, notwithstanding the foregoing revocation and without prejudice to the provisions of s. 38 of the Interpretation Act, 1889 , the provisions of para. (4A) aforesaid shall apply to any such notice to quit referred to in the said paragraph as has been given to a tenant prior to the date of coming into operation of this Order". That proviso supports the view which I have formed, that, having regard to the true construction of reg. 62 (4A), without a proper saving clause, it was not sufficient to rely upon the Interpretation Act, 1889 , to keep alive for all purposes quoad notices then current the revoked para. (4A) of reg. 62. Whether that was so or not, is a mere matter of speculation, but I confess that I have derived some comfort from the change in language, because I think it does indicate or lend support to the view that, as the Defence Regulations (No. 3), 1948 , stand, there is nothing, whether by invocation of the Interpretation Act,

1889 , or otherwise, to keep alive the provisions of para. (4A) of reg. 62 so far as concerns this notice.
For these reasons I think that this appeal fails.

44. In ***In re DNick Holding plc Eckerle and others v Wickeder Westfalenstahl GmbH and another*** **[2013] EWHC 68 (Ch),** it was held as under:

"The Act made new provisions that expressly concern and confer rights on holders of beneficial interests. Section 145 of the Act allows for indirect investors to enjoy membership rights where, as in the present case, a company's articles so provide. It is clear from section 145(4) that only a registered shareholder can enforce any of those rights against a company. Only a registered shareholder has the right to transfer shares. It would be anomalous if section 98 granted holders of beneficial interests in shares a right to issue proceedings against a company where they are unable to enforce the rights given to them by section 145 against the company. ***The exercise which the claimants require from the court would be "an impermissible form of judicial legislation": see Enviroco Ltd v Farstad Supply A/S [2011] 1 WLR 921, para 49. The claimants' construction, aside from creating considerable uncertainty as to who has standing to apply under section 98, would have the wholly undesirable consequence that both the legal and beneficial owners of a share could theoretically issue separate applications in respect of the same interest****. The claimants' understanding that they always considered themselves to be shareholders in the company has no bearing on whether they have standing under section 98(1): see In re Astec (BSR) plc [1998] 2 BCLC 556, 589."*

45. It is submitted that where the Courts must exercise special care is in adding words to the statute which are not there, especially where such additions were not envisaged by the Legislature. In ***Inco Europe Ltd v First Choice Distribution*** **[2000] 1 WLR 586,** the House of Lords, held as under:

"I freely acknowledge that this interpretation of section 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its

*interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, Statutory Interpretation , 3rd ed (1995), pp 93–105. He comments, at p 103: '**In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.' This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words.** Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in Jones v Wrotham Park Settled Estates [1980] AC 74, 105."*

46. It is submitted that the first exercise a court undertakes when interpreting a provision is to apply the plain meaning rule. Where the plain meaning accorded to each word of the statute produces an intelligible result, nothing further beyond is required. The American Supreme Court in ***Blockburger v. United States*, 1932 SCC OnLine US SC 8** has held that judicial legislation cannot be carried out under the guise of construction [**Para 18**]. In this regard, the following cases may be noted:

a. ***Ebert v. Poston*, 1925 SCC OnLine US SC 25** [Para 8]

b. ***Standard Oil Company of New Jersey v. United States*, 1911 SCC OnLine US SC 84**

47. The American Supreme Court has often further declined to enter in to policy questions '*firmly imbedded in the legislative and judicial tissues of the body politic'*.[3] The US Supreme Court has developed what it calls the 'political question' doctrine. The US Supreme Court views the non-justiciability of a political question as primarily a function of the separation of powers, the relationship between the judiciary and the coordinate branches of the federal government. In *Baker v. Carr*[4], J. Brennan outlined six criteria for political questions as under :

A. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or

B. A lack of judicially discoverable and manageable standards for resolving it; or

C. ***The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion***; or

D. ***The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government***; or

E. An unusual need for unquestioning adherence to a political decision already made; or

F. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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[3]Galvan v. Press 347 U.S. 522 (1954);Chae Chan Ping v. United States, 130 U.S. 581 (1889); Kleindienst v. Mandel, 408 U.S. 753 (1972); Trump, President Of The United States, Et Al. V. Hawaii Et Al.138 S. Ct. 2392; 201 L. Ed. 2d 775

[4] Baker v. Carr, 7 L.Ed. 2d 663 (1962)

48. It is submitted that further, as far as the general principle of separation of powers is concerned, the following cases may be noted which specifically highlight that Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another and that Judicial restraint is necessary in dealing with the powers of another coordinate branch of the Government. [See ***Ram Jawaya Kapur* v. *State of Punjab*, AIR 1955 SC 549, *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1, *GVK Industries Ltd. v. ITO*, (2011) 4 SCC 36, *State of Mysore v. C.R. Sheshadri*, (1974) 4 SCC 308].**

49. Thus, separation of powers embodies the principle of Judicial restraint. The same is evident from the following case law :

a. ***State of Rajasthan v. Union of India*, (1977) 3 SCC 592**

b. ***Bhim Singh v. Union of India*, (2010) 5 SCC 538**

c. ***Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683**

50. It is submitted that the accountability of the Legislature is ultimately to the citizens. In the question of personal laws, the Legislature is duty bound to act in accordance with the popular will. Where the social consensus favours a particular definition of Marriage, the Legislature in giving sanction to that form is only discharging its duty of adhering to the will of the people. This unequivocal democratic will should not be negated by a judicial order.

51. In making a law, Parliament is presumed to know what is in the best interest of the people and this is doubly so in the case of Personal Law. It is submitted that howsoever well intentioned a measure may be, it must not to be introduced in transgression of this basic principle. It is submitted that change cannot be compelled by judicial fiat and the best judge of the pace of change is the Legislature itself.

52. It is therefore necessary that such issues are left for being decided by the competent Legislature where social, psychological, religious and other impacts on society can be debated. It would also have to be seen if such recognition or creation would dimmish the special status enjoyed by heterogenous institution of marriage across the country. 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.

53. It is submitted that ***Jeremy Waldron*** in the **Yale Law Journal** in a seminal article titled "***The Core of the Case Against Judicial Review***" Apr 2006; 115, 6; ABI/INFORM Global pg. 1346, notes as under :

> *"Arguments to this effect have been heard before, and often. They arise naturally in regard to a practice of this kind. In liberal political theory, legislative supremacy is often associated with popular self-government,[5] and democratic ideals are bound to stand in an uneasy relation to any practice that says elected legislatures are to operate only on the sufferance of unelected judges. Alexander Bickel summed up the issue in the well-known phrase, "the counter-majoritarian difficulty."[6] We can try to mitigate this difficulty, Bickel said, by showing that existing legislative procedures do not perfectly represent the popular or the majority will. But, he continued, nothing in the further complexities and perplexities of the system, which modern political science has explored with admirable and ingenious industry, and some of which it has tended to multiply with a fertility that passes the mere zeal of the discoverer- nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy.[7] In countries that do not allow legislation to be invalidated in this way, the people themselves can decide finally, by ordinary legislative procedures, whether they want to permit abortion, affirmative action, school vouchers, or gay marriage. They can*

[5] The locus classicus for this concept is John Locke, The Second Treatise of Government, in Two TREATISES OF GOVERNMENT 265, 366-67 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[6] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986) ("[J]udicial review is a counter-majoritarian force in our system. ... [W]hen the Supreme Court declares unconstitutional a legislative act ... it thwarts the will of representatives of the actual people of the here and now .. .

[7] Id. at 17-18.

decide among themselves whether to have laws punishing the public expression of racial hatred or restricting candidates' spending in elections. If they disagree about any of these matters, they can elect representatives to deliberate and settle the issue by voting in the legislature. That is what happened, for example, in Britain in the 1960s, when Parliament debated the liberalization of abortion law, the legalization of homosexual conduct among consenting adults, and the abolition of capital punishment.[8] On each issue, wide-ranging public deliberation was mirrored in serious debate in the House of Commons. The quality of those debates (and similar debates in Canada, Australia, New Zealand, and elsewhere) make nonsense of the claim that legislators are incapable of addressing such issues responsibly -just as the liberal outcomes of those proceedings cast doubt on the familiar proposition that popular majorities will not uphold the rights of minorities.

xxx

In this Essay, ***I shall argue that judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation. And it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights****."*

A copy of the article titled "***The Core of the Case Against Judicial Review*****" by *Jeremy Waldron*** in the **Yale Law Journal**, is attached herewith and marked as **ANNEXURE A – 3**.

54. It is submitted that there is no denial that the Constitution provides for power of judicial review, but judicial review should not become judicial legislation. It is submitted that the Personal Laws in India essentially represents a social concurrence by which certain norms have been crystallised into law.

[8] Abortion Act, 1967, c. 87; Sexual Offences Act, 1967, c. 60; Murder (Abolition of Death Penalty) Act, 1965, c. 71.

judicial intervention to create this new institution of same sex marriage risks upsetting this balance apart from being without jurisdiction.

55. At this juncture, the words of ***Alexander Hamilton's*** famous **Federalist Paper No. 78** may be noted :

> *"Whoever attentively considers the different departments of power must perceive, that, in a Government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.* ***The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated****. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security."*

56. It is submitted that therefore, it is the humble request of the Applicant the issues raised in the present petition be left to the wisdom of the elected representatives of the people who alone shall be the democratically viable and legitimate source through which any change in the understanding and/or the creation/recognition of the any new social institution can take place.

57. The present application is bonafide and in the interest of justice.

PRAYER

It is, therefore, most respectfully prayed that your Lordships may graciously be pleased to:-

(a) Pass an order deciding the issues framed in Para 19 by the Applicant in the present application as a preliminary issue and be pleased to rule upon the same first; and/or

(b) Dismiss the present batch of petitions on grounds of maintainability;

(c) pass such further order/orders, as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE APPLICANT IS AS DUTY BOUND, SHALL EVER PRAY.

FILED BY:

AK SHARMA

ADVOCATE FOR THE APPLICANT

PLACE: NEW DELHI
DRAWN ON: 15.04.2023
FILED ON: 16.04.2023

DRAFTED BY :
Kanu Agrawal

Advocate

SETTLED BY :
Tushar Mehta,
Solicitor General of India

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

ARRANGEMENT OF SECTIONS

SECTIONS

CHAPTER IX

MISCELLANEOUS

SECTIONS

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

ACT NO. 40 OF 2019

[5*th December,* 2019.]

An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.—(*1*) This Act may be called the Transgender Persons (Protection of Rights) Act, 2019.

(2) It extends to the whole of India.

(*3*) It shall come into force on such date[1] as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "appropriate Government" means, —

(*i*) in relation to the Central Government or any establishment, wholly or substantially financed by that Government, the Central Government;

(*ii*) in relation to a State Government or any establishment, wholly or substantially financed by that Government, or any local authority, the State Government;

(*b*) "establishment" means—

(*i*) any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013 (18 of 2013), and includes a Department of the Government; or

(*ii*) any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution;

(*c*) "family" means a group of people related by blood or marriage or by adoption made in accordance with law;

(*d*) "inclusive education" means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students;

(*e*) "institution" means an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons;

(*f*) "local authority" means the municipal corporation or Municipality or Panchayat or any other local body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;

(*g*) "National Council" means the National Council for Transgender Persons established under section 16;

(*h*) "notification" means a notification published in the Official Gazette;

1. 10th January, 2020, *vide* notification No. S.O. 135(E), dated 10th January, 2020, *see* Gazette of India, Extraordinary, Part II, sec. 2(*ii*).

(*i*) "person with intersex variations" means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body;

(*j*) "prescribed" means prescribed by rules made by the appropriate Government under this Act; and

(*k*) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner, hijra, aravani* and *jogta*.

CHAPTER II

PROHIBITION AGAINST DISCRIMINATION

3. Prohibition against discrimination.—No person or establishment shall discriminate against a transgender person on any of the following grounds, namely:—

(*a*) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;

(*b*) the unfair treatment in, or in relation to, employment or occupation;

(*c*) the denial of, or termination from, employment or occupation;

(*d*) the denial or discontinuation of, or unfair treatment in, healthcare services;

(*e*) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;

(*f*) the denial or discontinuation of, or unfair treatment with regard to the right of movement;

(*g*) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;

(*h*) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and

(*i*) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be.

CHAPTER III

RECOGNITION OF IDENTITY OF TRANSGENDER PERSONS

4. Recognition of identity of transgender person.—(*1*) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.

(*2*) A person recognised as transgender under sub-section (*1*) shall have a right to self-perceived gender identity.

5. Application for certificate of identity.—A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:

Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.

6. Issue of certificate of identity.—(*1*) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.

(*2*) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (*1*).

(*3*) A certificate issued to a person under sub-section (*1*) shall confer rights and be a proof of recognition of his identity as a transgender person.

7. Change in gender.—(*1*) After the issue of a certificate under sub-section (*1*) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.

(*2*) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(*3*) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (*2*) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under sub-section (*2*) shall not affect the rights and entitlements of such person under this Act.

CHAPTER IV

WELFARE MEASURES BY GOVERMENT

8. Obligation of appropriate Government.—(*1*) The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.

(*2*) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes framed by that Government.

(*3*) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory.

(*4*) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.

(*5*) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

CHAPTER V

OBLIGATION OF ESTABLISHMENTS AND OTHER PERSONS

9. Non-discrimination in employment.—No establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.

10. Obligations of establishments.—Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to transgender persons as may be prescribed.

11. Grievance redressal mechanism.—Every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.

12. Right of residence.—(*1*) No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child.

(*2*) Every transgender person shall have—

(*a*) a right to reside in the household where parent or immediate family members reside;

(*b*) a right not to be excluded from such household or any part thereof; and

(*c*) a right to enjoy and use the facilities of such household in a non-discriminatory manner.

(*3*) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

CHAPTER VI

EDUCATION, SOCIAL SECURITY AND HEALTH OF TRANSGENDER PERSONS

13. Obligation of educational institutions to provide inclusive education to transgender persons.—Every educational institution funded or recognised by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others.

14. Vocational training and self-employment.—The appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.

15. Healthcare facilities.—The appropriate Government shall take the following measures in relation to transgender persons, namely:—

(*a*) to set up separate human immunodeficiency virus Sero-surveillance Centres to conduct sero-surveillance for such persons in accordance with the guidelines issued by the National AIDS Control Organisation in this behalf;

(b) to provide for medical care facility including sex reassignment surgery and hormonal therapy;

(*c*) before and after sex reassignment surgery and hormonal therapy counselling;

(*d*) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;

(*e*) review of medical curriculum and research for doctors to address their specific health issues;

(*f*) to facilitate access to transgender persons in hospitals and other healthcare institutions and centres;

(*g*) provision for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons.

CHAPTER VII

NATIONAL COUNCIL FOR TRANGENDER PERSONS

16. National Council for Transgender Persons.—(*1*) The Central Government shall by notification constitute a National Council for Transgender Persons to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

(*2*) The National Council shall consist of—

(*a*) the Union Minister in-charge of the Ministry of Social Justice and Empowerment, Chairperson, *ex officio*;

(*b*) the Minister of State, in-charge of the Ministry of Social Justice and Empowerment in the Government, Vice-Chairperson, *ex officio*;

(*c*) Secretary to the Government of India in-charge of the Ministry of Social Justice and Empowerment, Member, *ex officio*;

(*d*) one representative each from the Ministries of Health and Family Welfare, Home Affairs, Housing and Urban Affairs, Minority Affairs, Human Resources Development, Rural Development, Labour and Employment and Departments of Legal Affairs, Pensions and Pensioners Welfare and National Institute for Transforming India Aayog, not below the rank of Joint Secretaries to the Government of India, Members, *ex officio*;

(*e*) one representative each from the National Human Rights Commission and National Commission for Women, not below the rank of Joint Secretaries to the Government of India, Members, *ex officio*;

(*f*) representatives of the State Governments and Union territories by rotation, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members, *ex officio*;

(*g*) five representatives of transgender community, by rotation, from the State Governments and Union territories, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members;

(*h*) five experts, to represent non-governmental organisations or associations, working for the welfare of transgender persons, to be nominated by the Central Government, Members; and

(*i*) Joint Secretary to the Government of India in the Ministry of Social Justice and Empowerment dealing with the welfare of the transgender persons, Member Secretary, *ex officio.*

(*3*) A Member of National Council, other than ex officio member, shall hold office for a term of three years from the date of his nomination.

17. Functions of Council.—The National Council shall perform the following functions, namely:**—**

(*a*) to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons;

(*b*) to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons;

(*c*) to review and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to transgender persons;

(*d*) to redress the grievances of transgender persons; and

(*e*) to perform such other functions as may be prescribed by the Central Government.

CHAPTER VIII

OFFENCES AND PENALTIES

18. Offences and penalties.—Whoever,**—**

(*a*) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(*b*) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(*c*) forces or causes a transgender person to leave household, village or other place of residence; and

(*d*) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

CHAPTER IX

MISCELLANEOUS

19. Grants by Central Government.—The Central Government shall, from time to time, after due appropriation made by Parliament by law in this behalf, credit such sums to the National Council as may be necessary for carrying out the purposes of this Act.

20. Act not in derogation of any other law.—The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

21. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against the appropriate Government or any local authority or any officer of the Government in respect of anything which is in good faith done or intended to be done in pursuance of the provisions of this Act and any rules made there under.

22. Power of appropriate Government to make rules.—(*1*) The appropriate Government may, subject to the condition of previous publication, by notification, make rules for carrying out the provisions of this Act.

(*2*) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(*a*) the form and manner in which an application shall be made under section 5;

(*b)* the procedure, form and manner and the period within which a certificate of identity is issued under sub-section (1) of section 6;

(*c*) the form and manner in which an application shall be made under sub-section (*1*) of section 7;

(*d*) the form, period and manner for issuing revised certificate under sub-section (*2*) of section 7;

(*e*) welfare measures to be provided under sub-section (*2*) of section 8;

(*f*) facilities to be provided under section 10;

(*g*) other functions of the National Council under clause (*e)* of section 17; and

(*h*) any other matter which is required to be or may be prescribed.

(*3*) Every rule made by the Central Government under sub-section (*1*), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(*4*) Every rule made by the State Government under sub-section (*1*), shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such legislature consists of one House, before that House.

23. Power to remove difficulties.—(*1*) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

(*2*) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

ANNEXURE A - 2

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Writ Petition (Civil) No 869 of 2020

Ashwini Kumar Upadhyay **… Petitioner**

Versus

Union of India & Ors **… Respondents**

WITH

Writ Petition (Civil) Nos 1000, 1108 & 1144/2020 and 905, 480, 474, 707, 919, and 710/2021

O R D E R

1 This batch of writ petitions can, for convenience of reference be segregated into four categories based on the reliefs which have been sought :

1 WP(C) 869/2020 : Ashwini Upadhyay v. Union of India
2 WP(C) 474/2021 : Doris Martin v. Union of India
3. WP(C) 1000/2020 : Ashwini Upadhyay v. Union of India
4. WP(C) 710/2021 : Medhavi Mishra v. Union of India
5 WP(C) 919/2021 : Bhartiya Stree Shakti v. Union of India
6 WP(C) 1108/2020 : Ashwini Upadhyay v. Union of India
7 WP(C) 707/2021 : Lubna Qureshi v. Union of India
8 WP(C) 1144/2020 : Ashwini Upadhyay v. Union of India
9 WP(C) 480/2021 : Shazia Ilmi v. Union of India
10 WP(C) 905/2021 : Bhartiya Stree Shakti v. Union of India

2 In substance, the petitioner seeks the enactment of “gender neutral and religion neutral” legislation in matters governing (I) divorce; (ii) adoption and guardianship; (iii) succession and inheritance; and (iv) maintenance.

3 We have heard Mr. Ashwini Kumar Upadhyay, petitioner appearing in-person, Mr Tushar Mehta, Solicitor General of India appearing on behalf of the Union of India and Mr Huzefa A Ahmadi, senior counsel appearing on behalf of the intervener in IA No 44667 of 2021 in Writ Petition (Civil) No 869 of 2020.

4 The Solicitor General of India states that the Government of India as a matter of policy supports the enactment of uniform legislation. However, insofar as this batch of matters is concerned, it is his submission that such an intervention can only be through the legislative process.

5 On a considered view of the pleadings and the submissions, we are not inclined to entertain the petitions under Article 32 of the Constitution. The grant of relief in these proceedings would necessitate a direction for the enactment of law, a gender neutral and religion neutral legislation, as the petitioner has described it. Enactment of legislation lies exclusively within the domain of the legislature. It is a well settled position that a mandamus cannot be issued to the legislature to enact law.

6 As regards the prayer for a direction to the Law Commission to prepare a report, we see no reason to entertain the request since ultimately it is in aid of the enactment of legislation which falls in the legislative domain.

7 Hence, we are not inclined to entertain the Writ Petitions under Article 32 of the Constitution which shall accordingly stand disposed of.

8 Pending applications, if any, stand disposed of.

Writ Petition (Civil) Nos 928, 348, 603, 762, 878, 954, 995 of 2022 and Writ Petition (Civil) No 351 of 2023

9 De-tag and list on 28 April 2023.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[Pamidighantam Sri Narasimha]

.....J.
[J B Pardiwala]

New Delhi;
March 29, 2023
GKA